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October 28, 2017

Parents:



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Blaine School District
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Seattle, WA 98101

In re: **Blaine School District**
OSPI Cause No. 2017-SE-0049
OAH Docket No. 05-2017-OSPI-00297

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,

Matthew D. Wacker
Administrative Law Judge

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

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OCT 28 2017

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

OAH - SEATTLE

IN THE MATTER OF:

BLAINE SCHOOL DISTRICT

OSPI CAUSE NO. 2017-SE-0049

OAH DOCKET NO. 05-2017-OSPI-00297

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Blaine, Washington, on September 18 and 19, 2017. The Parents of the Student whose education is at issue¹ appeared and represented themselves (*pro se*). The Blaine School District (the District) was represented by Carlos Chavez, attorney at law. Also present for the District was Randy Elsbree, director of federal and special programs. The following is hereby entered:

STATEMENT OF THE CASE

The Parents filed a due process hearing request (the Complaint) on May 22, 2017. A Scheduling Notice was entered May 23, 2017. The Scheduling Notice set a prehearing conference for June 23, 2017, and a due process hearing for July 10, 2017. The District subsequently requested that the prehearing conference be continued. The Parents did not object and the continuance was granted. On June 9, 2017, an Order Continuing Prehearing Conference was entered, which set a prehearing conference for June 28, 2017. The prehearing conference was held on June 28, 2017, as scheduled. On August 3, 2017, a First Prehearing Order was entered that set a readiness prehearing conference for August 4, 2017, and continued the due process hearing to September 18-20, 2017. The readiness prehearing conference was held as scheduled on August 4, 2017. On August 7, 2017, a Notice of Prehearing Conference was entered, which set another prehearing conference for August 28, 2017, by agreement of the parties. The prehearing conference was held as scheduled on August 28, 2017. On August 30, 2017, a Second Prehearing Order was entered.

Due Date for Written Decision

The due date for a written decision in the above matter was continued to thirty (30) calendar days after the close of the hearing record, pursuant to a motion by the District. See First Prehearing Order of August 3, 2017. The Parents elected to present an oral closing argument on September 19, 2017, the last day of the due process hearing. The District requested and was granted until September 29, 2017, to file its written post-hearing brief. Accordingly, the record in the above matter closed on September 29, 2017. Thirty (30) calendar

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

days from September 29, 2017 is October 29, 2017. Therefore, the due date for a written decision in the above matter is **October 29, 2017**.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parents Exhibits: P1 through P4; P5, pgs. 1-3 and pgs. 5-7; P6; P7; and P9 through P11.
District Exhibits: D1 through D7; D10 through D12; D14; and D15.

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

The Student;
The Father of the Student;
Leslie Dykstra, District special education teacher;
Annie Foster, District general education teacher;
The Mother of the Student; and
Randy Elsbree, District director of federal and special programs.

ISSUES

The issues for the due process hearing are:

- a. Whether the District violated the IDEA and denied the Student FAPE during the 2016-2017 school year² by:
 - i. Failing to implement the Student's October 2016 individualized education program (IEP), including;
 - a. Failing to provide the Student with his 1:1 aide when an incident occurred at school on February 24, 2017;
 - b. Failing to inform the Student's general education teacher (Ms. Foster) about interventions for the Student in his IEP;
 - ii. Failing to implement the Student's October 2016 behavioral intervention plan (BIP);
 - iii. Using curriculum in the Student's general education classroom that was not appropriate for the Student, causing the Student to become frustrated and act out in class;
 - iv. Removing the Student from his general education language arts class in 2017;

² The only issue which falls outside the 2016-2017 school year is the issue of whether the District failed to consider the results of the UWMC reevaluation of the Student.

- v. Failing to have a general education teacher attend the Student's IEP meetings;
 - vi. Failing to consider the results of a psychological reevaluation of the Student that took place at the University of Washington Medical Center (UWMC) in April 2010;
- b. And, whether the Parents are entitled to their requested remedies:
- i. The Student will continue to be home-schooled by the Mother, and the District shall pay for at-home tutoring support for the Student;
 - ii. If the Student wants to attend school in another school district, the District will support the Student's attendance in another school district.

See August 3, 2017 First Prehearing Order.

