STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
*One Union Square • 600 University Street • Suite 1500 • Seattle, Washington 98101*
*(206) 389-3400 • (800) 845-8830 • FAX (206) 587-5135 • www.oah.wa.gov*



January 8, 2019

Parents
[redacted]

Karen Remy-Anderson
Executive Director for Student Support Services
North Thurston School District
305 College St NE
Lacey, WA 98516-5390

Randal Brown, Attorney at Law
25913 - 163rd Ave SE
Covington, WA 98042

Philip A. Thompson, Attorney at Law
Perkins Coie
10885 NE Fourth St, Suite 700
Bellevue, WA 98004-5579

**In re: North Thurston School District**
**OSPI Cause No. 2018-SE-0124X**
**OAH Docket No. 11-2018-OSPI-00636**

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 E. Senter

Anne Senter
Administrative Law Judge

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

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

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| IN THE MATTER OF: | OSPI CAUSE NO. 2018-SE-0124X |
| | OAH DOCKET NO. 11-2018-OSPI-00636 |
| NORTH THURSTON SCHOOL DISTRICT | **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** |

A due process hearing was held before Administrative Law Judge (ALJ) Anne Senter on December 7, 10, and 11, 2018, in Lacey, Washington. The Mother of the Student whose education is at issue[1] appeared and the Parents were represented by Randal Brown, attorney at law. The North Thurston School District (District) was represented by Philip A. Thompson, attorney at law. Also present for the District was Donnita Hawkins, director of secondary special education.

## STATEMENT OF THE CASE

The Parents filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on November 6, 2018. The Complaint was assigned Cause No. 2018-SE-0124X and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered November 7, 2018, which assigned the matter to ALJ Anne Senter. The District filed its Response to the Complaint on November 19, 2018. A prehearing conference was held on November 15, 2018, and a prehearing order was entered November 19, 2018.

### Due Date for Written Decision

The parties have the right to obtain a written decision in this matter within ten school days after the due process hearing. WAC 392-172A-05160(3)(a); 34 CFR 300.532(c)(2). The due date for a written decision in this matter is **January 8, 2019.**

### Evidence Relied Upon

Exhibits Admitted:

District's Exhibits: D1 - D14; and

Parents' Exhibits: P2 - P5 and P9 - P11 .

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



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Witnesses Heard (in order of appearance):

The Mother;
Tammi Rideout, probation counselor, Thurston County Juvenile Probation;
Mike Smith, District assistant principal;
Kaitlyn Bauer, District school psychologist;
Darin Edwards, District special education teacher;
Ken Westphal, school resource officer, City of Lacey Police;
David Warning, District director of student achievement; and
Donnita Hawkins, District director of secondary special education.

**Post-Hearing Briefs**

The parties timely submitted post-hearing briefs, as agreed, by December 17, 2018.

## ISSUES

As set forth in the Prehearing Order entered November 19, 2018, the issues for the due process hearing are:

a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:

   i. Failing to return the Student to the emotional/behavioral disability (EBD) class at River Ridge High School after the manifestation determination was made; and

   ii. Failing to conduct an evaluation, including a functional behavioral assessment (FBA), and/or revise the Student's individualized education program (IEP), including any behavioral intervention plan (BIP);

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

   i. Return to the EBD classroom at River Ridge High School or to an alternate appropriate placement with appropriate services;

   ii. Compensatory education;

   iii. And/or other equitable remedies, as appropriate.



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## FINDINGS OF FACT

Background

1. The Student is 16 years old and in the tenth grade. Exhibits D9, p. 3; D11, p. 3. He has attended school in the District since 2010. (Mother testimony)[2]

2. The Student qualifies for special education and related services under the emotional behavioral disability (EBD) category. Exhibit D11, p. 4. His individualized education program (IEP) provides that he receive specially designed instruction in reading, written language, social skills, and math in a special education setting for a total of 1800 minutes per week. Exhibit D7, p. 20. The Student also has a behavioral intervention plan (BIP).[3] Exhibit 10, p. 3; Mother testimony.

