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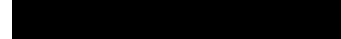
JUN 04 2015

SEATTLE-OAH

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
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June 4, 2015

Parent



Monroe, WA 98272

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RECEIVED

JUN 08 2015

In re: **Monroe School District**
OSPI Cause No. 2014-SE-0087
OAH Docket No. 12-2014-OSPI-00025

SUPERINTENDENT OF PUBLIC INSTRUCTION
ADMINISTRATIVE RESOURCE SERVICES

Dear Parties:

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

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

Sincerely,

Anne Senter
Administrative Law Judge

cc: Administrative Resource Services, OSPI
Michelle C. Mentzer, Acting Senior ALJ, OAH/OSPI Caseload Coordinator

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

MAILED
JUN 04 2015
SEATTLE-OAH

IN THE MATTER OF:

MONROE SCHOOL DISTRICT

OSPI CAUSE NO. 2014-SE-0087

OAH DOCKET NO. 12-2014-OSPI-00025

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

A due process hearing was held before Administrative Law Judge (ALJ) Anne Senter on March 20, 23-27, and 30, and April 9, 10, 13, 15, 16, and 21, 2015. The Parent of the Student whose education is at issue¹ was represented by Erika Krikorian and Brian Krikorian, attorneys at law. The Monroe School District (District) was represented by Philip Thompson, attorney at law.

STATEMENT OF THE CASE

The Parent filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on October 30, 2014. The Complaint was assigned Cause No. 2014-SE-0087 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered October 31, 2014, which assigned the matter to ALJ Anne Senter. The District filed its response on November 10, 2014. The Parent's request to amend the Complaint was granted on December 2, 2014. The District filed a response to the Parent's Amended Complaint on December 15, 2014.

Prehearing conferences were held on November 7 and 24 and December 2, 4, and 23, 2014, January 22, February 26, and March 5, 2015. Prehearing orders were entered November 7 and December 8, 2014, January 2, 16, and 26, February 26, and March 10, 2015. An Order on District's Motion for Partial Summary Judgment was entered March 10, 2015.

The parties each timely submitted post-hearing briefs on May 5, 2015.

Due Date for Written Decision

As set forth in the Second Prehearing Order, the due date for a written decision was continued at the District's request to 30 days after the record of the hearing closes. As the record closed with the receipt of the parties' post-hearing briefs on May 5, 2015, the due date for the written decision in this case is **June 4, 2015**.

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

Evidence Relied Upon

Exhibits Admitted:

Parent's Exhibits:² PP1 - PP22, PP24, PP26, PP27, PP31, PP33, PP34, PP36, P1 - P9, P11 - P14, P16 - P20, P22, P23, P24 (top 2 emails only), P25 - P28, P30, P33, P34, P35 (top 2 emails only), P36 - P41, P42 (top email only), P43 (top 2 emails only), P44, P45, P47 - P55, P57 - P64, P66 - P70, P87, P88, P90, P93, P96, P97, P99, P102, P103, P107, P108, P112, P113, P117, P119, P123, P125 - P127, P130 - P135, P139, P142, P143, P144 (top 2 emails only), P146 - P150, P152, P154, P155, P162 - P164, P166 - P168, P172, P178, P180, P181, P186, P187, P191, P200, P204, P206, P207, P209, P211, P214 - P216, P219, P226, P227 (email in box only), P231, P234, P235, P238, P240 - P242, P244 - P248, P250, P251 (pp. 4 - 6 only), P254 - P257, and

District's Exhibits: D1-D146.

Witnesses Heard (in order of appearance):

The Student's Parent;

Amy Mudrovich, former District special education teacher;

Janet Dolan, Dolan Academy and Learning Center director;

Melissa VanZanten (formerly Oliver), former District principal;

Laurie Giddings, former District intervention specialist;

Janna Dmochowsky, District principal;

Mairead Kinney, District special education teacher;

Trina Eriks, District paraeducator;

Vanessa Ostler, District paraeducator;

Heidi Brennan, District paraeducator;

Lance Egli, District school psychologist;

Melissa Hart, District special education teacher;

Ralph Yingling, District director of facilities;

Kristie Goree Barr, District teacher on special assignment;

Kaitlin Duffy, District speech and language pathologist;

Margaret Brashers, Ph.D., behavioral consultant; and

Lara Cole, District executive director of student services.

ISSUES

1. As set forth in the Third Prehearing Order, 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:

² The Parent submitted two separately-numbered sets of exhibits. The exhibits contained in one of the sets are designated "PP," and the exhibits in the other set are designated "P." All District exhibits are designated "D."

- i. Failing to implement the May 2013 individualized education program (IEP) by:
 - A. Not ensuring that staff members carrying out aversive interventions were Right Response-trained;
 - B. Using aversive interventions as a means of discipline to punish the Student for disability-related behavior;
 - C. Not equipping the classroom with a computer for use as a positive behavioral support;
 - D. Not employing the de-escalation steps prior to employing aversive interventions;
 - E. Placing the Student in a seclusion room that does not conform to the requirements of WAC 392-172A-03130;
 - F. Not remaining in visual contact with the Student while he was in seclusion;
 - G. Not becoming sufficiently familiar with the Student's functional behavioral assessment and behavioral intervention plans so as to avoid creating situations that might trigger inappropriate behavior and to avoid responding with punishment as opposed to redirection;
- ii. Failing to implement the IEP amended November 12, 2013, by:
 - A. Not ensuring that staff members carrying out aversive interventions were Right Response-trained;
 - B. Not properly carrying out seclusions by:
 - I. Keeping the Student in seclusion in excess of the allowed duration;
 - II. Using aversive interventions as discipline for disability-related behavior;
 - III. Placing the Student in a seclusion room that did not conform to the requirements of WAC 392-172A-03130;
 - IV. Not using a seclusion room located within the front office;
 - V. Not staying in visual contact with the Student when he was in seclusion;
 - VI. Not changing the Student's location after 20 minutes in seclusion and not giving him the opportunity to go to the bathroom;

- VII. Not contacting the Parent after the Student had been in seclusion more than 20 minutes;
 - VIII. Not ensuring that staff carrying out the seclusions were Right Response-trained;
 - IX. Not ensuring the Student's physical safety while left unattended in seclusion;
- C. Not documenting all interventions, including holds;
 - D. Taking away the Student's lunch from home and snack and not providing him with substitute nutrition;
 - E. Not scheduling an IEP meeting within 30 days of November 19, 2013,³ and in response to the Parent's request;
- iii. Failing to provide a continuum of educational placements by:
 - A. Denying placement options other than the class offered in the District, home school, private school at the Parent's expense, or an inter-district transfer;
 - B. Denying assistance with an inter-district transfer and taking steps to interfere with a transfer to the Sultan School District;
 - C. Refusing to provide the Student with homework materials pending a resolution of the dispute regarding the aversive interventions;
 - D. Denying transportation to any placement outside the District;
 - E. Denying the Student the ability to participate in recess with other District students if enrolled in homeschool;
 - F. Not assisting in the search for alternative placements after the discovery of the improper aversive interventions;
 - iv. Failing to designate the Student's disability as autism;
 - v. Failing to ensure the Student's Parent meaningful participation in the IEP process by:
 - A. Not addressing the Parent's concerns about the interventions and instead creating new aversive intervention plans (AIPs) and a new behavioral intervention plan (BIP) over the Parent's objection without justification;

³ Although the Third Prehearing Order identified the date for this issue as November 19, 2014, the parties agreed at the hearing that 2013 is the correct date.

- B. Not giving meaningful consideration, beginning September 4, 2013, to the Parent's claim that the Student suffered harm from the interventions;
 - C. Not giving meaningful consideration, beginning September 26, 2014, to the Parent's claim that the Student is afraid to return to District property and its personnel and insisting that the Student submit to evaluation by District personnel on District property without concession or regard for the Student's anxiety;
 - D. Refusing to cooperate with the Parent, beginning October 2, 2014, in creating solutions to the issues surrounding the reevaluation;
 - E. Dismissing the legitimacy of the Student's fears and anxiety, beginning November 19, 2013, on the grounds that he walks through doorways at school and closes the door when he uses the bathroom;
 - F. Denying on October 3, 2014, that the Parent ever claimed that the Student had been harmed by the interventions;
 - G. Refusing to communicate with the Parent by phone;
 - H. Sending the Parent attachments to emails that it knew she could not open;
 - I. Refusing to allow the Parent's attorney to attend an IEP meeting;
 - J. Limiting the means by which the Parent's attorney could communicate with the District and refusing to agree to an arrangement under which communication could be efficiently exchanged;
 - K. Instructing the Parent's attorney to "shut up" at a resolution meeting;
- vi. Predetermining the Student's placement by:
- A. Limiting the Student's placement options, beginning September 2013, to an intra-district transfer, home school, private school at the Parent's expense, or a classroom in the District pursuant to an expanded aversive intervention plan to which the Parent objected;
 - B. Interfering with the Parent's ability to transfer the Student to the Sultan School District from September through November 2013;
 - C. Deleting the Right Response training requirement from the Student's AIPs on September 16 and 19, 2013, and September 16 and 24, 2014, and advising the Parent that the new plan would be implemented despite her objection and without due process;
 - D. Conducting a vote of the IEP team members on whether to implement the amended IEP over the Parent's objection in October 2014;

- vii. Failing to maintain and/or disclose a complete record by:
 - A. Not producing all responsive records when requested by the Parent;
 - B. Not maintaining a complete and accurate record by:
 - I. Failing to provide an accurate and complete daily home journal between September 4 and 11, 2013;
 - II. Failing to properly document IEP meetings and accurately record attendance;
 - III. Failing to accurately report the training credentials of staff who worked with the Student;
 - IV. Failing to ensure that aversive intervention records for the Student's second-grade year were properly maintained and secure;
 - V. Amending and/or altering intervention reports between September 4 and November 21, 2013;
 - VI. Failing to prepare comprehensive documentation of all interventions between September 4 and November 21, 2013;
 - VII. Preparing intervention reports in a manner that did not disclose the total duration time in a single record from September 4 to November 21, 2013;
 - VIII. Recording facts that do not fully and accurately reflect the circumstances surrounding an intervention from September 4 to November 21, 2013;
 - IX. Failing to timely provide the Parent with written reports of interventions from September 4 to November 21, 2013;
 - X. Misrepresenting to OSPI and OAH the characteristics of the seclusion room and its compliance with governing regulations;
 - XI. Failing to prepare a prior written notice when required on September 16, 2013;
 - XII. Misrepresenting facts in prior written notices between September 20, 2013, and December 2014;
 - XIII. Altering AIPs to delete requirements for Right Response training on September 16 and 19, 2013, and September 16 and 26, 2014;

- viii. Unilaterally implementing an IEP with which the Parent did not agree rather than requesting a due process hearing;
 - ix. Not honoring OSPI's decision of January 3, 2014, regarding the District's failure to properly implement the Student's IEP;
 - x. Refusing to participate in Sound Options mediation from January through May 2014;
 - xi. Refusing to mark the Student's absences as excused and instituting a truancy proceeding against the Parent pending a resolution to the dispute over the interventions;
 - xii. Refusing to provide the Student with homework materials;
 - xiii. Taking the position that the Parent's only recourse in a dispute over educational services is home school, private school, or intra-district transfer;
 - xiv. Seeking to preclude the Parent from disclosing the District's attempt to negotiate a waiver of civil claims in exchange for the provision of FAPE;
- b. Whether Dolan Academy is an appropriate placement for the Student;
- c. And, whether the Parent is entitled to her requested remedies:
- i. Reimbursement for tuition at Dolan Academy and transportation expenses;
 - ii. Private placement at the District's expense with transportation costs at Dolan Academy or Northwest Behavioral Associates;
 - iii. Compensatory education:
 - A. Summer program at Camp Prov through Providence Medical Center;
 - B. Summer program at Apex at the University of Washington;
 - C. Instruction in written expression;
 - D. Instruction in social/emotional skills;
 - E. Instruction in math calculation;
 - F. Instruction in adaptive;
 - G. Occupational therapy;
 - iv. And/or other equitable remedies, as appropriate.

2. The following of the above issues were dismissed on summary judgment: (a)(i)(C); (a)(iii)(B); (a)(vi)(B); (a)(vi)(D); (a)(viii); (a)(ix); and (a)(x). See Order on District's Motion for Partial Summary Judgment.

FINDINGS OF FACT

Background

1. The Student was 9 years old at the time of the hearing.
2. The Student participated in a birth-to-three program and a developmental preschool in a different school district. Parent testimony.⁴
3. The Student transferred into the District in the fall of the 2010-2011 school year and was placed in the Structured Learning Center (SLC) classroom at Salem Woods Elementary School (Salem Woods) for kindergarten. Exhibit D9, p.2; Parent testimony.
4. The District first evaluated the Student in May 2011. Exhibit D9, pp. 2, 18. The District determined the Student qualified for special education and related services under the eligibility category of developmental delay. Exhibit D9, p. 18. The Student remained in the SLC classroom at Salem Woods for the remainder of the school year. Exhibit D9, p. 2.
5. During a portion of the next school year, 2011-2012, the Parent unilaterally enrolled the Student in a private school, and the District provided special education services through a service plan. Exhibit D9, p. 2. While at the District during that year, the Student was placed in a self-contained setting in the Positive Behavioral Support (PBS) classroom at Chain Lake Elementary School (Chain Lake). Exhibit D9, p. 2. He remained in that class the following year when he was in second grade. Exhibit D9, p.2.
6. The District conducted a functional behavioral assessment (FBA) of the Student in March of 2013, when he was in the second grade. Exhibit D113.
7. The Student's individualized education program (IEP) was amended in May of that year. Exhibits D9, pp. 2; D11, pp. 2, 12-34. Under the May 2013 IEP, the Student would remain in the PBS classroom at Chain Lake for the 2013-2014 school year. Exhibit D11, p. 22. The IEP included a behavioral intervention plan (BIP) and an aversive intervention plan (AIP). *Id.* at 30-34. None of these documents mention the Student's dietary needs. *Id.* at 12-34.
8. The BIP includes the following consequence strategies:

Continue to use the current point system within the classroom. [The Student] responds well to earning points so he can earn computer or Wii time during his breaks. Other immediate rewards should be put in place for [the Student] meets

⁴ A court reporter transcribed the due process hearing. Because the parties submitted briefing and requested a decision in the matter before the transcript was completed, the ALJ has not cited to the transcript.

[sic] task demands in the classroom. When [the Student] fails to self-correct his behavior and is not responding to the interventions or teacher direction [the Student] will be given his own space to reduce his anxiety and move away from environmental stimulus. If [the Student] continues to demonstrate disruptive or destructive behavior he will be removed from the class setting to help him regain control. If this still is not effective and his behavior is still disruptive or destructive the use of the time out room may be appropriate.