FINDINGS OF FACT

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

General Background

1. During all periods of time material to resolution of the issues, the Student has resided in the District with his Parents and siblings.
2. The Student entered the District's Developmental Preschool program when he was three years old for support in the areas of adaptive, pre-academic and speech/language. He was determined eligible for special education and related services under the developmental delay eligibility category. Exhibit D2p1.
3. The Student attended a District general education kindergarten class on a half-day schedule with a 1:1 paraprofessional to support him. Exhibit D2p1. However, the Student exhibited significant behavioral, emotional, and social challenges that resulted in his being almost constantly reprimanded. As a result, the Student's IEP team determined that Whatcom Discovery School (WDS) would be the least restrictive environment that would meet his academic and behavioral needs. Exhibit D1p2.
4. For first through fifth grades, the Student was placed at WDS, a self-contained school on a segregated campus that exclusively served children with significant social, emotional and behavioral difficulties. Exhibits D1p2, D2p1. The Student eventually returned from WDS and attended middle school in the District for sixth, seventh, and the majority of eighth grade until his

last day attending school in the District on February 24, 2017. Testimony of Elsbree (Elsbree) at T239, T242.³

University of Washington Medical Center, Center on Human Development and Disability – Child Development Clinic Evaluation - April 2010

5. During first grade, the Parents had the Student evaluated at the University of Washington Medical Center, Center on Human Development and Disability – Child Development Clinic (CDC) in April 2010.⁴ Exhibit D1. The evaluation noted the Student's teacher at WDS reported concerns about the Student's aggressive and argumentative behavior. The Student was aggressive both verbally and physically at WDS. Exhibit D1pp1-2. The evaluation assessed the Student with a Full Scale IQ (FSIQ) of 62, which is in the Extremely Low range. This meant that that only 1% of children the Student's age functioned at or below the Student's level of cognitive functioning. Exhibit D1p4.

6. Overall, the results of the CDC evaluation concluded that the Student had a:

Developmental Neurological Disorder characterized by Mild Intellectual Disability (formerly known as Mild Mental Retardation...), anxiety problems with severe emotional and behavioral dysregulation, ADHD by history..., [and] Mixed Receptive-Expressive Language Disorder...

Exhibit D1p7.

7. The CDC evaluation went on to offer recommendations regarding the Student's behavior and emotional health, as well as his education. *Id.*

8. The Mother gave a copy of the CDC evaluation report to WDS, but is unaware if anyone at the District read or acted on the report. Testimony of Mother (Mother) at T201.

9. The Father does not believe the District considered the CDC evaluation because if the District had taken the time to consider the evaluation "they would know how to handle my son in all areas of his behaviors and his learning disabilities. Student is going to need more time. He's going to need a one-on-one tutor." Testimony of Father (Father) at T82.

The District's Reevaluation of the Student – May 2014

10. The District conducted a reevaluation of the Student in May 2014. Exhibit D2. Under the section entitled "Review of Existing Data," the reevaluation states:

Re-evaluation while at Whatcom Discovery (6/11) indicated eligibility for service as a student with a Health Impairment based on a 'developmental neurological disorder of

³ References to the transcript of the due process hearing are by the name of the particular witness (Elsbree) and page number where the testimony appears in the transcript (T239).

⁴ This was at least the second time the Student had been evaluated at CDC, after an earlier evaluation in July 2007. D1p1, p3.

unknown origin' (**UW Medical Center**) which was thought to impact his academics and executive functioning...

Exhibit D2p1; (Emphasis added).

11. The reevaluation went on to reference the 2010 CDC evaluation of the Student at least four more times:

Dr. Courtney supported the diagnoses of ADHD, Oppositional Defiant Disorder and Adjustment Disorder. As well, she referenced earlier disorder as per **UW Medical Center** (Language Disorder, Intellectual Disability, Rule out-Social (sic) Communication Disorder). Exhibit D2p2; (Emphasis added).

[The Student] continues to qualify for special education as a student with a Health Impairment based on past medical opinion as to a 'neurological disorder of unknown origin' (**UW Medical Center**)... Exhibit D2p2; (Emphasis added).

[The Student] has reduced skill (**as per the UW finding**) to manage executive problem solving. Exhibit D2p2; (Emphasis added).

An evaluation completed by the **University of Washington Center on Human Development and Disability** expressed a delay in the following specific areas... Exhibit D2p11; (Emphasis added).

12. The Student was administered the Wechsler Intelligence Scale for Children (4th Edition) to assess his cognitive functioning as part of his reevaluation. Exhibit D2p8. The results indicated that the Student's overall cognitive functioning was in the Low Average range, with only 23% of children the Student's age functioning at or below the Student's level of cognitive functioning. The Student's greatest weakness was in short-term verbal memory. This is memory for details or holding information details while working through a multiple-step problem. The Student's short-term verbal memory was assessed at the Very Low range, with only 2% of children the Student's age functioning at or below the Student's level of short-term verbal memory. Exhibit D2p8.