3. The Student started the 2018-2019 school year at River Ridge High School (River Ridge). Exhibit D7, p. 3. He received his special education services in an EBD classroom. (Mother testimony)

4. The Student was placed on an emergency expulsion effective October 16, 2018, through October 30, 2018, for making a threat at school to shoot another student. Exhibit D3, p. 1; Smith testimony.

5. The Student was arrested on October 17, 2018, and held at a juvenile detention facility. (Rideout testimony; Smith testimony; Westphal testimony) He was released on October 19, 2018. Exhibit D4. The Thurston County Juvenile Court release order included, as a condition of release, "no association or contact with" the student he had threatened and River Ridge "unless enrolled in school and approved by [his probation officer]." *Id.* at 2. The release order form included a box for "incidental school contact okay" but it was not checked. *Id.*

6. The Student's probation officer is Tammi Rideout. (Rideout testimony) Ms. Rideout initially approved of the Student attending River Ridge. *Id.* However, after she checked with the prosecutor, she learned that the Student could not attend River Ridge because the court order did not allow for incidental contact between the Student and the student he threatened. *Id.* Contact between the Student and the student he threatened could not be eliminated at River Ridge because they were in the same EBD program and both had access to the EBD teacher during the day if they needed to leave their general education classes to deescalate. (Rideout testimony; Smith testimony; Edwards testimony) Accordingly, after talking to the prosecutor, Ms. Rideout no longer approved the Student's attendance at River Ridge while the court order was in place and informed the District. (Rideout testimony; Smith testimony)

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[2] Although the hearing was transcribed, no transcript was created. Accordingly, citations to witness testimony are only to the name of the witness.

[3] An IEP meeting was held on September 21, 2018, to address the Student's BIP. Exhibit 10, pp. 1, 3. The Mother alleged that the BIP discussed that day was only a draft and was never finalized. (Mother testimony) Because the development of the BIP is not at issue, no determination is made about whether Exhibit 10 is a draft or final BIP or which BIP was in effect following this meeting.



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7. On October 24, 2018, the District sent the Parents notice that the Student's emergency expulsion was converted to a long-term suspension of 69 school days until February 13, 2019. Exhibit D3, p. 2; Smith testimony. The Mother did not receive this document. (Mother testimony)

8. A manifestation determination meeting was held on October 29, 2018. Exhibit D5. The Mother attended the meeting, which lasted approximately two hours. (Mother testimony) As a result of the meeting, it was determined both that the Student's conduct had a direct and substantial relationship to his disability and that the conduct was a direct result of the District's failure to implement the IEP. Exhibit D5, p. 5. Accordingly, the conduct for which the Student was disciplined was determined to be a manifestation of his disability. *Id.*

9. Because the Student's conduct was determined to be a manifestation of his disability, the team concluded he could return to an educational placement in the District the following next day, October 30, 2018. Exhibit D5, p. 6; Exhibit D6; Bauer testimony. Because of the court order, the Student could not return to River Ridge unless the order was changed. Exhibit D6, p. 1. The Mother indicated she was going to try to get the order changed so that he could attend River Ridge. Exhibit D6, p. 1; Mother testimony. It was discussed that, in the meantime, the Student's attendance options were Timberline High School (Timberline) or North Thurston High School (North Thurston), both of which are comprehensive high school like River Ridge. Exhibit D6, p. 1; Smith testimony; Bauer testimony; Warning testimony. Alternately the Student could attend Gravity/Fuel Ed (Gravity). Exhibit D6, p. 1; Smith testimony; Bauer testimony. This is a program operated by the local educational service district at which students can work towards their general education development (GED) certification or earn high school credits at their own pace. (Smith testimony; Warning testimony)

10. The manifestation team meeting did not include a discussion about revising the Student's IEP, FBA, or BIP. It was expected that the Student's IEP team at his new school would convene to consider these issues. (Bauer testimony; Smith testimony)