Id. at 32.

9. The BIP also provides the following crisis management strategies:

[The Student] is placed on a point system in the classroom. When behavior that is unsafe occurs; [sic] the following plan is put in place: [the Student] is asked to take a time out at his desk with his head down. If successful, he moves on with his day. If unsuccessful, he is asked to complete a time out in a more secluded area of the classroom. If his behavior increases or becomes unsafe to himself or others he is asked to take a time out in the seclusion room with the door open and an adult stands in doorway. If behavior remains a safety issue the door to the seclusion [sic] may be closed and [the Student] will be monitored through the window. All time outs issued are 5 minutes and once students [sic] have calmed down and debriefed with an adult they [sic] return to class.

Id.

10. The BIP requires that a "daily summary" is written home about the Student's day. *Id.*

11. The AIP provides that aversive interventions may be used if the Student "becomes unsafe to himself or others." Exhibit D11, p. 33. The behavioral objective sought to be achieved by the use of aversive interventions is "to keep [the Student] and peers safe." *Id.* The AIP specifies that "time out, seclusion, and Right Response techniques for physical management" are the types of interventions that may be used. *Id.* The AIP identifies the maximum duration of time-outs to be five minutes, and the maximum duration of seclusions to be 20 minutes. *Id.* It provides that all "Right Response trained individuals" are permitted to use aversive interventions. *Id.* at 34.

Third Grade at Chain Lake

12. The May 2013 IEP was still in effect when the 2013-2014 school year began on September 4, 2013. Exhibits D1, D9, p. 3.

13. The Student attended school at Chain Lake on Wednesday, September 4, through Friday, September 6, 2013, and Monday, September 9, through Wednesday, September 11, 2013, a total of six school days. Exhibit D9, p. 3; Parent testimony.

14. Melissa Hart was the Student's special education teacher in September 2013. Exhibit D11, p. 2. Three paraeducators assisted Ms. Hart: Vanessa Ostler, Heidi Brennan, and Stefanie Perry. *Id.* at 3. Ms. Ostler had worked in the class the year before as well. Mudrovich testimony.

15. Ms. Hart reviewed the Student's IEP, including his BIP and AIP, before school started. Hart testimony. She did not review his FBA before school started. *Id.*

Right Response training of Chain Lake staff

16. The Parent stipulated at the hearing that all staff who worked with the Student at Chain Lake in September of 2013, with the exception of Ms. Hart, were Right Response trained.

17. Ms. Hart was hired by the District soon before school started. Oliver testimony. This was her first job as a certificated teacher. *Id.* She had not received Right Response training or certification before she was hired. Hart testimony.

18. In order for a teacher to be Right Response *certified*, they must take a 14-hour course, which includes behavior management, de-escalation and self-protection skills, and physical holds. Exhibit P251, pp. 4-6; Giddings testimony; Mudrovich testimony.

19. When a District employee will have responsibility for implementing an aversive intervention plan but has not yet had formal Right Response training, the District provides one-on-one training for the employee with the District's certified trainer until the employee can go through the formal program. Exhibit D10, p. 2.

20. Ms. Hart received one-on-one training from Laurie Giddings, the District's certified Right Response trainer. Exhibit D13. Ms. Giddings provided Ms. Hart with one and one-half hours of one-on-one training in de-escalation and physical intervention using Right Response techniques after school on September 4, 2013, which was the first day of school. Exhibits D11, p. 2; D13; Giddings testimony; Hart testimony. Ms. Giddings and Ms. Hart reviewed the Student's BIP and AIP. Exhibit D13. Ms. Giddings determined that Ms. Hart was adequately trained to use Right Response techniques with the Student, and Ms. Hart felt confident about using the techniques. Exhibit D13; Giddings testimony; Hart testimony.

21. Ms. Hart also received fourteen hours of formal Right Response training between October 8 and 16, 2013, when the Student was no longer at Chain Lake, and was certified on October 16, 2013. Exhibit D10, p. 5; Exhibit D11, p.2.

The Chain Lake seclusion room

22. Ms. Hart was assigned to classroom P1/P2 for the 2013-2014 school year. Exhibit D11, pp. 2-3. This a portable composed of two classrooms, P1 and P2. Ms. Hart used the P1 side of the portable for her class. There is a smaller room within the P2 side of the portable, which the parties have alternately referred to as the "quiet room," the "time-out room," the "seclusion room," the "padded room," or the room with blue mats. It is described herein as the seclusion room or the quiet room.

23. The room measures five and one-half by five and one-half feet. Parent testimony; Yingling testimony. It has a tile floor and padded walls. Exhibit P255; Oliver testimony; Mudrovich testimony; Yingling testimony.

24. The room has a standard size door with a window at the top. Exhibit P255; Yingling testimony. Ms. Oliver, Ms. Ostler, Ms. Brennan, and Ms. Hart all testified that the window was not covered during September 2013. Oliver testimony; Ostler testimony; Brennan testimony; Hart testimony. The Parent testified that she believed the window to the seclusion room was covered in paper because she saw it when she visited the class before school started, because she saw another window at a different school covered in paper, and because the Student told her that he "saw one blue eye." Parent testimony. The Parent did not recall whether it was covered on the day she observed the classroom, which was the only day she was there while the Student attended school. Parent testimony. As the Parent did not observe paper on the window during the time period the Student was in school and the Student's statement is hearsay offered without any context, the consistent testimony of District staff who saw the room at the time the Student attended is given greater weight, and it is found that the window was not covered during the time the Student attended Chain Lake in September 2013.

25. The latch for the door is custom-designed. Yingling testimony. It does not lock unless the handle is held up from the outside. Oliver testimony; Mudrovich testimony; Yingling testimony; Hart testimony. Unless someone is holding the latch to engage it from the outside, the door either swung open on its own or could be pushed open from the inside. Oliver testimony; Ostler testimony; Brennan testimony; Hart testimony.

26. Amy Mudrovich, who taught in the same classroom the year before Ms. Hart, testified that, although the lock was designed to lock only when someone was holding it from the outside, the door sometimes jammed and would not open. Mudrovich testimony. This is because a student had broken the doorframe. Mudrovich testimony; Ostler testimony. However, she acknowledged that the doorframe was fixed with glue, and there is no evidence that she was ever present in the classroom during the 2013-2014 school year. *Id.* Ms. Ostler, who worked in the classroom both years, testified that the door was fixed during the time Ms. Mudrovich worked in the classroom. Ostler testimony. There is no evidence the door stuck in September 2013. Accordingly, it is found that, during September 2013, the door did not lock or stick unless someone was holding the latch from outside of the seclusion room.

27. The portable classroom has outside wall-mounted heating and cooling units on a programmable thermostat to maintain air flow and temperature. Yingling testimony. The seclusion room and the classroom in which it is located are subject to the same temperature control system, so the thermostat in the larger classroom controls the temperature in the seclusion room. Exhibit D14, p. 2. The seclusion room, inside the portable, has natural convection ventilation, which uses the principle that heat rises. *Id.* Air comes into the room around the door, rises, and exits through a vent near the ceiling. *Id.*

28. Ms. Mudrovich testified that it was hard to control the temperature in the portable, which got too hot, and that the seclusion room became a "sweat box" when the door was closed. Mudrovich testimony. Ms. Ostler, who worked in the class during the 2013-2014 school year as well as the year before, testified that she never had concerns about the temperature in the room and it was not too hot for her. Ostler testimony. Ms. Hart did not find the seclusion room to be an uncomfortable temperature or oppressively hot in September 2013. Hart testimony. The room was not too hot when Ms. Oliver was inside it, and Ms. Brennan did not find the room oppressively hot. Oliver testimony; Brennan testimony.

29. Because the temperature in the portable was controlled by a thermostat and the seclusion room was ventilated with the air from the portable, and because no one who was in the room in September 2013 testified that it was too hot, it is found that the seclusion room was both ventilated and temperature-controlled during September 2013.

The aversive interventions at Chain Lake

30. The Parent stipulated that the only time she was in the classroom at Chain Lake in September 2013 while class was in session was on September 11, 2013. She further stipulated that she never personally observed the Student in any quiet or isolation room at Chain Lake during this time period, and that she never personally observed any physical abuse of the Student by Ms. Hart, Ms. Brennan, Ms. Ostler, or Ms. Oliver.

31. There were ten incidents of aversive interventions documented over the six days the Student attended Chain Lake in September 2013.

32. The incident/aversive intervention report form used by the District in this time period identifies the Student, his age, and the date and time of the intervention. See, e.g., Exhibit PP1. It has a place for the antecedents (what occurred immediately before the Student's behavior), and the Student's behavior. *Id.* It has a place to state whether the behavior is targeted on the Student's IEP and whether the intervention fit the terms of the Student's IEP. *Id.*

33. The form has a section entitled "interventions applied," with places to check which of the following staff responses took place prior to the incident: re-direction, statement of consequences, time allowed for compliance, point loss, directed time out, and other. *Id.* With few exceptions, which will be specifically identified below, each form completed for the Student in September 2013, had the words "point loss" crossed out, and redirection, statement of consequences, time allowed for compliance, and directed time out are all checked. Exhibits PP1-PP5.

34. The form contains a place to describe a physical escort and identify the location to which the student was escorted. *Id.* It has a section entitled "containment," which does not define that term. *Id.* It has a place to identify the duration of the containment and to describe the containment. *Id.* The form has a section entitled "quiet room", a place to identify the duration in the quiet room and to describe the quiet room incident. *Id.* The line for the duration in the quiet room contains the pre-printed statement "See monitoring sheet." *Id.* The form also has a place to describe injuries sustained by a student or staff, and a place for signatures. *Id.* There are designated places for the "intervention leader" and "program administrator" to sign as well as blank signature lines. *Id.*

35. The first documented aversive intervention took place on the first day of school, September 4, 2013, at 9:45 a.m. Exhibit PP1, p.1. The form identifies as the antecedent that the Student was asked to write his name. *Id.* The form identifies as the behavior that the Student was aggressive towards teacher with hitting and kicking. *Id.* Under physical escort, the form states that the Student was escorted to the quiet room. *Id.* It states "2 person escort w/ Ms. Hart and Mrs. O." *Id.* All references to Mrs. O in the incident reports are to Ms. Ostler, the paraeducator, not to Principal Oliver. Hart testimony. The form states that Ms. Hart sustained bruises on her left leg. Exhibit PP1, p.1. The form contains the initials of Ms. Hart as

intervention leader, the signature of Chain Lake Principal Melissa Oliver as program administrator, and the initials of Ms. Ostler. *Id.*

36. The Student was asked to write his name. Hart testimony. Writing his name was something the Student had done the year before and Ms. Ostler suggested it would be a good task for his morning challenge. Ostler testimony. The Student refused to write his name so the task demand was lowered and he was asked to just trace it, but he still refused. Hart testimony. Ms. Hart redirected him, offered a statement of consequences – he could earn a sticker – and gave him time to comply. *Id.* Then Ms. Hart directed him to a time out in a study carrel near Ms. Ostler. Hart testimony. Ms. Hart went over to talk to him about it and the Student started to hit and kick her. *Id.*

37. Ms. Hart testified that, because she was not yet Right Response trained, Ms. Ostler and Ms. Brennan were going to handle any aversive interventions that first day, and that they escorted him to the quiet room. Hart testimony. Ms. Ostler and Ms. Brennan each also recalled that it was the two of them that escorted the Student to the quiet room. Ostler testimony; Brennan testimony. Given that the intervention report, completed by Ms. Hart closer in time to the incident, expressly states that she and Ms. Ostler escorted the Student to the quiet room and is not signed by Ms. Brennan, it is found (in conjunction with the findings below related to other aversive interventions that first day of school) that Ms. Hart escorted the Student to the quiet room even though she had not yet been Right Response trained.

38. The Student's aggression continued once he was in the quiet room, so the door was closed, and staff set the timer for five minutes and told him he could come out when his body was quiet. Ostler testimony. While the Student was in the quiet room with the door closed, Ms. Hart opened it and went inside with him to talk about strategies he could use when he gets upset, such as deep breathing. Hart testimony. The Student was calm by then, they had a conversation, and then moved on with the day. *Id.*

39. The second documented intervention also took place on September 3, 2013, the first day of school. Exhibit PP1, p. 2. This incident took place at 12:40 p.m. *Id.* The form identifies as the antecedent that the Student pulled out his PSP (an electronic device) to play during class. *Id.* The form identifies the behavior as being verbally and physically aggressive toward teacher and students. *Id.* The form states that there was a two-person escort to the quiet room and that the Student was in the quiet room from 12:40 to 12:45 and 12:45 to 12:50. *Id.* The form is initialed by Ms. Hart as intervention leader, signed by Ms. Oliver as program administrator, and also signed by Ms. Brennan. *Id.*

40. When the Student pulled out his PSP after lunch, Ms. Hart told him that was not appropriate, and he looked confused. Hart testimony. She told him the consequences of making a good choice and gave him time to comply, but the amount of time was minimal because he escalated much more quickly than earlier in the day. *Id.* Ms. Hart did not have time to try to use a time out because he escalated so quickly. *Id.* He was hitting and kicking and trying to throw backpacks at other students. *Id.* Ms. Hart believes that Ms. Perry and Ms. Ostler escorted the Student to the quiet room and that Ms. Perry monitored him there, but she is not sure. *Id.* Ms. Ostler does not recall that she was involved in this intervention. Ostler testimony. Ms. Brennan recalled that she had escorted the Student to the quiet room with Ms. Ostler. Brennan testimony. It is not clear who participated in this intervention with Ms. Brennan.

41. The third documented intervention also took place on the first day of school. Exhibit PP1, p.3. This incident took place at 3:20 p.m.⁵ *Id.* The form states as an antecedent that the Student was frustrated with another student in line. *Id.* The form describes the behavior as the Student pushing the other student into the wall. *Id.* The description under physical escort states "2 person escort to QR." *Id.* Under those words, it states " Ms. Hart/Mrs. O." *Id.* The form also states "Ms. Oliver was able to talk to him to calm him down before going home on the bus." *Id.* The form is initialed by Ms. Hart as the intervention leader, signed by Ms. Oliver as the program administrator, and also initialed by Ms. Ostler. *Id.*

42. At the end of the day, the Student was very frustrated because he wanted his lunchbox in his backpack but he could not make it fit. Hart testimony. He ran from the line, pushing other children out of the way. *Id.* Ms. Hart recalled that Ms. Ostler and Ms. Oliver escorted him back to the quiet room. *Id.* Ms. Oliver denied that she was involved in any aversive interventions other than to observe or talk with the Student once he was already in the quiet room or when he was brought to the office. Oliver testimony. Ms. Brennan believed that Ms. Hart may have been involved in this incident even though it had been her understanding that Ms. Hart would not participate in aversive interventions that first day because she was not yet Right Response trained. Brennan testimony. Given the contradictory recollections of the witnesses involved in the third intervention, it is found that the information on the intervention form completed closer in time to the intervention is likely more reliable and merits the greater weight. It is found as fact that Ms. Hart more likely than not escorted the Student to the quiet room even though she had not yet been Right Response trained.