13. On May 19, 2014, the Mother attended a meeting with members of the District's reevaluation team to review the reevaluation report. The Mother signed the reevaluation report. Exhibit D2p5.

Eighth Grade: 2016-2017 School Year

14. The Student began eighth grade in a District middle school during September 2016. The Student had an IEP from the prior school year in place at the start of eighth grade, but no copy of that prior IEP was offered for the record by either party at the due process hearing. While there is no copy of the prior IEP in the record, a review of the Student's IEP developed later during eighth grade (Exhibit D3) provides some information about the prior IEP. The testimony of witnesses at the due process hearing also provides some additional information about the Student's placement at the start of eighth grade.

15. The IEP in place at the start of eighth grade provided the Student with 1:1 support from an adult while he was at school. The 1:1 adult support was provided to the Student to help him with his emotional and behavioral volatility. Exhibit D3p4. The Student had either a

paraeducator or his special education teacher with him as his 1:1 adult at all times during eighth grade. Testimony of Dykstra (Dykstra) at T117.

16. Leslie Dykstra was the Student's special education teacher and case manager during eighth grade. Dykstra at T116, T128-129, T131. The Student spent part of his school day in Ms. Dykstra's life-skills classroom, but he also attended a general education language arts/social studies class taught by Annie Foster, a general education science class taught by Dan Steelquist, and for a short time at the beginning of the school year the Student also attended a general education math class. The Student also attended general education band and physical education (PE) classes. Exhibit D3p5; Dykstra at T117.

17. As well as her roles as the Student's special education teacher and case manager, Ms. Dykstra would routinely assume the role of the Student's 1:1 adult. Dykstra at T117. Ms. Dykstra set aside from 9:00 a.m. to 10:00 a.m. each day to be the adult in close proximity to the Student. *Id.* at T131. Ms. Dykstra maintained this daily schedule for the entire school year, through the last day the Student attended eighth grade. *Id.* at T136.

18. As the Student's case manager, Ms. Dykstra spoke with the Student's language arts/social studies teacher, Ms. Foster, regarding the contents of the Student's IEP, meeting with Ms. Foster on a daily basis. *Id.* at T122.

19. On September 8, 2016, the Student was reported by a District staff person for using the N-word⁵ in the school cafeteria. Exhibit D10p3. This was the first of eventually three incidents that occurred during the Student's eighth-grade year, all three involving the Student using the N-word at school. *Id.*; D5p1; See Dykstra generally at T101-107; See Foster generally at T146-T170.

October 5, 2016 IEP Meeting to Review the Student's New IEP

20. On October 5, 2016, a meeting was held to review the Student's new annual IEP. Exhibit D3p1. This was the only IEP meeting held while the Student was attending eighth grade during the 2016-2017 school year. Mother at T235.

21. Both of the Parents attended the meeting. Also present for the meeting was Ms. Dykstra, a District speech-language pathologist, a District administrator/designee, and a District assistant principal at the middle school. *Id.* at p3. The Parents each signed the IEP, indicating that they had participated in the development of the IEP. *Id.*

22. It is undisputed that Annie Foster, the Student's general education language arts/social studies teacher did not attend the meeting.⁶ Testimony of Foster (Foster) at T141. Mother at T211; See District's Post-Hearing Brief at p.16.

⁵ The actual racial epithet will not be used in this Order. Rather, it will be referred to as the N-word. When quoting the Student, the quotation will include the use of brackets [N-word] to indicate it replaces the actual word used by the Student.

⁶ Despite her not attending the meeting, Ms. Foster's signature appears on the IEP. Exhibit D3p3. Ms. Foster thinks she was asked to sign the IEP by Ms. Dykstra. Foster at T177. Ms. Dykstra cannot recall if she provided the IEP to Ms. Foster for her signature after the meeting. Dykstra at T119. However, the

23. Ms. Dykstra was questioned by the District's counsel at the due process hearing. After Ms. Dykstra made reference to the Student's general education science class, the following exchange took place between her and the District's counsel:

Counsel: You referenced a science teacher. That was a general education science class?

Dykstra: Yes.

Counsel: Do you know—and that's Mr. Steelquist?

Dykstra: Correct.