11. A document entitled disciplinary manifestation determination stated that the Student could return to an educational placement as of October 30, 2018. Exhibit D5, p. 6. The minutes of the manifestation meeting state that the Student's options, given the court order, were Timberline, North Thurston, or Gravity. Exhibit D6, p. 1. These documents were mailed, with a prior written notice, to the Mother, but she did not receive them. (Bauer testimony; Mother testimony)

12. The Mother testified that she learned at the manifestation determination meeting that the Student could return to a District school and that he could not return to River Ridge but that there was no discussion about what school he could attend or when he could start. (Mother testimony) She initially testified that she only learned that Gravity was an option when she later spoke with Mr. Warning, District director of student achievement, and that she did not know that Timberline or North Thurston were options until the resolution meeting. *Id.* However, she alternately testified that she did learn that Gravity was an option at the meeting. *Id.* Because the other witnesses who attended the meeting all testified that it was discussed that the Student could attend North Thurston or Timberline beginning the day after the meeting, which was consistent with the written documentation of the meeting, and because the Mother's testimony was inconsistent, it is found that it is more likely than not that discussion took place at the manifestation meeting about the Student's ability to attend Timberline or North Thurston beginning the next day.



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13. After the manifestation determination meeting, the Mother attempted to have the court order changed to allow the Student to attend River Ridge but was not successful. (Mother testimony) She also had phone conversations with Mr. Warning about the Student attending Gravity, which would have provided an opportunity to catch up on his missing credits from prior absences. *Id.* Because Gravity was a self-paced program, the Mother did not believe it was a good fit for him. *Id.*

14. At the resolution meeting on November 9, 2018, the Parent had not yet enrolled the Student in a school. (Hawkins testimony). The Parent indicated she preferred the Student to attend North Thurston rather than Timberline, and Dr. Hawkins said she would make arrangements with North Thurston. (Mother testimony; Hawkins testimony) Ms. Hawkins contacted the assistant principal and EBD teacher at North Thurston to let them know the Student would be coming. (Hawkins testimony) The Student did not want to attend North Thurston so he did not enroll there. (Mother testimony)

15. The Mother eventually took the Student to Timberline to enroll on November 19, 2018, but he was not enrolled until November 29, 2018, partly because Timberline staff did not expect them because Ms. Hawkins had made arrangements with North Thurston. (Mother testimony; Hawkins testimony)

16. At the time of the hearing, the Student had been attending Timberline for about a week. (Mother testimony) Timberline is implementing the Student's River Ridge IEP in an EBD program there and he is receiving the same amount of special education. (Hawkins testimony)

17. There were ten school days between October 16, 2018, when the Student's emergency suspension was effective and October 29, 2018, when it was determined he could attend school beginning the next day. Exhibit D1.

## 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 (2005). As the Parents are seeking relief in this case, they have 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



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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 206-07 (footnotes omitted).

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" [FAPE] as defined by the Act.

*Id.* at 188-89. A district is not required to provide a "potential-maximizing" education" in order to provide FAPE, but only a "basic floor of opportunity" that provides "some educational benefit" to the Student. *Id.* at 200-01.

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

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

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

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

*M.C. v. Antelope Valley Union High Sch. Dist.*, 852 F.3d 840 (9th Cir. 2017)(citation omitted).



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FAX (206) 587-5135

Manifestation Determination

6. The IDEA sets forth specific procedural requirements for the discipline of a student eligible for special education. When a school district seeks to expel a student or suspend him from school for more than ten days for violation of a code of student conduct, a review must be conducted within ten days of the decision to determine whether the misconduct is a manifestation of the student's disability. WAC 392-172A-05146(1). This manifestation review is to be made by "the school district, the parent, and relevant members of the student's IEP team." *Id.*

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

> If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or
>
> If the conduct in question was the direct result of the school district's failure to implement the IEP.