43. The fourth documented intervention took place on the second day of school, September 5, 2013, at 9:13 a.m. Exhibit PP2, p.1. The form states that the antecedent was the Student being asked to write, and the behavior was that the Student became aggressive towards the teacher. *Id.* The form states that "Mrs. B" escorted the Student to the quiet room, and that the duration of containment was from 9:13 to 9:18, 9:18 to 9:23, and 9:23 to 9:28 a.m.⁶ *Id.* The form states that the injuries sustained were "bruises on teacher's leg." *Id.* The form is initialed by Ms. Hart as the intervention leader, signed by Ms. Oliver as the program administrator, and also signed by Ms. Brennan. *Id.*

44. The Student did not want to write his name. Brennan testimony. When he was asked to sit up, he lashed out, and was aggressive towards Ms. Hart. *Id.* Ms. Brennan was involved in escorting him and observed him in the quiet room. *Id.*

45. The fifth documented aversive intervention also took place on September 5, 2013, at 12:53 p.m. Exhibit PP2, p. 2. The form identifies as the antecedent the Student being told that he was expected to attend music. *Id.* The original version of the form does not contain an entry regarding the Student's behavior. *Id.* A later version of the form identifies as the behavior at issue that the Student was "aggressive towards Mrs. B." Exhibit PP2, p. 3. There is no

⁵ The Parent testified that the Student arrived home from school that day with dried feces in his pants and down his legs. Parent testimony. No finding is made as to this allegation as it is not necessary to the resolution of the legal issues in this case.

⁶ The form states that the first duration of containment was from "9:13 to 9:98." Exhibit PP2, p.1. It is evident from the context, however, that this was intended to mean "9:13 to 9:18."

explanation as to when this information was added, and the change to the form is not initialed or signed by anyone. *Id.* Neither version of the form contains any information about the interventions applied prior to the incident. Exhibit PP2, pp. 2-3. Both versions of the form state that "Mrs. B and Mrs. O calmed him down on the floor." Exhibit PP2, pp. 2-3. Both versions of the form are initialed by Ms. Hart as intervention leader, signed by Ms. Oliver as program administrator, signed by Ms. Brennan, and initialed by Ms. Ostler. Exhibits PP2, pp. 2-3.

46. The Student did not want to go to music and stated that he did not have to go the prior year. Exhibit D11, p. 5; Brennan testimony. Once in the music room, he initially participated appropriately. Exhibit D11, p. 5. Near the end of the class, the Student became disruptive and was asked to move to the side of the room for a break. *Id.* He responded by lying on his side and turning in circles while attempting to kick other students. *Id.* When he stood up, he began trying to hit other students with his hands. *Id.* Ms. Brennan provided oral redirects. *Id.* The Student then kicked and hit Ms. Brennan. *Id.* The Student attempted to elope, but Ms. Ostler stopped him at the door. *Id.*; Brennan testimony. Ms. Ostler gave the Student oral prompts to calm down and redirected him to stand to the side so other students could leave. Exhibit D11, p. 5. Ms. Brennan and Ms. Ostler took him to the stairwell, and Mrs. Brennan placed him in a hold. *Id.*; Brennan testimony. Ms. Ostler recalls being involved with this intervention, but only remembers Ms. Brennan and the Student sitting in a stairwell. Ostler testimony.

47. The sixth documented aversive intervention also occurred on September 5, 2013, at 1:57 p.m. Exhibit PP2, p. 4. The form identifies as the antecedent the Student being asked to participate in a group activity, and that the behavior was that the Student kicked a classmate. *Id.* The form states that the Student was escorted to the quiet room and that the duration of the containment was 1:57 to 2:07 p.m. *Id.* The form is initialed by Ms. Hart as the intervention leader and signed by Ms. Oliver as the program administrator. *Id.*

48. Neither Ms. Hart, Ms. Brennan, nor Ms. Ostler recall participating in this intervention. Hart testimony; Brennan testimony; Ostler testimony. Thus, it cannot be determined who participated in this intervention.

49. The seventh documented aversive intervention took place on the third day of school, September 6, 2013. Exhibit PP3, p. 1. The form identifies as the antecedent the Student being asked to sit safely in his chair. *Id.* The form describes the behavior as the Student pushing the chair at the teacher, trying to hit her, and kicking her. *Id.* The form states that the Student was escorted to the quiet room by "Mrs. B" and identifies the duration of containment as 9:32 to 9:36 a.m. *Id.* The form is initialed by Ms. Hart as the intervention leader, signed by Ms. Oliver as the program administrator, and signed by Ms. Brennan. *Id.*

50. The Student was sitting unsafely and refused to sit safely when asked. Brennan testimony. He shoved the chair toward other people, mostly Ms. Hart. *Id.* He tried to hit Ms. Hart and he kicked her. Exhibit D11, p. 6; Hart testimony. Ms. Brennan took the Student to the quiet room by herself and observed him while he was there. *Id.*; Brennan testimony; Hart testimony.

51. The eighth documented aversive intervention also took place on September 6, 2013, at 12:45 p.m. Exhibit PP3, p. 2. The form states that the antecedent was that the Student was annoyed at another student's words, and that the behavior was that the Student punched the other student. *Id.* The form states that "Mrs. Hart and Mrs. B escorted [the Student] to QR,"

and that the duration of containment was 12:45 to 12:50 p.m. *Id.* The form states that the injuries sustained were a bruise on the Student's arm and a bite on Ms. Brennan's arm. *Id.* The form is initialed by Ms. Hart as the intervention leader, signed by Ms. Oliver as the program administrator, and signed by Ms. Brennan. *Id.*

52. The Student was annoyed by a younger student and punched him. Exhibit D11, p. 6; Brennan testimony; Hart testimony. He was asked to move to time out and was "thrashing." *Id.* Ms. Brennan put her arms around him from behind the chair with her hands on his forearms, and he bit her arm. *Id.* Ms. Brennan and Ms. Hart escorted him to the quiet room, and Ms. Brennan watched him there. *Id.*

53. There were no documented aversive interventions on the fourth day of school, September 9, 2013.

54. The ninth documented aversive intervention took place on the fifth day of school, September 10, 2013, at 11:35 a.m. Exhibit PP4, p. 1. The form states that the Student was asked to stop making "fart noises" during music and that he willingly moved to the side of the room and took a deep breath, but then left the room and ran from the teachers. *Id.* The form states that, as they walked back to the music room, the Student kicked and pinched the teacher and was restrained on the floor to try to calm him down. *Id.* He then hit a teacher and was escorted to the office. *Id.* The form states that Ms. Hart sustained a bite on her right thumb. *Id.* The form is initialed by Ms. Hart as the intervention leader and signed by Ms. Oliver as the program administrator. *Id.*

55. The Student was engaged in noncompliant behavior during music and then ran from the music room. Exhibit D11, p. 7. As Ms. Hart walked him back, he kicked and pinched her. *Id.*; Hart testimony. Ms. Hart attempted to use a one-person hold to restrain the Student to calm him. *Id.* Ms. Oliver helped Ms. Hart escort the Student to the office. *Id.*

56. The tenth documented aversive intervention took place on the sixth day of school, September 11, 2013, at 9:46 a.m. Exhibit PP5. The form states that the antecedent was a younger student making noises that the Student did not like, and the behavior was that the Student swung at the student and missed, then swung again and hit the other student. *Id.* The form states that the Student was escorted to the time-out chair in a two-person walk and, when the chair hold did not work, floor containment was used with a duration of three minutes. *Id.* The form states that, during the floor containment, the Student picked up a paper clip from the floor and stated he was going to stab a staff member with it. *Id.* The form is initialed by Ms. Hart as the intervention leader, signed by Ms. Oliver as the program administrator, initialed by Ms. Ostler, with her name written next to the initials, and signed by Ms. Brennan. *Id.*

57. Ms. Oliver recalled the Student being brought to the office, but no other testimony was provided about this incident. Oliver testimony.

58. Ms. Oliver recalled that she observed the Student in the quiet room at least once and talked to him while he was there, although she did not recall on which day or days this took place. Oliver testimony. She recalled convincing the Student to get on the bus one day, rather than making the Parent come to get him. *Id.* One time she observed him being restrained in the library by Ms. Ostler and Ms. Brennan. *Id.* Ms. Ostler recalls that the restraint in the library took place on a Friday afternoon, because she hoped things would be better the next week.

Ostler testimony. Similarly, the Parent recalled that Ms. Oliver and Ms. Hart had called her on September 6, 2013, in the afternoon and told her that the Student had run from the classroom to the library and the bus had waited for him. Parent testimony. There is no intervention report for September 6, 2013, or any other date, that describes the Student being physically restrained in the library. Oliver testimony.

Observation of the Student in the seclusion room at Chain Lake

59. The door was not always closed when the Student was placed in the quiet room. Brennan testimony. Regardless of whether it was open or closed, Ms. Brennan testified that a staff member always observed the Student in the quiet room. Brennan testimony. There is no evidence that the Student was ever in the quiet room in September 2013 without a District staff person observing him the entire time.

The use of de-escalation steps before aversive interventions at Chain Lake

60. The evidence is not adequate to determine what steps were or were not taken prior to using aversive interventions for some of the ten incidents identified above. However, sufficient evidence is provided about many of the interventions to determine that the de-escalation steps set forth in the May 2013 BIP were not employed before resorting to aversive interventions.

61. For several of the incidents, staff described interventions they attempted to address the Student's behavior before aversive interventions were used. However, there are very few instances of staff employing the specific interventions identified in the BIP: giving the Student space to reduce his anxiety, moving away from environmental stimulus, or removing him from the class setting. See Exhibit D11, p. 32. Even the "crisis management strategies" in the BIP start with the use of the point system. *Id.* Staff did not identify using the point system in any of the ten interventions, and the reference to the point system was crossed out on the intervention reports. Under the crisis management strategies, when "unsafe behavior" occurs, the Student is to be asked to take a time out at his desk with his head down. *Id.* Staff did not identify asking the Student to take a time out with his head down at his desk in even one of the incidents described above. If a time out with the Student's head down is not successful, he is to be asked to complete a time out in a more secluded area of the classroom. *Id.* While there are a few examples of asking the Student to complete a time out in a more secluded area of the classroom before resorting to aversive interventions, this was not employed consistently and not ever after first asking the Student to put his head down. There are likely circumstances in which the Student's behavior might be so unsafe that it would not be practical to follow the steps set forth in the BIP before using aversive interventions. However, the crisis management portion of the BIP is written specifically for dealing with "unsafe" behavior and does not identify circumstances in which it need not be followed. The Parent has met her burden of proving that the District did not employ the de-escalation strategies in the BIP before using aversive interventions in September 2013.

Additional facts about the Student's time at Chain Lake

62. The Parent observed unusual behavior in the Student during the first days of school in September 2013. After the first day of school, he came home from school, went to bed, and woke up screaming. Parent testimony. He reported that he had the worst teacher in the world. *Id.* After the second day of school, the Parent observed that the Student got tools from the

garage and insisted on having them with him. *Id.* He also insisted on having the doors and windows in the house open. *Id.* Over the weekend, after the first three days of school, she noted that the Student did not want her to touch him even though he used to love to be held. *Id.* Sound had always bothered the Student, but he became unable to be in the car because of the sound of the locks. *Id.* He continued to insist on having windows and doors open and to have tools with him. *Id.*

63. Following the first weekend, the Parent requested copies of the Student's IEP, BIP, and other documents. Parent testimony. The District quickly provided her a number of documents, including some of the intervention reports. Parent testimony. She did not receive a copy of the intervention report for the third incident on September 4, 2013, until an IEP meeting on September 19, 2013. *Id.* She also did not receive the amended version of the intervention report for the second intervention on September 5, 2013, until much later. *Id.* She did not receive the intervention report for the incident on September 10, 2013, until she filed a citizen complaint in late 2013. *Id.*

64. When the District attempted to locate records requested by the Parent from the prior school year, records, including intervention reports, that should have been found in the Student's classroom could not be located. Oliver testimony. The District believed that Ms. Mudrovich, the Student's previous teacher, removed the records from the classroom, and the District took steps to retrieve the records from her. *See, e.g.,* Exhibits D138, P69. No finding is made as to whether Ms. Mudrovich removed records from the District as no such finding is necessary for the resolution of the legal issues in this case.

After the Student Stopped Attending Chain Lake

65. The Parent stopped sending the Student to school after September 11, 2013. Exhibit D9, p. 3; Parent testimony.

66. An IEP meeting was held on September 16, 2013. Exhibit D41; Parent testimony. The Parent had requested that Lara Cole, District executive director of student services, attend the meeting. Exhibits D42, P11. Because of confusion about the scheduling, Ms. Cole was not able to attend. Exhibits D42, P11. The purpose of the meeting was to address the Parent's concerns and to look at proposed changes to the BIP and AIP. Exhibit D41. The Parent expressed a number of concerns at the meeting and accused Ms. Hart of "abuse" and dishonesty. Parent testimony; Oliver testimony. The District IEP team members agreed to schedule another IEP meeting when Ms. Cole could attend. Oliver testimony. A draft BIP and AIP had been prepared before the meeting. Exhibits D41, PP12, PP18. The team discussed the proposed changes, but did not plan to implement a new BIP or AIP until they met again. Oliver testimony; Giddings testimony. The Parent was provided an adequate opportunity to participate at the meeting. Oliver testimony; Giddings testimony; Hart testimony.

67. Before the next IEP meeting, Ms. Hart, Ms. Cole, and Laurie Giddings prepared a new draft BIP and AIP to propose at the meeting. Giddings testimony. Ms. Giddings, a behavioral intervention specialist, felt that the BIP and AIP should be more specific than ones drafted the prior year. Giddings testimony. Ms. Oliver got permission from the Parent to contact Amy Mudrovich, the Student's teacher from the year before, to see what had worked with the Student then. Oliver testimony.

68. Another IEP meeting was held on September 19, 2013, with Ms. Cole present. Exhibit P18, p.2. The agenda summarized concerns the Parent had raised: using the isolation room for noncompliance rather than danger to himself or others, significant disruption to learning, or destruction of property, isolations happening too long and too often, the behavior plan not being utilized enough, two of the calming strategies in the behavior plan - time outside and an alternative setting/other room - not being utilized, and the Student's need to continue working on IEP objectives not currently mastered. Exhibit P18, p. 3. The Parent shared at this meeting her belief that the Student was having serious emotional problems and was emotionally traumatized from being locked in the seclusion room. Exhibit P18.

69. The District proposed a BIP and AIP that it believed incorporated and addressed the majority of the Parent's concerns. Exhibit P18, p.3. The team proposed changes to the Student's BIP to better support the Student and address the Parent's concern that aversive interventions were being used too frequently. Giddings testimony. The BIP created incentives for the Student to complete tasks and also to ask for a break when necessary. *Id.* The proposed BIP had more specific examples of what staff would do in response to lower level behaviors, and removed the crisis management plan because of concerns that its steps might not be appropriate if the Student was engaging in unsafe behavior. Cole testimony.

70. The new AIP stated that staff would be trained, but did not specify Right Response training as the District was contemplating changing to a different training program. Exhibit PP19; Cole testimony. Rather than simply stating that "Right Response techniques for physical management" could be used, the proposed AIP specifically identified physical safety techniques to be used: 1 person holds in which an adult uses the Student's arms to hold him; 2 person holds in which adults on either side hold his arms; and escorts in which adults on either side hold his arms and move him to a different location for de-escalation. Exhibit PP19. The reason the aversive interventions are judged to be appropriate was changed to a clear and present danger of serious harm to another student or person, of serious harm to property, or of seriously disrupting the learning environment. *Id.*

71. The Parent wanted to remove aversive interventions entirely from the Student's IEP. Cole testimony. The team explained the reasons that an AIP was necessary. *Id.* At the Parent's request, the team agreed that isolations would take place in the front office, rather than in the quiet room in the portable. Cole testimony. The Parent believed that more people would be around to know what was happening. Parent testimony. Additionally, the team agreed that the Parent would be called if the Student were isolated for more than 20 minutes because she wanted to be involved in the decision about what would happen next. Parent testimony. Other things added at the Parent's suggestion were adding a step to prompt the Student how he could earn back tokens, allowing him to wash his face and change his location after 20 minutes in isolation to break the behavioral momentum, and ensuring that the Student and staff be trained on the new plan. Cole testimony. The District proposed removing the one-person hold because Ms. Mudrovich had reported that it did not work as well with the Student as a two-person hold. Oliver testimony. The Parent was aware of a time that Ms. Oliver had "hugged" the Student in a dangerous situation and successfully de-escalated him, so the District left the one-person hold in the AIP so that type of "hug" would remain an option. Oliver testimony.

72. Ms. Cole agreed to conduct fidelity checks of the classroom for two weeks in which she would go to the class to monitor the implementation of the plan. Exhibit PP26, p. 2. After the two weeks, Ms. Oliver would assume responsibility for fidelity checks. *Id.*

73. The Parent testified that she was not allowed to talk at the meeting, but changes were made to the proposed IEP based on her concerns, demonstrating that she did participate in a meaningful way. There is no evidence that the Parent specifically raised concerns at the meeting about Right Response training no longer being identified by name, or that the AIP contained different terminology about when aversive interventions would be appropriate.

74. The Parent did not state any objection to the IEP developed at the meeting. Parent testimony; Oliver testimony. The District members left the meeting believing that the Parent was in agreement and that the Student would be returning to school. *Id.* The Parent stated she would go to Chain Lake after the meeting to see changes already made in the classroom. Oliver testimony. The Parent was not able to see the class that day, and later changed her mind and refused to return the Student to school. Parent testimony.

75. In an email to Ms. Cole dated September 22, 2013, the Parent stated that she must insist that the Student be removed from Ms. Hart's class "due to the extreme overuse of seclusion and other aversive interventions and the damaging emotional and physical effects [the Student was] still suffering." Exhibit P23. She stated that she understood there were other self-contained classrooms in the District and asked that the Student be transferred. *Id.*

76. Ms. Cole responded in an email dated September 22, 2013, that she would respond to the Parent the following week with information on her options. Exhibit P24.

77. In an email dated September 25, 2013, Ms. Cole thanked the Parent for her email requesting that the District consider placing the Student in a more restrictive environment rather than continuing with the PBS placement. Exhibits D44, P27. She explained that, if the Parent wished to discuss moving the Student to a more restrictive environment, another IEP meeting would need to be scheduled to consider the request. *Id.* Ms. Cole asked the Parent to let her know if she wanted her to set up another IEP meeting. *Id.*

78. Ms. Cole's email then stated:

It has come to my attention that [the Student] has not returned to school. The District excused his absences through September 19th in order to give us the opportunity to try to work out our disagreements, and I emailed you the appropriate IEP documents on the 20th. We expected [the Student] to return to school on Monday, September 23rd or sooner, but he did not. Accordingly, [the Student] has accrued 3 unexcused absences and will continue to be marked unexcused unless you take one of the following actions:

- Return [the Student] to school at Chain Lake immediately where he will receive services in accordance with the IEP that was developed at the IEP meeting on September 19th. Attached is another copy of [the Student's] IEP, along with the PWN that attached all of the new plans to the existing IEP. We have worked together with you to craft the Positive Behavior Support Plan, "Lower Level" behavior plan, and Aversive Therapy Plan.
- You may choose to register [the Student] as a "home schooled" student. The necessary forms are available in my office. Let me know if you want me to send

you the form. As a home-school parent, you have the right to enroll [the Student] part time for some services in the District.

- You may elect to enroll [the Student] at a private school at your own expense.
- You may apply for an interdistrict transfer.

If prompt action is not taken to address [the Student's] non-attendance, the unexcused absences will continue to accrue towards a potential Becca petition for non-attendance. As the OSPI Ombudsman noted, [the Student] is subject to the mandatory school attendance law.

Id.

79. The Parent responded to Ms. Cole's email on September 26, 2013, stating that she had not requested a more restrictive placement for the Student, and that she had not agreed to accept that aversive interventions be used with the Student for anything other than imminent danger situations. Exhibit P33. The Parent stated that she had attended the prior IEP meeting to show the District "the abusive treatment" the Student had endured. *Id.* She stated that by proposing the maximum allowable aversive interventions be used, Ms. Cole was "[e]ffectively condoning the abuse." *Id.* She stated that she had not and would not agree to return the Student to "an environment in which he will be physically and emotionally harmed." *Id.* The Parent asked that, if another IEP meeting is necessary to get the Student back in school, Ms. Cole facilitate the scheduling right away. *Id.*

80. In another email on September 26, 2013, Ms. Cole repeated that the District was willing to hold another IEP meeting if the Parent wanted to discuss other special day classes, even though the District believed that his current placement and IEP were appropriate. Exhibits D45, P34. She asked the Parent to let her know if she wanted to set up a meeting (although the Parent had already requested an IEP meeting). *Id.* She also reiterated that the Student was accruing unexcused absences and urged the Parent to return the Student to school and explained the three other options – home schooling the Student, enrolling in a private school at the Parent's expense, and applying for an interdistrict transfer, which Ms. Cole stated could be requested by any parent at any time. *Id.*

81. In an email to Ms. Cole on September 27, 2013, among other things, the Parent stated that the Student needed to return to school as soon as possible. Exhibits D46, P38, P39. She asked that Ms. Cole transfer the Student to the Sultan School District, which she believed had an autism program that would be appropriate for him, and to provide transportation pursuant to his IEP. *Id.* She stated that she would like to see the Student back in school that week, and asked that Ms. Cole facilitate all necessary actions to ensure the Student was able to begin class as soon as possible with his IEP unchanged. *Id.*

82. Ms. Cole responded in an email dated September 27, 2013. Exhibit D46. She stated that the Parent was welcome to apply for a transfer to another school district and reiterated that she had no influence over the other district's decision. *Id.* She also attached the form, which she stated included information on transportation, to the email. *Id.* She stated that, if the Parent wanted to discuss a different placement in the District, to request an IEP meeting (although the Parent had already requested one the day before). *Id.*

83. On September 29, 2013, the Parent sent Ms. Cole another email, stating, among other things, that she had been repeatedly requesting an IEP meeting so the Student could return to school and that no such meeting had been scheduled, nor had other options within the District been offered despite the Parent's insistence that she disagreed with the IEP and the Student would not be returning to Ms. Hart. Exhibit P40.

84. In an email on September 30, 2013, Ms. Cole stated that the District would schedule another IEP meeting to discuss and consider the Parent's concerns. Exhibit P42. Ms. Cole reminded the Parent that, unless the Student returned to school or the Parent made other arrangements for his education, the Student's absences would continue to be marked as unexcused. *Id.*

85. In an email dated September 30, 2013, the Parent asked Ms. Cole to tell her about all available options for excusing the Student's absences. Exhibit P43. She stated that returning the Student to Ms. Hart with the amended IEP would be "physically and emotionally unsafe and would result in further harm" to the Student. *Id.* She expressed her hope that they could quickly come to an agreement so the Student may safely return to school. *Id.*

86. That same day, Ms. Cole learned from Sound Options, an organization that provides mediation services, that the Parent had requested mediation. Exhibit D47. Ms. Cole notified the Parent in an email that day that she would wait to schedule the IEP meeting until she contacted Sound Options the next day to learn more about the request, as she did not know whether the request was for mediation or for a facilitated IEP meeting. *Id.*

87. In an email on October 1, 2013, in response to the Parent's question about excusing the Student's absences, Ms. Cole stated that there was no reasonable justification for the District to excuse the absences, and she urged the Parent to return the Student to school. Exhibit P44. Ms. Cole stated that she would contact Sound Options. *Id.*

88. The District agreed to the Parent's request to mediation through Sound Options, and Ms. Cole stated that she would bring the current IEP to the mediation to reflect any changes made. Exhibits P49, D48.

89. The parties participated in mediation on October 9, 2013, but were not able to reach agreement. Exhibits D9, p. 5; D51; Parent testimony.

90. On October 14, 2013, the Parent went to the District superintendent's office. Parent testimony. Ms. Cole happened to be in the office at the same time and reminded the Parent that she could ask for another IEP meeting. Cole testimony. The Parent responded by asking if she had to as she had already had two IEP meetings. *Id.*

91. On October 16, 2013, the Parent sent another email to Ms. Cole, expressing disappointment that, despite her requests, she had not been given any options, other than Ms. Hart's class, within the District. Exhibits P59, P61. She stated that she wanted to observe a class at Maltby Elementary to see if it might be a good fit. *Id.* The Parent asked Ms. Cole to schedule a meeting to discuss all placement opportunities. *Id.*

92. On October 17, 2013, Ms. Cole sent an email to the Parent, stating that she was interpreting the Parent's email of October 16, 2013, as a request for an IEP meeting and stating

that she would schedule it as soon as possible and include staff from Maltby since the Parent expressed an interest in that school. *Id.*

93. The Parent responded in an email dated October 18, 2013, stating that she would like to observe the class at Maltby to see if it might be a good fit for the Student. Exhibit P63. She asked what other placement options were available within the District, and stated that she had been working on her own to locate available classrooms. *Id.*

94. Ms. Cole responded in an email dated October 18, 2013, that she would set up an observation for the Parent at Maltby. Exhibits P63, 64. She reminded the Parent that the IEP team determines placements and shared that she was glad they would have another meeting for further discussion. *Id.*

95. On October 21, 2013, the Parent sent an email to Principal Oliver, asking that she assist her in getting homework for the Student because he had missed so much class time. Exhibits D52, P66.

96. Ms. Oliver responded in an email on October 22, 2013, stating that she could not provide homework for the Student and that the Student had been withdrawn from the District for having twenty consecutive unexcused absences. *Id.* She reminded the Parent that she still had the four choices Ms. Cole had explained in her previous emails: return the Student to Chain Lake; register the Student as a "home schooled" student; enroll the Student in a private school; or apply for an interdistrict transfer. *Id.*

97. At some point, the Parent wrote a letter to Dr. Hoover, the District superintendent, about her concerns. Exhibit P57. Ms. Cole notified the Parent in an email dated October 24, 2013, that the superintendent had passed her submission along to her and that she would share them with the IEP team. Exhibits D53, P70. She also informed the Parent that she had requested that Sound Options provide a facilitator for the upcoming IEP meeting. *Id.*

98. The District postponed the scheduling of the IEP meeting pending the Parent's observation of the Maltby classroom. Exhibit D54.

99. On November 4, 2013, the Parent filed a citizen complaint with OSPI. Exhibits P254, P257, p. 2. During OSPI's investigation, Ms. Cole reported in an email to OSPI that Ms. Hart had been trained by Ms. Giddings "before working with students." Cole testimony. Ms. Cole later realized that she was using the wrong date for the first day of school and that this was not an accurate statement, as Ms. Giddings had trained Ms. Hart after school on the first day. *Id.*

100. When the Parent learned that the facilitated IEP meeting might be scheduled for the second week in November, she notified the District, in an email dated October 29, 2013, that the Student could not be out of school for two more weeks. Exhibit D57. She requested that the District provide transportation for the Student (presumably to Sultan) so she could provide an education for her son. *Id.*

101. Ms. Cole informed the Parent, in an email dated October 30, 2013, that it was the Parent's unilateral decision to remove the Student from school, and her choice not to take advantage of other options, that was the reason for the Student's missed educational

opportunities. Exhibit D57. She stated that transportation to the Student's placement in the District was available. *Id.*

102. The Parent responded to Ms. Cole in an email dated October 30, 2013, stating that she had been clear that she would not return the Student to Ms. Hart, and that it was her right and responsibility to protect the Student from "such treatment." Exhibit D59. She stated that a church had offered to pay the fuel expense for her to take the Student to an autism class in Sultan. *Id.*

103. In an email dated October 31, 2013, Ms. Cole again told the Parent that her options were to home school the Student, enroll him in a private school at the Parent's expense, apply for a transfer to another district, or return him to his program at Chain Lake. Exhibits D60, P88. She stated that the District had offered and was continuing to offer an appropriate placement for the Student, and would not authorize a different placement outside of the IEP process. *Id.*

104. In an email dated November 1, 2013, the Parent told Ms. Cole that the Student was in immediate need of a placement outside Ms. Hart's class, and asked if there were any options. Exhibit D61. Ms. Cole responded in an email dated November 4, 2013, stating that she had already addressed the Parent's questions, most recently in her email dated October 31, 2013. *Id.*

105. The IEP team, including the Parent, agreed to change the Student's placement and revise the IEP dated September 19, 2013, at an IEP team meeting facilitated by Sound Options on November 12, 2013. Exhibits D9, p. 6; D62; D63, D120, pp. 2-5. Under the amended IEP, the Student's IEP would be implemented in a Structured Learning Center (SLC) classroom at Salem Woods. Exhibits PP27, D120, p. 3. Changes resulting from the facilitated IEP meeting included that the District would provide an aide for the Student three hours per day to provide some of his instruction one-on-one, one-on-two, or in small group settings; Ms. Giddings would observe the Student and convene another IEP team meeting within 30 days of placement at Salem Woods, and the words "Right Response Trained" were added to the requirements in the prior IEP for individuals authorized to use escorts, holds, and isolations. Exhibit D12, p. 2.