*Id.*

8. If it is determined that the student's misconduct *was* a manifestation of his disability, the IEP team must either conduct an FBA, if one has not been previously conducted, and implement a BIP for the student or, if a BIP has already been developed, review the BIP and modify it as necessary to address the behavior. WAC 392-172A-05147(1) and (2). The student must also be returned to the placement from which he was removed unless the parent and the school district agree to a change of placement or unless certain special circumstances not relevant here exist. WAC 392-172A-05147(3).

*Placement*

9. Because it was determined that the Student's misconduct was a manifestation of his disability, the District was obligated to return him "to the placement from which he was removed." WAC 392-172A-05147(3). The Ninth Circuit has stated that a change in educational placement "relates to whether the student is moved from one *type of program* – i.e, regular class – to another type – i.e, home instruction." *N.D. v. Hawaii Dept. of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010). (italics added). Likewise, the Department of Education has stated that its "longstanding position" is that "placement refers to the provision of special education and related services rather than a specific place, such as a specific classroom or specific school." 71 Fed. Reg. 46540, 46687 (August 14, 2006).

10. The District argues that allowing the Student to attend school at Timberline constitutes returning him to his placement because he is receiving the same special education services under the same IEP. The Parents do not argue that Timberline constitutes a change in placement. Instead, they argue that the conversion of the Student's emergency expulsion to a long-term suspension was a change of placement because it was longer than ten days. The Parents are correct that a disciplinary removal of more than ten days is a change of placement. *See* WAC 392-172A-05155(1)(a). Indeed, it was that disciplinary removal that triggered the obligation for the manifestation determination review. *See* WAC 392-172A-05146(1). That review resulted in the determination that the Student's conduct that was a manifestation of his disability and the



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determination that he could return to a District school the next day because of the obligation that he be returned to his placement. The Student can receive the same program at Timberline that he received at River Ridge and that program was made available to him the day after the manifestation determination meeting even though the Student did not avail himself of that opportunity. Accordingly, the Parents have not met their burden of proving the District did not return the Student to the placement from which he was removed following the manifestation determination.

*Amending the BIP*

11. Because it was determined that the Student's misconduct was a manifestation of his disability, the Student's IEP team was obligated to either conduct an FBA, if one had not been previously conducted, and implement a BIP or, if a BIP had already been developed, review the BIP and modify it as necessary to address the behavior. *See* WAC 392-172A-05147(1) and (2). Notably, it is the Student's *IEP team* that is obligated to conduct this review, not the manifestation team. Thus, it was not a violation of the IDEA that no such review took place at the manifestation meeting itself. Because the Student would be attending a new school, he would have a new IEP team, which would be responsible for this task. Because the Parents had not identified which school the Student would attend before filing the Complaint in this case, there was no violation of the IDEA that an IEP team had not met for this purpose before the filing. Any alleged failings in this regard after the filing of the Complaint are not at issue in this proceeding.

*Other arguments*

12. The Parents also argue that the manifestation team was not properly constituted because no teacher participated; the District denied the Parents their IDEA right to participate in meetings by not including them in the student threat assessment review meetings; and the District failed to ensure the Student's special education and disciplinary records were transmitted to the school resource officer when the Student's conduct was reported to him. Because these issues were not included in the Parents' Complaint or in the statement of the issues for hearing, they are not considered.[4] *See* WAC 392-172A-05100(3).

## ORDER

The Parents have not met their burden of proving that the District violated the IDEA or denied the Student a FAPE. Accordingly, the Parents' requested remedies are denied.

Signed at Seattle, Washington on January 8, 2019.

Anne E. Senter

Anne Senter
Administrative Law Judge
Office of Administrative Hearings

[4] Although testimony was allowed on some of these issues for background and context, the District made clear that it was not consenting to the trial of any issues outside the statement of the issues.



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## Right To Bring A Civil Action Under The IDEA

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

## CERTIFICATE OF SERVICE

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

Parents
[redacted]

Karen Remy-Anderson
Executive Director for Student Support Services
North Thurston School District
305 College St NE
Lacey, WA 98516-5390

Randal Brown, Attorney at Law
25913 - 163rd Ave SE
Covington, WA 98042

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10885 NE Fourth St, Suite 700
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