106. The team did not draft a new IEP. Instead, the District issued another prior written notice (PWN), dated November 14, 2013, stating the agreements made at the meeting. Exhibits PP27, D120, pp. 2-5. That PWN, combined with the PWN for the IEP meeting of September 19, 2013, and the May 2013 IEP constituted the IEP. Exhibit D120, p.1; Cole testimony. The Parent believes that the PWN did not accurately reflect the agreements, although she did not identify any specifics. Parent testimony.

Salem Woods

107. The Student began school at Salem Woods on November 19, 2013, and also attended on November 20, 21, 22, and 25, 2013. Exhibits D9, p. 6; D15, p.2; D16, p.1.

108. Mairead Kinney was the Student's special education teacher at Salem Woods. Exhibit D15, p.2. There were three paraeducators in the class: Trina Eriks, Wendy Chatterton, and Tyler Giddings. Kinney testimony. There were seven students in the class at the beginning of the year before the Student started. *Id.* Some, but not all, of them had BIPs and/or AIPs. *Id.*

109. The Parent stipulated at the hearing that all staff who worked with the Student at Salem Woods, with the exception of Janna Dmochowsky, the principal, were Right Response trained.

110. Before the Student began attending Salem Woods, staff prepared a small room, which had previously been used as an office, to be the Student's quiet room. Giddings testimony; Dmochowsky testimony. The room was approximately a 45-second walk from Ms. Kinney's classroom. Kinney testimony. At Salem Woods, there is no isolation or seclusion room in the front office area. Dmochowsky testimony.

111. The room is approximately nine by 14.5 feet. Yingling testimony. It has forced air heat, exhaust ventilation, and lighting. *Id.* The room has a window as well as a door that could be locked with a key from the outside. Yingling testimony; Kinney testimony.

112. The room was prepared for use as the Student's quiet room by moving out the person who previously used the room as an office, placing padding on the floor, and removing furniture and things that were the Student's height. Dmochowsky testimony; Kinney testimony.

113. The room was used as a quiet room for de-escalation when the Student was a danger to himself or others, or causing a disruption. Kinney testimony. The Student used the quiet room three times while he was at Salem Woods. Kinney testimony; Dmochowsky testimony. Ms. Kinney and Ms. Eriks were assigned to be with the Student in the quiet room at all times. Dmochowsky testimony. Each time the Student used the quiet room, Ms. Kinney and Ms. Eriks remained in the room with him the whole time. Kinney testimony; Eriks testimony. When Ms. Kinney and Ms. Eriks took the Student to the quiet room, the other paraeducators remained with the other students. *Id.* Additionally, the preschool teacher in the room next door was available to assist in the classroom if necessary. *Id.*

114. The Student first used the quiet room on November 20, 2013. At approximately 9:35 a.m., the Student was carrying his chair in an unsafe manner above his head from circle time to his desk. Exhibit PP6, pp. 1,2; Kinney testimony; Eriks testimony. Because there are medically fragile students in the class, he was asked to carry the chair safely, with the legs on the ground. *Id.* In response, the Student started hitting and kicking Ms. Kinney and Ms. Eriks. *Id.* They unsuccessfully tried to de-escalate his behavior by reminding him he could take a break, using the break menus, and reminding him of his token economy. Exhibit PP6, pp. 1, 2; Kinney testimony. Ms. Kinney and Ms. Eriks used a two-person hold on the Student, and then used a two-person escort to the quiet room. Exhibit PP6, pp. 1, 2; Kinney testimony; Eriks testimony. They used the two-person escort all the way to the quiet room because the Student tried to kick or run when they tried to give him more independence. Kinney testimony.

115. Once in the quiet room, the Student chose not to use options from his break card or to interact with Ms. Kinney and Ms. Eriks. Kinney testimony. He ran around the room, kicked at the walls and the trim, tried to tear things down from the walls, and hit and kicked Ms. Kinney and Ms. Eriks. Kinney testimony. After 20 minutes in the room, he had become calm, and they gave him the choice of staying longer or walking back to the classroom. Kinney testimony; Eriks testimony. He chose to leave, but once they left the room, he hit Ms. Kinney and tried to run away from them. Exhibit PP6, p. 4; Kinney testimony; Eriks testimony. Because there was a danger of his running into the road, Ms. Kinney and Ms. Eriks used a two-person hold and then a two-person escort to take him back to the quiet room. Exhibit PP6, pp. 3, 4; Kinney testimony; Eriks testimony.

116. After they returned to the room, the Student continued to hit the walls and attempted to hit Ms. Kinney and Ms. Eriks. Kinney testimony. They gave him sensory items, like therapuddy, but he tried to throw it or use it like a whip. Kinney testimony. The Student scraped his knuckles when he was hitting the wall, and got a scratch on the palm of his hand when he hit an intercom switch. Exhibits PP6, pp. 3, 4; P108, P113; Kinney testimony; Eriks testimony. The Student calmed down after 15 minutes in the quiet room and walked back to class independently. Kinney testimony. The nurse came to the classroom, where she washed the Student's hand and applied a bandaid to his injury. Exhibits PP6, pp. 3, 4; P108, P113; Kinney testimony.

117. These two interventions were documented in four restraint/isolation procedure and report forms. Exhibit PP6. The first form was completed by Ms. Kinney on November 20, 2013, with respect to the incident at 9:35 a.m. Exhibit PP6, p.1. It documented the date and time of the incident, the name and title of the employees involved in the incident, the antecedents occurring before the Student's behavior, the de-escalation strategies employed prior to restraint/isolation, type and duration of restraint/isolation used with the Student, an indication of whether employees or the student were injured in the incident, and an indication of whether the procedures outlined in the Student's aversive plan were followed. *Id.* The entry under antecedent said, "Was not carrying chair safely from circle time to desk. Was asked to carry the chair safely." The second form is a revision of the first form, with a notation that it was revised on November 21, 2013, by Ms. Kinney. Exhibit PP6, p. 2. The revision is an addition to the antecedent section that states, "A clear and present danger of serious harm to the Student or another person – hitting teachers." *Id.*

118. The third form was completed by Ms. Kinney on November 20, 2013, with respect to the return to the quiet room after the Student tried to run. Exhibit PP6, p.3. It documented each of the items addressed in the first form. *Id.* Additionally, because the Student was injured, the form also stated that medical care was provided. *Id.* The entry under antecedent said, "Leaving the quiet room to go back to SLC." *Id.* The fourth form is a revision of the third form, with a notation that it was revised by Ms. Kinney on November 21, 2013. Exhibit PP6, p. 4. The revision is an addition to the antecedent section that states, "[a] clear and present danger of serious harm to student or another person – attempting to run," the addition of a de-escalation strategy used before employing restraint/isolation, and the addition of the words "without need of restraint" to the duration section. *Id.*

119. The forms originally completed for the two incidents were mailed to the Parent on November 21, 2013. Exhibit PP6. The revised version of the form about the second incident was mailed to the Parent on November 22, 2013. Exhibit PP6, p.4. There is no evidence in the record as to when the revised version of the form about the 9:35 a.m. incident was sent to the Parent, but she received the revised forms. Parent testimony.

120. The Student used the quiet room again on November 21, 2013. At approximately 12:50 p.m., the Student refused to wash his hands after lunch. Exhibit PP7. He was prompted with a reminder about his tokens and the removal of tokens, but then began to hit and kick the teachers. Exhibit PP7; Kinney testimony. Ms. Kinney and Ms. Eriks used a two-person hold and then a two-person escort to the quiet room. Exhibit PP7; Kinney testimony; Eriks testimony. In the quiet room, the Student began to hit the walls, tried to climb the walls, and asked for therapuddy, but used it inappropriately. Kinney testimony. After twenty minutes in the quiet

room, the Student was still not calm and asked to stay in the room to use more sensory tools to de-escalate. Exhibit PP7; Kinney testimony.

121. A restraint/isolation procedure and report form was completed for this incident as well. Exhibit PP7. It contained the same categories of information as the reports for November 20, 2013. *Id.* It was mailed to the Parent on November 22, 2013. *Id.*

122. Principal Dmochowsky had asked to be called each time the Student was escorted to the quiet room. Dmochowsky testimony. She observed the Student in the quiet room, but does not know whether she observed him in the room each time he was there and, if she did not, which times she observed. Dmochowsky testimony. Each time Principal Dmochowsky observed the Student in the quiet room, he was with two adults, probably Ms. Kinney and Ms. Eriks. Dmochowsky testimony.

123. The Parent stipulated at the hearing that she never observed the Student in any quiet room or isolation room at Salem Woods. Nonetheless, the Parent believes that the Student was locked in the quiet room at Salem Woods by himself. Her basis for this is the following: the changes she has seen in his behaviors, including his fear when he hears a lock click, his receiving a wound on his hand, her belief that his tooth was chipped and/or fell out while he was in the room, a hearsay statement from the Student that he "tried to get out," a statement attributed to Ms. Dmochowsky that when she "came back," the Student's shoe was off, the damage the Student caused to the floor in the room, and her disbelief that Ms. Kinney and Ms. Eriks would both leave the classroom to go with the Student to the quiet room. Parent testimony. The Parent did not describe the circumstances of the statement allegedly made by Ms. Dmochowsky, and Ms. Dmochowsky was not asked about it. The remaining reasons are speculative and/or hearsay. Accordingly, it is found, based on the credible testimony of Ms. Kinney, Ms. Eriks, and Ms. Dmochowsky, that the Student was not ever left alone in the quiet room at Salem Woods.

124. The Parent testified that the Student observed her looking at a book about physical restraints, pointed to a picture of a physical hold, and stated that Ms. Dmochowsky had done that to him and was trying to break his arm. Parent testimony. Ms. Dmochowsky affirmatively denies ever physically restraining the Student, escorting the Student, or touching him, and Ms. Kinney did not observe Ms. Dmochowsky use a physical restraint with the Student. Exhibit D17, p.2; Dmochowsky testimony; Kinney testimony. As the only evidence presented of Ms. Dmochowsky's use of restraint on the Student is the hearsay statement of the Student, no finding can be made that Ms. Dmochowsky used such a restraint.

125. Ms. Dmochowsky observed Ms. Kinney's classroom each of the five days the Student attended Salem Woods. Dmochowsky testimony. She did not observe anything that concerned her. *Id.* Based on her observations, she did not have any sense that the Student was afraid or anxious at Salem Woods. *Id.* Similarly, neither Ms. Kinney nor Ms. Eriks observed behavior suggesting that the Student was fearful of them. Kinney testimony; Eriks testimony. The Student was not injured while at Salem Woods, other than the injuries to his hands on November 20, 2013. Kinney testimony.

126. After November 25, 2013, the Student again stopped attending school. Exhibit D9, p. 6. The Parent notified the District that the Student did not want to get on the bus on November 26, 2013, because he was scared, did not want to be put in seclusion, and said that teachers hurt

him. Exhibits P131, P134. Ms. Cole responded in an email that day, among other things, stating that Ms. Kinney and Ms. Giddings report that the Student does not express behaviors consistent with a fear of doors at school. Exhibits D81, P133.

After the Student Stopped Attending Salem Woods

127. On November 26, 2013, the Parent requested that Ms. Cole schedule an "emergency IEP meeting" because she believed that the IEP was not being followed and she had recovered data from the prior year. Exhibits D82, P130. The Parent stated that she would contact Sound Options to request that the same facilitator be present, and she made requests about which District staff would participate. *Id.*

128. Ms. Cole responded to the request for an IEP meeting by email on December 2, 2013. Exhibits D82, P130, P143. She noted that they had just had a facilitated IEP meeting on November 12, 2013, the Student had only been in class for five school days, and that Principal Dmochowsky disagreed that the IEP was not being followed. *Id.* Ms. Cole stated that it was unclear to her how the Parent's recent recovery of data from the year before would relate to compliance with the current IEP. *Id.* Accordingly, Ms. Cole disagreed that an "emergency" IEP meeting was necessary. *Id.* She proposed that the Parent let her know the specific components of the IEP the Parent believed were not being followed and why the Parent believed that was the case. *Id.* She also requested copies of the recently obtained documents and an explanation of how they relate to the current situation. *Id.* Ms. Cole stated that, once she had reviewed that information, they could discuss the timing of the next IEP meeting, and reminded the Parent that the PWN after the last IEP meeting stipulated there would be an IEP meeting within 30 days. *Id.* She also stated that, in the interim, the Parent was always welcome to arrange to meet with, email, or call staff at the school to discuss issues with the Student. *Id.*

129. The Parent provided the District with a declaration of intent to provide home-based instruction on December 3, 2013. Exhibits D110, P146. The Parent had not provided the information Ms. Cole requested regarding the ways in which the Parent believed the IEP was being violated before she submitted this document. Cole testimony. District staff told the Parent that she could enroll the Student part time for classes or services while she was home schooling. Exhibits D83, D84, P147; Barr testimony; Parent testimony. The District sent the Parent a PWN stating that the District would no longer provide educational services while the Student was home schooled. Exhibit D85, p. 2. The PWN reminded the Parent to contact the District if she wished to pursue returning the Student to school or discuss partial enrollment. *Id.*

130. On January 3, 2014, OSPI issued a decision on the Parent's citizen complaint. Exhibit P257. OSPI ordered student-specific corrective action if the Parent chose to enroll the Student in the District by March 3, 2014. *Id.* at 20. If the Student so enrolled, the District was to ensure that the Student received an FBA from an independent evaluator, which was to be used by the IEP team to determine whether the Student's IEP provided appropriate behavior goals and specialized instruction, and whether the BIP should be revised. *Id.*

131. The Parent requested, through Sound Options, in early 2014, that the District participate in another mediation, but the District declined. Parent testimony; Exhibits P155, P178; P181, P191. The Parent also shared concerns with the District's school board in or around March 2014. Exhibit P172, p. 1. The Parent describes these actions, as well as her citizen complaint,

as requests to enroll the Student. Parent testimony. However, the Parent did not enroll the Student in the District during the remainder of the 2013-2014 school year, and there is no evidence that she attempted to enroll him. Exhibit D9, pp. 6-7. In communications about the mediation and in response to the letter to the school board, Ms. Cole reminded the Parent that the Student was welcome to come back to the program at any time, that the Parent could consider partial enrollment in the District, while he was home schooled, for special education services or through the homeschool program, and encouraged the Parent to return the Student to school. Exhibits P155; P172, p. 4; P178.

132. In September 2014, the Parent communicated with Ms. Cole through a state ombudsperson and requested a meeting with the District. Exhibit D87. Ms. Cole informed the Parent that the Student's evaluation had expired, so the District would seek permission to conduct a reevaluation. *Id.* In the meantime, the District would schedule an IEP meeting to develop an interim IEP. *Id.*

133. On September 17, 2014, Ms. Cole sent the Parent an email clarifying that she could immediately enroll the Student if she wished and did not need to wait until an IEP meeting was scheduled. Exhibits D90, D122. At the same time, Ms. Cole sent a PWN proposing to initiate a reevaluation, a reevaluation notification and consent form, and a PWN proposing to initiate an interim IEP. Exhibit D122. The PWN attached an IEP and explained that it would be the interim IEP in effect if the Parent chose to enroll the Student before the IEP meeting. *Id.* at D122. The IEP was the one in effect during the Student's last period of attendance, which the Parent had agreed to at the November 2013 facilitated IEP meeting, but the District had rewritten the AIP. Exhibit D122, p.6.

134. The newly drafted AIP was dated September 16, 2014. Exhibit PP20. It stated that a multidisciplinary team consisting of Principal Oliver, Ms. Giddings, the Parent, Mr. Egli, and Ms. Hart had met on September 16, 2014, and made the recommendations set forth in the AIP. *Id.* The Parent posted a copy on her facebook book, accusing the District of holding a meeting without her participation and of stating that she had been present when she had not. Cole testimony. When Ms. Cole learned of these accusations, she explained to the Parent that no meeting was held and that the participant names from a previous plan had been included through the IEP forms software program the District used. Exhibits D92, P211. Ms. Cole acknowledged that Ms. Oliver and Ms. Giddings no longer worked for the District, and apologized for the error. *Id.*; Cole testimony.

135. An IEP meeting was held on September 26, 2014. Exhibit D94. The Parent brought her attorney, Ms. Krikorian. Parent testimony; Cole testimony. The Parent had not told the District in advance that she planned to bring counsel so the District had not invited its attorney, as is its practice when parents are represented at IEP meetings. *Id.* Ms. Cole gave the Parent the choice of excusing Ms. Krikorian and proceeding with the meeting without her or rescheduling the meeting for a time when the District's attorney would be available too. *Id.* The Parent opted to proceed with the meeting without Ms. Krikorian present. *Id.*

136. At the meeting, the Parent consented to a reevaluation of the Student. D132, p.2; Parent testimony. The District presented a proposed BIP and a proposed AIP, which was different than the proposed AIP dated September 16, 2015. Exhibit PP16; *Compare* Exhibit PP20 *with* Exhibit PP21. The Parent did not agree with the proposed BIP and AIP, but there is no evidence in the record as to whether she explained any specific concerns at the meeting or

asked for any alternate language. Exhibit D123. At the hearing, the only complaint about the documents the Parent testified about was the failure of the AIP to include Right Response training. Parent testimony. There is no evidence that she raised this with the District at the meeting to give the District the chance to explain why the training was not identified by name or to change its position. The meeting was extended beyond the scheduled end time in an effort to discuss the IEP rather than the Parent's other concerns and allegations. Exhibit D123; Cole testimony.

137. The Parent testified that the District had agreed at the meeting it would test the Student at locations other than District properties. Parent testimony. Ms. Cole testified that the District had only agreed to test the Student at the District administration building rather than a school. Cole testimony. The PWN stated that, if the Parent did not re-enroll the Student the District would "work with [the Parent] to schedule the evaluation sessions at other locations." Exhibit D123, p.2. Because this suggests multiple other locations, it is found that the District did not limit its agreement to conduct testing only at the administration building, but it is not found that the District agreed that all testing would be off District property.

138. Following the meeting, the District issued a PWN stating, among other things that it would initiate the attached IEP if the Student were re-enrolled. Exhibit D123. The PWN stated that the District committed to schedule another IEP meeting to allow the Parent to share any suggestions related to its IEP or another proposal. *Id.* The parent testified that much of the PWN issued following this meeting was inaccurate, but did not explain in what ways. Exhibit D123; Parent testimony.

139. In an email to the District's attorney, Mr. Thompson, on October 3, 2014, Ms. Krikorian stated "[a]s you know, the [Parents] have very serious concerns regarding [the Student's] safety with the placement proposed by the District." Exhibit P226, p.2. Mr. Thompson responded that he was not aware of the Parents having "serious concerns regarding [the Student's] safety with the placement proposed by the District." *Id.* at 1. He stated that he would be happy to discuss the details of the concerns with the District if Ms. Krikorian provided them. *Id.* Ms. Krikorian responded that she was referring to the aversive interventions that had been the subject of ongoing emails and meetings between their clients and that were addressed in the OSPI citizen complaint. *Id.* She stated that it concerned her that Mr. Thompson was not aware of the issue. *Id.* Mr. Thompson responded that he was familiar with the citizen complaint, which resulted in no finding or suggestion by OSPI that the Student's safety was jeopardized, and stated that the interventions had occurred in September 2013. He again asked Ms. Krikorian to inform him of specific safety concerns related to the proposed IEP so he could share them with the District. *Id.*

140. Another IEP meeting was held on October 20, 2014. Exhibits D97, D124. At the meeting, the District agreed to review the Student's medical records and assessments from outside providers to determine whether further testing by the District would be necessary. Exhibits D124, P235; Cole testimony. The Parent requested that the District place the Student at Dolan Academy (Dolan), a private school where the Student was being tutored. Exhibit D124. The District did not agree because that would be a significant change of placement, which would require completion of the reevaluation. *Id.* The District proposed instead to initiate its proposed IEP, which was the same one discussed at the IEP meeting on September 26, 2014. *Id.* The Parent testified that she disagreed with the information contained in the PWN issued after this meeting, but again provided no specifics. Exhibit D124; Parent testimony.

141. The Parent provided numerous medical reports, including a psychiatric diagnostic evaluation, a communications assessment from a bibehavioral assessment clinic at Seattle Children's Hospital (Seattle Children's), and documents from a provider at the autism center at Seattle Children's and from the Student's pediatrician, to the District on or around October 22, 2013. Exhibits P234, P234; Parent testimony. None of these reports include a diagnosis of post-traumatic stress disorder (PTSD) or recommend or suggest a need for any precautions with respect to the Student's alleged fears in reevaluating or educating him. See Exhibits D22-D29, D99, P235. No report or other information from Lindsay Beard, the Student's mental health counselor, was provided.⁷ Exhibits D99, P235; Cole testimony.

142. As part of the reevaluation, the District contracted with Seattle Children's to conduct a speech language pathology (SLP) evaluation related to augmentative alternative communication, which took place in late October 2014 with a District SLP present. Exhibit D125; Cole testimony; Duffy testimony. Additionally, District staff observed the Student at Dolan. Exhibits D129, D130, D131. The District also planned occupational and physical therapy testing, adaptive and vocational testing, and hearing and vision screenings. Exhibits D95, P244. The District agreed to use IQ and academic assessments from reports the Parent provided rather than conducting new assessments. Exhibit P244.

143. The Parent requested, through her attorney, that the remaining assessments of the Student be done off District property by third parties because of the Student's fears that District staff members will find him, lock him in seclusion, and hurt him. Exhibits P235, P245. The District formally declined this request, in a PWN dated November 13, 2014, as unnecessary and unsupported by any data made available to the District. Exhibits PP33, D106, D126, P246. The District noted that it had agreed to conduct assessments at the District office rather than a school and that it had notified the Parent of the staff who would be conducting assessments. *Id.* The District summarized its attempts to contact the Parent to schedule the remaining assessments and requested that she respond. *Id.* The Parent disagreed with the information in the PWN but was not specific as to why other than stating that the District had previously agreed to work with her on the location. Parent testimony.

144. The District provided the Parent with parent and teacher rating scales to obtain information related to the Student's adaptive and social/emotional/behavior assessments, but the Parent did not return them. Exhibit D104; Cole testimony. The District also requested educational records, including student work samples and data, from Dolan, but did not receive a response. Exhibit D105; Cole testimony. The Parent did not make the Student available for any of the additional testing because she did not want it to take place on District property by District staff. Parent testimony.

⁷ The Parent submitted as an exhibit the Declaration of Lindsay Beard, in which Ms. Beard states that she has diagnosed the Student with PTSD and determined that it stems from aversive interventions at school in the fall of 2013. Exhibit P247, p.3. Because Ms. Beard did not testify at the hearing and was not available for cross-examination, no findings may be made based exclusively on her hearsay statements. See RCW 34.05.461(4).

145. On November 17, 2014, the District issued a PWN, informing the Parent that it was not able to complete the Student's reevaluation because the Parent had not provided the District with access to the Student to conduct the remaining assessments after multiple requests. Exhibits PP34, D127.

146. The Parent had not reenrolled the Student in the District at the time of the hearing. Parent testimony.

Methods of Communications with the District

147. In an email on September 27, 2013, the Parent told Ms. Cole that someone in Ms. Cole's office said that she could only communicate with Ms. Cole through email, rather than by phone. Exhibit D46, p. 1; P38, p. 1. The Parent stated that it was difficult to send and receive messages, type detailed messages, perform spelling and grammar corrections, and open attachments on her cell phone. *Id.* She stated that it was becoming increasingly difficult to depend on email for communication. *Id.* Ms. Cole's email in response did not state that this was incorrect or otherwise respond to the statement. *Id.*

148. Ms. Cole corresponded with the Parent by email because the Parent often used email to communicate with her. Cole testimony. Additionally, because Ms. Cole is often in meetings or out of her office, it is sometimes easier to communicate by email rather than by phone. *Id.*

149. In an email on September 29, 2013, the Parent stated that Ms. Cole had sent her an email with an attachment even though she knew she could not open attachments. Exhibit P40. Ms. Cole responded to this email on September 30, 2013, by email. *Id.* Her email noted that she was also sending a copy of the email in the U.S. mail along with the attachment from the prior email. *Id.*

150. Once Ms. Cole understood that the Parent could not open attachments to email, she began a practice of sending all email correspondence with an attachment to the Parent by U.S. mail as well. Cole testimony. She sometimes sent emails without an attachment by U.S. mail also, but was not as consistent about that practice. *Id.*

151. The record is replete with examples of the Parent sending lengthy emails to Ms. Cole, including responses to Ms. Cole's emails. There are also numerous examples in the record of the District stating in emails that it would also send the attachments to the Parent by U.S. mail or otherwise referencing sending documents to the Parent in that manner. See, eg. Exhibits D55, D56, D57, D60, D67, D68, D90, D106, D123, D124 D180, p.1; P19, P44, P70, P139, P181, P186, P191.

152. Moreover, Ms. Cole did at least occasionally speak with the Parent on the phone. See Exhibit P200. In one email, Ms. Cole suggested to the Parent that it might be helpful to have a phone call, rather than to continue to email about a subject. Exhibit D71, p.3. She also reminded the Parent in an email that she was always welcome to meet with, email, or call staff at the school to discuss concerns about the Student. Exhibit D82, p. 1. And the Parent did speak with school staff frequently when the Student was attending school, both in person and by phone. Parent testimony; Oliver testimony; Hart testimony; Dmochowsky testimony; Kinney testimony.

Records Requested by the Parent

153. The Parent requested a number of records from the District at various times in various ways. With the exception of documents from the 2012-2013 school year, which the District could not locate, and the aversive intervention reports discussed above, the Parent did not identify specific documents that she did not receive in a timely manner.

154. Some District employee witnesses brought documents with them to the hearing. These documents were not entered into the record. The Parent did not in her testimony describe specific documents received in this manner that she had not previously received from the District. Based on the testimony regarding the documents, some of them were already in the record. See, e.g., Oliver testimony. Based on the testimony regarding the documents, many of them were notes kept by District staff. See, e.g., *id.*

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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

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

The IDEA

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

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

Id. at 206-207.

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

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

Id. at 188-189.

Aversive Interventions

5. Under Washington law prior to October 25, 2013, "aversive intervention" meant "the systemic use of stimuli or other treatment which a student is known to find unpleasant for the purpose of discouraging undesirable behavior on the part of the student." Former WAC 392-172A-03120(1). As of October 25, 2013, the term means "use of isolation or restraint practices for the purpose of discouraging undesirable behavior on the part of the student." WAC 392-172A-03120(1); WSR 13-20-034.⁸ The term does *not* include the use of reasonable force, restraint, or other treatment to control unpredicted spontaneous behavior that poses a clear and present danger of 1) serious harm to the student or another person, 2) serious harm to property, or 3) seriously disrupting the educational process.⁹

6. The term "bodily contact" is defined as the "use of any form of aversive interventions which involves contacting the body of a student." WAC 392-172A-03130. The term "isolation" is defined as the "use of aversive interventions which involve[s] excluding a student from his or her regular instructional area and isolation of the student within a room or any other form of enclosure." *Id.*

Implementation of the May 2013 IEP

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

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

⁸ Unless specified, cited WAC provisions were in effect, without changes, during all relevant time periods.

⁹ The District does not argue that this exception to the definition of aversive interventions applies to any of the incidents at issue in this case.

* * *

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

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

Right Response training

8. AIPs must specify the person or persons permitted to use the aversive interventions and the current qualifications and required training of the personnel permitted to use them. WAC 392-172A-03135. The May 2013 AIP required that personnel be "Right Response *trained*" in order to use aversive interventions with the Student. It did not require that they be Right Response *certified*. The Parent failed to prove that one-on-one Right Response training by Ms. Giddings, who is qualified to provide such training, was not sufficient to comply with the terms of the AIP.

9. However, as found above, Ms. Hart participated in at least two aversive interventions with the Student on the first day of school *before* Ms. Giddings trained her in Right Response holds. It is concluded that Ms. Hart's participation in the aversive interventions prior to receiving Right Response training constituted a failure to implement the Student's IEP.

Use of aversive interventions as a disciplinary tool

10. The Parent argues that the District used aversive interventions with the Student to punish him for disability-related behavior. The Parent argues that each of the aversive intervention reports identified as the antecedent disability-related deficits identified in the Student's IEP or (the subject of a social/emotional goal. The aversive interventions were not used because of the antecedents, however. They were used because of the unsafe behavior resulting from the antecedents. For example, the Parent contends that the Student was required to go to the quiet room because he would not write his name. The aversive intervention was used because the Student hit and kicked Ms. Hart after he refused to write his name, not because of the refusal itself. The Parent has not proven that the District used aversive interventions as punishment, for disability-related behavior or otherwise, rather than to prevent continued unsafe behaviors.

Employment of de-escalation steps prior to using aversive interventions

11. With respect to at least some of the aversive interventions involving the Student, it is concluded that the Parent has proven that District staff did not employ each of the de-escalation steps set forth in the Student's BIP before resorting to use of those aversive interventions. It is concluded that the failure to employ each of the de-escalation steps constituted a failure to implement the Student's IEP.

12. The Parent has proven two separate and independent failures to implement the Student's IEP: Ms. Hart's participation in the aversive interventions prior to receiving Right Response training, and the staff's failure to employ each of the de-escalation steps in the Student's BIP before resorting to use of aversive interventions. Considered together, it is

concluded that these two failures to implement the Student's IEP constitute more than a minor discrepancy between the services the District provided to the Student and the services required by the Student's IEP. While the failures took place over only six days and did not affect the entire school day, the proper use of a BIP and the safe use of aversive interventions are vital to the education of a Student in a PBS classroom. Accordingly, it is concluded that these two implementation failures collectively constitute a material failure to implement the Student's IEP, violated the IDEA, and denied the Student a FAPE.

The "seclusion room" and the requirements of WAC 392-172A-03130

13. WAC 392-172A-03130 requires that a room used to isolate a student is subject to four conditions: 1) It must be "ventilated, lighted, and temperature controlled from the inside or outside for purposes of human occupancy;" 2) It must "permit continuous visual monitoring of the student from outside the enclosure;" 3) "An adult responsible for supervising the student shall remain in visual or auditory range of the student;" and 4) "Either the student shall be capable of releasing himself or herself from the enclosure or the student shall continuously remain within view of an adult responsible for supervising the student." WAC 392-172A-03130(2).

14. The seclusion room at Chain Lake was ventilated, lighted, and temperature controlled for purposes of human occupancy. The room has a window on the door, which permits monitoring from the outside. The Parent has not proven that there was not an adult responsible for supervising the Student in visual or auditory range at any time while the Student was in the seclusion room at Chain Lake in September 2013. Likewise, the Parent has not proven that the Student was not capable of releasing himself from the room if a staff person was not holding the door or that he was not in view of a staff person during any of the times he was in the seclusion room at Chain Lake in September 2013.

Visual observation of the Student in the seclusion room

15. As concluded above, the Parent has not proven that the Student was not under visual observation by a staff person any of the times he was in the seclusion room at Chain Lake in September 2013.

District staff familiarity with the Student's FBA and BIP

16. The Parent argues that District staff was not sufficiently familiar with the Student's FBA and BIP to avoid creating situations that might trigger inappropriate behavior and to avoid responding with punishment as opposed to redirection. Ms. Hart reviewed the Student's BIP, but not his FBA, before school started. There is no requirement in the IDEA that a teacher read the assessments or evaluations upon which a student's IEP is based, including an FBA. Moreover, the Parent does not explain how a lack of familiarity with a student's IEP or FBA would violate the IDEA or deny a student a FAPE separate from any failure to implement the IEP.

Implementation of the IEP as Amended in November 2013

Right Response training

17. The Parent stipulated that all relevant Salem Woods staff, with the exception of Ms. Dmochowsky, were Right Response trained. There was no allegation in the Parent's Amended Due Process Hearing Request that Ms. Dmochowsky was not Right Response trained and the District did not agree at the hearing to amend the Request. Accordingly, the issue of whether Ms. Dmochowsky was Right Response trained is not addressed, and the Parent has not proven a violation with respect to Right Response training of staff at Salem Woods. See WAC 392-172A-05100(3); 34 CFR §300.512(d) (The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process hearing request unless the other party agrees otherwise).

Seclusions

18. The Parent argues that the District failed to implement the IEP as amended in November 2013 by "not properly carrying out seclusions" in a number of ways. However, the Parent did not prove that the Student was ever secluded while at Salem Woods as he was always with two adults in the quiet room. Accordingly, she has not proven a violation in this respect.

19. One of the allegations with respect to seclusions could apply to the use of physical holds on the Student, so it is considered even though the Parent's issue statement refers only to seclusions. This allegation is that aversive interventions were used as discipline for disability-related behavior. As each of the aversive interventions used related to the safety of the Student or others – hitting and kicking teachers and staff or trying to run from teachers outside – the Parent has not proven that aversive interventions were used to discipline the Student for disability-related behavior.

Documentation of all aversive interventions

20. The Parent argues that the District failed to document all aversive interventions at Salem Woods because it did not document Ms. Dmochowsky's use of a hold on the Student. However, the Parent has not met her burden of proving that such a hold took place. Accordingly, she has not proven a violation with respect to failing to document aversive interventions at Salem Woods.

Access to lunch and snacks

21. The Parent argues that the District violated the IDEA by taking away the Student's lunch and snacks from home and not providing him with substitute nutrition on his first day of school at Salem Woods. However, neither the May 2013 IEP nor the associated BIP and AIP as amended in September 13, 2013, included provisions about meals or snacks, and the Parent does not explain how this allegation, if proven, would violate the IDEA. Accordingly, the Parent has not proven a violation of the IDEA related to the Student's lunch and snack.

Scheduling an IEP meeting within 30 days of November 19, 2013

22. The Parent argues that the District violated the IDEA by refusing to convene an IEP meeting within 30 days of November 19, 2013, or in response to her request for an "emergency" IEP meeting. The Parent did not prove that the District "refused" to convene an IEP meeting. To the contrary, Ms. Cole only stated that she did not believe, without more information, that an "emergency" IEP meeting was necessary so soon after the facilitated IEP meeting and when the Student had attended so few days of school. She requested information from the Parent and stated that, once she received that information, they would determine the appropriate timing for the next IEP meeting. She also acknowledged the District's agreement to convene an IEP meeting within 30 days. The Parent did not respond to the request for information before withdrawing the Student to homeschool him. She withdrew him sooner than 30 days after November 19, 2013, obviating the need for an IEP meeting to address the Student's progress at Salem Woods. The Parent did not prove that she requested another IEP meeting until the fall of 2014, at which point the District convened a meeting. Accordingly, the Parent has not met her burden of proving a violation with respect to the scheduling of an IEP meeting during the 2013-2014 school year.

Provision of a Continuum of Educational Placements

23. WAC 392-172A-02055(1) requires that "[e]ach school district shall ensure that a continuum of alternative placements is available to meet the special education and related services needs of students." See also 34 CFR §300.115(a). The required continuum must "[i]nclude the alternative placements listed in the definition of special education in WAC 392-172A-011175, such as instruction in general education classes, special education classes, special schools, home instruction, and instruction in hospitals and institutions." WAC 392-172A-02055(2)(a). See also 34 CFR §300.115(b)(1).

24. The Parent argues that the District violated this obligation to have available a continuum of alternative placements by telling the Parent that, if the Student did not return to school, she would need to home school him, send him to a private school at the family's expense, or apply for a transfer to another school district. The District made clear that the Parent needed to do this in order to comply with *compulsory attendance laws*, which require that parents of children between eight and eighteen years of age must see that they attend public school in the district in which they reside unless one of several exceptions, which include attending private school and receiving home-based instruction, apply. RCW 281.225.010. Compulsory attendance is not an IDEA issue.

25. The Parent has not alleged in her Complaint or as an issue in this case that either the IEP resulting from the meeting on September 19, 2013, or the Student's placement in the PBS classroom at Chain Lake was inappropriate or not in the Student's least restrictive environment. Thus, there is no allegation that the District did not maintain an appropriate placement on the continuum for the Student during the time it was communicating these options to the Parent.

26. As part of the continuum of placement argument, the Parent contends the District should have provided homework for the Student pending a resolution of the dispute. The Parent does not explain how homework relates to the requirement that a District have available a continuum of placements. Similarly, the Parent argues that the District should have provided transportation for the Student to attend another school district. But the District's provision of transportation to

another district would only be appropriate if the District were placing the Student out of the District because it could not serve him, a decision that would have to be made by the IEP team. See WAC 392-172A-04080 (allowing school districts to enter into interdistrict agreements to provide special education and/or related services to eligible students). The Parent also argues that the District denied the ability to allow the Student to participate in recess if he were home schooled during this time period. Again, the Parent does not explain how this would relate to the obligation to have available a continuum of placements.

27. The Parent has not met her burden of proving a violation of the IDEA with respect to the obligation to provide a continuum of placements.

Identification of the Student's Disability as Autism

28. The Parent argues that the District violated the IDEA because it did not identify the Student's disability as autism. However, because labels do not determine services, the misidentification of a Student's eligibility category would not itself violate the IDEA:

Eligibility categories serve as gatekeepers for special education. Once eligible, a student is entitled to an IEP that meets all his disability-related needs, whether those needs would separately qualify him for eligibility or not. As a result, the IDEA and related laws do not entitle a student to eligibility under any particular category, nor do they regulate the addition of an eligibility category to the IEP of a student already eligible under another category.

San Rafael City Schs., 112 LRP 12088 (SEA CA 2012). Because the District determined the Student to be eligible for special education and related services throughout the time period at issue here, and because the Parent has not alleged in her Complaint that the District's IEPs were inappropriate if properly implemented, a different determination of the Student's eligibility category would not affect the outcome of the case, and the issue is moot.

Meaningful Participation of the Parent in the IEP Process/Predetermination

29. Procedural safeguards are essential under the IDEA:

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

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

30. The IDEA requires that parents have the opportunity to "participate in meetings with respect to the identification, evaluation, and educational placement of the child." WAC 392-172A-03100; 34 CFR §300.322. To comply with this requirement, parents must not only be invited to attend IEP meetings, but must also have the opportunity for "meaningful participation in the formulation of IEPs." *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed Appx. 342, 48 IDELR 31 (9th Cir. 2007).

31. A district violates this procedural requirement if it predetermines a student's placement, meaning that it "independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). Likewise, a district "may not enter an IEP meeting with a 'take-it-or-leave-it' approach." *Id.* However, preparation by a district prior to an IEP meeting, including developing a draft IEP, does not itself establish predetermination. *Lee's Summit R-VII Sch. Dist.*, 112 LRP 14677 (SEA MO 2012). And Parents do not have veto power over individual provisions or the right to dictate any particular educational program. *Ms. S.*, 337 F.3d at 1131.

Creating new AIPs and a BIP over the Parent's objection

32. The Parent continues to argue, despite the relevant issues having been dismissed on summary judgment, that the District could not implement the amended IEPs over the Parent's objection without the District seeking a due process hearing. As explained in the summary judgment order, this is not the law. If the IEP team cannot reach agreement, the district must determine the appropriate services and provide the parent with prior written notice of the district's determination and the *parent's* right to a due process hearing. See, e.g., *Ms. S.*, 337 F.3d at 1131; *Doe v. Gonzalez*, 793 F.2d 1470, 1490 (9th Cir. 1986), *aff'd in part and rev'd on other grounds in part* by *Honig v. Doe*, 484 U.S. 305 (1988). Nor is the Parent correct that the "stay-put" provision required the District to continue enforcing the May 2013 IEP when the Parent expressed her disagreement with the new IEP. Stay put is only triggered when a due process hearing request is filed, not whenever a parent disagrees with a district's actions. See WAC 392-172A-05125; 34 CFR §300.518(a) (student must remain in his then current educational placement "during the pendency of any administrative hearing or judicial proceedings").

33. Thus, implementing an IEP over a parent's objection is not itself a violation of the IDEA. The relevant question here is whether the Parent had a meaningful opportunity to participate in the IEPs' formation. With the exception of the IEP dated September 16, 2014, it is concluded that the Parent had the opportunity to participate meaningfully in IEP meetings leading to each of the IEP amendments. The District made changes to proposed IEPs based on the Parent's suggestions and, in November 2013, changed the Student's placement at the Parent's request. There is no evidence that the Parent raised certain of her concerns, such as the requirement that employees using aversive interventions be Right Response trained, at the time of the meetings so that the District could consider different proposals. That the Parent's primary desire – that aversive interventions not be used with the Student at all – was not adopted does not prove that the District did not seriously consider her concerns about the Student's safety. In addition to changing the Student's placement, the District made efforts to improve behavioral supports for the Student in hopes of reducing the need for aversive interventions and addressed the Parent's concerns by agreeing that seclusions at Chain Lake would be in the front office where more people would be aware of what was taking place, agreeing to call the Parent when a seclusion lasted more than 20 minutes so she could be involved in the decision making about what would happen next, and agreeing that Ms. Cole would conduct daily fidelity checks in the classroom.

34. The IEP dated September 16, 2014, and provided to the Parent on September 17, 2014, was drafted by the District, without the Parent's participation. The accompanying PWN stated that it would be implemented if the Parent allowed the Student to attend school before

the upcoming IEP meeting scheduled for September 26, 2014. It is concluded that proposing to implement an IEP that was drafted without the Parent's participation was a procedural violation of the IDEA.

35. Not all procedural errors result in a denial of FAPE. *LM v. Capistrano Unified Sch. Dist.*, 538 F.3d 1261 (9th Cir. 2008). Procedural inadequacies constitute a denial of FAPE when they impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefit. WAC 392-172A-05105(2); 34 CFR §300.513(a)(2). Here, much of the proposed IEP was the same as that the Parent agreed to at the facilitated IEP meeting in November 2013. Moreover, the longest time period for which the proposed interim IEP might be implemented before the Parent was scheduled to participate in an IEP meeting was only eight school days. Accordingly, under these particular facts, it is concluded that the District's proposal to implement the interim IEP for any time period before the scheduled IEP meeting that the Parent chose to send the Student to school did not impede the Student's right to a FAPE, significantly impede the Parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefit and, therefore, did not constitute a denial of FAPE.

Limiting the Student's placement options after he stopped attending school

36. The Parent argues that the District predetermined the Student's placement by limiting his placement options after he stopped attending school at Chain Lake to returning to the PBS classroom, being home schooled by the Parent, attending private school at the Parent's expense, or seeking a transfer to another school district. This was not predetermination of a new placement. As explained above, this refers to the District's notification to the Parent that she would need to take one of these other actions in order to comply with compulsory attendance laws if the Student was not attending school in his existing placement. Ms. Cole expressly stated that the Parent could request an IEP meeting if she wished to discuss a different placement, and that is what ultimately took place. The Parent is essentially complaining that Ms. Cole would not change the Student's placement *without* an IEP meeting. The Parent has not proven any IDEA violation.

2014 reevaluation

37. The Parent argues that the District denied her the opportunity to meaningfully participate by failing to give meaningful consideration to the Parent's claim that the Student is afraid of District properties and personnel, by insisting on his submission to evaluation by District personnel on District property, and by refusing to cooperate with the Parent with respect to the reevaluation.

38. Special education evaluations are to be conducted by a "group of qualified professionals *selected by the school district.*" WAC 392-172A-03020(2)(emphasis added). Thus, a school district generally has the right to choose its evaluators so long as they are trained and knowledgeable personnel as required by WAC 392-172A-03020(3)(a)(iv). When a parent imposes significant conditions to a consent for evaluation, the parent is determined to have refused consent. *See, e.g., G.J. Muscogee County Sch. Dist.*, 668 F.3d 1258 (11th Cir. 2012) (parents imposed a number of conditions, including that they would choose the evaluator, would have the right to discuss the assessment with the evaluator prior to it being provided to the

district, and that the evaluation be confidential and could not be used in litigation); *Lake Washington Sch. Dist.*, 113 LRP 29950 (SEA WA 2013) (parent's insistence on evaluation being conducted by a particular provider and that she participate in all communications between the district and the provider); *Federal Way Sch. Dist.*, 107 LRP 11238 (SEA WA 2007) (parent's insistence on being present for evaluation).

39. Although the Parent did not provide any medical support for the argument that it would not be appropriate to evaluate the Student on District properties or using District staff, the District agreed to conduct assessments at its administrative building, rather than at a school, and identified the District personnel who would conduct the assessments in advance. The Parent has not proven that the District's refusal to provide greater accommodations with respect to the reevaluation denied her the right to meaningfully participate.

Denying that the Parent ever claimed that the Student had been harmed by the interventions

40. The Parent's allegation that the District denied the Parent ever claimed the Student had been harmed by the aversive interventions is based on a letter from Mr. Thompson to Ms. Krikorian. In that letter, Mr. Thompson stated that he was not aware of the Parent having "serious concerns regarding [the Student's] safety with [a] placement proposed by the District" in October 2014. When Ms. Krikorian expressed alarm that Mr. Thompson was not aware of the Parent's concerns regarding aversive interventions in September 2013, Mr. Thompson responded that he was familiar with those concerns. The Parent has not proven that the District denied that the Parent ever claimed the Student had been harmed.

Communications with the Parent by email

41. The Parent argues that the District prevented her from meaningfully participating in the IEP process because Ms. Cole refused to talk with her by phone, rather than email, and by sending her email attachments when it knew she could not open them. The record is full of lengthy, detailed email discussions between Ms. Cole and the Parent. While it may not have been convenient for her to type these on her cell phone, it is evident that corresponding mainly by email did not prevent her meaningful participation. Moreover, once the District learned that the Parent could not open email attachments, it sent such documents by U.S. mail as well. In addition, the Parent had numerous conversations, in person and by phone with school staff, and participated at IEP meetings in person. The Parent has not proven a violation with respect to her participation rights related to communication methods.

Refusing to allow the Parent's attorney to attend an IEP meeting without District's counsel present

42. The Parent argues that the District prevented her from meaningfully participating in the IEP process when she brought her attorney to an IEP meeting by offering her a choice of conducting the meeting without her attorney or rescheduling the meeting for a time when the District's attorney would be available to participate as well.

43. The Parent has cited no authority for this proposition and the only authorities found by the ALJ support the District's right to reschedule the meeting to a time when its counsel could attend. See *Lexington County Sch. Dist. Five*, 25 IDELR 933 (SEA SC 1997); *Holyoke Public Schs.*, 26 IDELR 1247 (SEA MA 1997).

Limiting the means by which the Parent's attorney could communicate with the District and refusing to agree to an arrangement under which communication could be efficiently exchanged

44. The Parent argues that the District impeded the Parent's ability to meaningfully participate by requiring her attorney to communicate with the District's attorney rather than with District staff. The District made continued attempts to communicate with the Parent during this time period. The Parent has not explained how requiring the Parent's counsel to comport with the Rules of Professional Responsibility with respect to communicating with a represented party would violate the IDEA. See Washington RPC 4:2 (lawyer shall not communicate about the subject of litigation with a person the lawyer knows to be represented by another lawyer). Accordingly, the Parent had not proven a violation in this regard.

Communications between attorneys

45. The Parent argues that the District impeded her ability to meaningfully participate because the District's attorney instructed one of her attorneys to "shut up" at a resolution meeting. The Parent has not proven how one comment between counsel prevented her meaningful participation in the IEP process.

Failing to Maintain and/or Disclose a Complete Record

Aversive intervention reports

46. School districts must document the use of an aversive intervention, the circumstances under which it was used, and the length of time of use. WAC 392-172A-03135(2). Additionally, written reports must include the date and time of the incident, the name and job title of the individual who administered the restraint or isolation, a description of the activity that led to the restraint or isolation, the type of restraint or isolation used on the student, including the duration, and whether the student or staff was physically injured during the restraint or isolation and any medical care provided. RCW 28A.600.485(4). Written notification must be sent to the student's parent as soon as practical, but postmarked no later than five business days after the restraint or isolation occurred. RCW 28A.600.485(5).

47. Four of the aversive intervention reports from Chain Lake did not contain the name of the individuals who administered the restraint or isolation, creating a situation where even District staff do not seem to know who participated. None of the Chain Lake intervention reports contain the job title of the individuals. Accordingly, the Chain Lake intervention reports did not comply with the law with respect to identifying staff. This is a procedural violation of the IDEA. Additional detail about the activity that led to the restraint or isolation would be useful in understanding the reports, but because the law does not require any particular level of detail, no violation is found in this respect. The Salem Woods intervention reports all comply with the legal requirements.

48. The Parent alleges that the District altered or amended the reports. There is no prohibition to amending the reports, so no violation is found in that respect.

49. Two of the aversive intervention reports from Chain Lake were not provided to the Parent within five days. Additionally, the report from Chain Lake that was amended was not

timely provided to the Parent in its amended form. And no intervention report was prepared related to the hold in the library at Chain Lake. These are procedural violations of the IDEA. The Parent has not proven that the aversive intervention reports from Salem Woods were untimely.

50. The Parent argues that the District failed to ensure that aversive intervention records for the Student's second-grade year were properly maintained and secure. The Parent argues that the District should have maintained these records in a central location, rather than in a classroom. Neither the IDEA nor state law contains such a requirement, and the Parent has not proven a violation in this respect.

51. It is concluded that the procedural violations with respect to aversive intervention reports significantly impeded the Parent's ability to participate in the decision-making process because she did not have complete and timely information about the interventions. Accordingly, these violations constitute a denial of FAPE.

Records requested by the Parent

52. School districts must permit parents of students eligible for special education to inspect and review any educational records relating to the student that are collected, maintained, or used by the district. WAC 392-172A-05190; 34 CFR §300.613(a). The District shall comply with a response promptly and before any meeting regarding an IEP or hearing or resolution session and, in no case, more than forty-five calendar days after the request has been made. *Id.*

53. Other than the aversive intervention reports discussed above, and records from the 2012-2013 school year which apparently are no longer in the District's possession, the Parent has not identified specific records that she requested and did not timely receive. In her brief, the Parent argues that District employees brought records to the hearing, but there is no evidence in the record as to whether specific documents had not previously been provided to the Parent or whether they would constitute "education records" for purposes of the requirement that the Parent had the right to inspect and review them under the IDEA. The Parent has not proven any IDEA violation.

Failing to accurately report training credentials

54. The Parent argues that the District failed to accurately report the training credentials of staff who worked with the Student. There is no evidence that the District failed to accurately report this information to the Parent. Ms. Cole told the Parent that Ms. Hart was Right Response trained. She did not say she was certified, and she did state that she was referring to the entire time Ms. Hart worked with the Student as opposed to at the time she was reporting to the Parent. Ms. Cole did inaccurately report to OSPI, in responding to the citizen complaint, that Ms. Hart had been trained before she worked with students. The Parent does not explain, how such a representation would violate the IDEA.

Prior written notices

55. A school district must provide written notice to a parent a reasonable time before the district either proposes to initiate or change the identification, evaluation, or educational placement of the student, or the provision of FAPE to the student or refuses to initiate or change

the identification, evaluation, or educational placement or provision of FAPE to the student. WAC 392-172A-05010(1).

56. As the District was not proposing or refusing to take any action following the IEP meeting on September 16, 2013, no prior written notice was necessary.

57. The Parent has not proven any significant misrepresentation of facts in any of the prior written notices.

58. The Parent also argues that the District failed to “properly document IEP meetings and accurately record attendance.” There is no particular requirement to document IEP meetings and accurately record attendance separate from the obligation to provide prior written notice. Moreover, the Parent’s argument appears to refer to the IEP in which Ms. Cole accidentally auto-populated the IEP team member names from the year before. Ms. Cole explained that this was an error and apologized. This does not violate the IDEA.

59. The Parent has not proven any IDEA violation with respect to prior written notices.

Other record-related issues

60. The Parent also raises a number of issues related to the District’s failure to maintain and complete accurate records that do not constitute violations of the IDEA.

61. The Parent argues that the District did not prove an accurate and complete daily home journal between September 4 and 11, 2013. While the BIP requires that a “daily summary” about the Student’s day be provided, there is no requirement that it contain specific information. Accordingly, the Parent has not proven that a journal that does not contain as much information as the Parent wishes would be a material failure to implement the IEP that would violate the IDEA. See *Van Duyn*, 502 F.3d at 811 (only material failures to implement an IEP violate the IDEA).

62. The Parent argues that the District violated the IDEA by “altering” AIPs to delete requirements for Right Response training on September 16 and 19, 2013, and September 16, and 26, 2014. Because an IEP team may amend an IEP, the Parent has not explained how the IEP team’s amendment of AIPs could constitute a violation of the IDEA separate from the predetermination argument already addressed above.

63. The Parent argues that the District violated the IDEA by misrepresenting to OSPI and OAH the characteristics of the seclusion room and its compliance with governing regulations without explaining how representations made in the context of citizen complaints or due process hearings would violate the IDEA.

64. The Parent has not met her burden of proving a violation of the IDEA with respect to any of these allegations.

The District’s Treatment of the Student’s Absences as Unexcused

65. The IDEA does not address the treatment of absences as excused or unexcused and the Parent does not explain how treating the Student’s absences as unexcused would violate

the IDEA. Accordingly, where the Parent has not alleged in her Complaint that that the IEP in effect at the time of the absences was inappropriate, she has not proven a violation of the IDEA in this regard.

Refusing to Provide the Student with Homework Materials

66. The Parent argues that the District violated the IDEA by refusing to provide the Student with homework materials during the time period she removed him from Chain Lake until he returned to school at Salem Woods. The Parent has provided no authority for the proposition that the IDEA requires a District to provide homework for a Student who is not attending school. The Parent has not proven a violation in this regard.

District Position on Parent's Only Recourse is Home School, Private School, or Intra-District Transfer

67. The Parent argues that the District violated the IDEA by "taking the position that the Parent's only recourse in a dispute over educational services is home school, private school, or intra-district transfer." As explained above, the District did not tell the Parent these options were her only recourse. It told her that she would need to do one of these things in order to meet the compulsory attendance requirements if the Student did not return to school. Significantly, the District also informed the Parent that if she wished a different placement for the Student, she could request an IEP meeting. Once the Parent made this request, the District participated in mediation with the Parent, assisted her in viewing a classroom in another District school, and arranged for and participated in a facilitated IEP meeting, which led to an agreement for another placement in the District. The Parent provided no authority demonstrating that the IDEA obligated the District to take some other action during this time period. Accordingly, she has not met her burden to prove a violation of the IDEA.

Settlement Offer

68. The Parent argues that the District violated the IDEA by requiring the Parent to waive civil claims in order to resolve the due process issues, effectively removing the requirement that FAPE be free. However, the Parent has provided no authority for the proposition that a settlement proposal could violate the IDEA. There is no IDEA requirement that a school district make a settlement offer in the course of a due process hearing, let alone that it make an offer that would itself provide the Student FAPE. For this reason, the Parent was not allowed to present evidence of the settlement proposal at issue as she could not demonstrate that it was offered for "another purpose" such that it would not be prohibited under Evidence Rule 408. The Parent has not proven a violation of the IDEA in this regard.

Other arguments

69. The Parent also argued in her brief that the District failed to comply with the Student's health plan. As this issue was not included in the Parent's Amended Due Process Hearing Request, it is not considered.

REMEDIES

Private placement

70. Parents who unilaterally enroll a student in a private school are entitled to reimbursement only if 1) the district placement violated the IDEA, and 2) the parent's private school placement is proper under the IDEA. *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). Thus, parents who unilaterally change their child's placement do so at their own financial risk. *Burlington v. Dep't of Ed. of Mass.*, 471 U.S. 359, 374 (1985). The Supreme Court explained that reimbursement for a private placement is allowed because Congress could not have intended to require parents to either accept an inadequate public-school education pending adjudication of their claim or bear the cost of a private education. *Id.* at 370.

71. Here, the District denied the Student a FAPE when he attended Chain Lake. The Parent did not prove a denial of FAPE with respect to the time period the Student attended Salem Woods or later. Because the Parent has not proven that the District placement available to the Student when he most recently left the District or when he began attending Dolan violated the IDEA, neither reimbursement for a private placement nor a prospective private placement is appropriate. For this reason, it is not necessary to determine whether Dolan is an appropriate placement for the Student.

Compensatory education

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

73. All of the violations found in this case relate to the failure to implement the Student's IEP with respect to behavioral interventions and proper training for aversive interventions as well as the failure to properly document aversive interventions at Chain Lake. Because each of these violations relate to the Student's behavior, it is determined that the appropriate compensatory education is instruction in social/emotional skills. The District shall provide the Student one hour of one-on-one instruction in social/emotional skills for each of the six days the Student attended Chain Lake.

74. The compensatory services ordered above shall be provided by fully certificated District staff with the education, training, and experience to provide such instruction. Unless the Parent agrees otherwise, the instruction shall be provided by staff who have not previously worked with the Student. The compensatory education may be delivered at any time in the four months following the entry of this decision, at the duration and frequency determined appropriate by the Parent and the District. Once such a schedule is set, the Student shall, except in an emergency, give notice 24 hours in advance of a scheduled session. Without such notice and in the absence of an emergency, that session will count towards the compensatory education

award. The instruction shall take place at the District office where the hearing was held unless the Parent and the District agree otherwise.

Other remedies

75. The Parent's requested remedies are otherwise denied.

ORDER

1. The District violated the IDEA and denied the Student a FAPE by failing to implement the Student's May 2013 IEP by not providing Right Response training to his special education teacher before she implemented aversive interventions and by not employing de-escalation steps identified in his BIP before employing aversive interventions.
2. The District violated the IDEA and denied the Student a FAPE by failing to properly document aversive interventions and timely provide required documentation to the Parent.
3. The District did not otherwise deny the Student a FAPE.
4. The District shall provide the Student with compensatory education services in the form of six hours of one-on-one instruction in social/emotional skills to be delivered as set forth above.

Signed at Seattle, Washington on June 4, 2015.



Anne Senter
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

CERTIFICATE OF SERVICE

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



Parent

[REDACTED]
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Michelle C. Mentzer, Acting Senior ALJ, OAH/OSPI Caseload Coordinator