Counsel: Do you know whether he had participated at all in the student's October 2016 IEP?

Dykstra: I truly believe that he did, but I do not know with 100 percent certainly.

See Transcript at T124. This is the evidence relied upon by the District to prove Mr. Steelquist attended the IEP meeting in the role of a general education teacher of the Student. In opposition to this evidence, the Father testified that no general education teacher ever attended any IEP meeting. Father at T69. Close examination of the signature page on the IEP does not reflect any clearly identifiable signature by any individual named Steelquist.⁷ Exhibit D3p3. Given District counsel's question for Ms. Dykstra was ambiguous (counsel did not ask if Mr. Steelquist had participated in the Student's October 2016 IEP *meeting*), the context in which it occurred during Ms. Dykstra's testimony, Ms. Dykstra's less than certain response, the Father's clear and unambiguous testimony that no general education teacher attended an IEP meeting, and the illegible signature on the IEP, it is found as fact that the District, as the party asserting the attendance of Mr. Steelquist at the IEP meeting, has not met its burden of proof. It is found as fact that Mr. Steelquist did not attend the October 5, 2016 IEP meeting, and it is found as fact that no general education teacher of the Student attended that meeting.

24. The Student's October 2016 IEP included a program modification related to the Student's behavior: "adult proximity" "all throughout the school day to aid in social interactions." Exhibit D3p10. The IEP included the following support for the Student: "Adult proximity and para educator support for all parts of the day to aid in social interactions and implementation of the behavior intervention plan." *Id.* at p11.

25. There was no discussion at the IEP meeting about any specific curricula that was not to be used as part of the Student's instruction during eighth grade. Dykstra at T126. There is nothing in the Student's IEP regarding the use, or prohibition of use, of any particular curricula for the Student's instruction. Exhibit D3.

26. Although the exact date is not clear, after the IEP meeting Ms. Dykstra provided a copy of the Student's IEP to Ms. Foster. Dykstra at T131. Ms. Dykstra continued her prior practice of meeting with Ms. Foster "on a daily basis" to discuss the Student's educational program. *Id.* at

issue raised by the Parents is whether the District violated the IDEA and denied the Student FAPE by failing to have a general education teacher present at the IEP meeting. That issue can be resolved without having to determine the facts that ultimately led to Ms. Foster's signature appearing on the IEP. See Conclusions of Law.

⁷ There is one signature on the IEP that is illegible and has no printed name associated with it. Neither party at the due process hearing elicited any testimony regarding whose signature it may be.

T122. Ms. Dykstra discussed the modifications in the Student's IEP with Ms. Foster. Foster at T181. Ms. Foster received a copy of the Student's IEP. *Id.* at T180.

The Student's October 2016 Behavioral Intervention Plan

27. On the same day as the Student's IEP team met to review his new annual IEP, the same group of individuals also met to review a behavioral intervention plan (BIP) for the Student.⁸ Exhibit D4p1.

28. The BIP included a summary of the data collected to develop the BIP, identification of the Student's behaviors targeted for intervention, hypotheses regarding the factors, settings, and triggers associated with the targeted behaviors, and the identification of more socially appropriate replacement behaviors the Student would be taught to substitute for the undesirable behaviors he was exhibiting. Exhibit D4.

29. The two behaviors targeted for intervention were: the Student will decrease name calling and verbal threats of violence, and the Student will decrease noises in a group learning environment. Exhibit D4pp2-3.

30. The BIP included the following interventions: classroom seating near the front corner of the classroom; no more than one adult at a time sitting at the Student's classroom table; a quiet space provided for the Student when needed; pre-teaching appropriate behaviors in an academic setting; staff modeling appropriate language in the classroom; praise when the Student demonstrated appropriate replacement behavior(s); locating the Student's desk in the front corner of all classrooms; use of "signals" by the Student to inform classroom staff when he was in a "good place" as well as when he felt overwhelmed and needed a break; shortening tasks to make completion quicker; using a "first/then" board to show desired activity after completion of a task; verbal reminders from staff; and praise for appropriate behaviors. Exhibit D4.

31. As the Student's case manager, Ms. Dykstra was the staff person primarily responsible for developing the BIP. Dykstra at T123. Ms. Dykstra and Ms. Foster discussed the modifications and interventions for the Student. Foster at T181. Ms. Dykstra and Ms. Foster implemented the interventions in the BIP with the Student. Dykstra at T123. The Student had preferential seating in Ms. Foster's classroom, and a quiet room was made available to the Student when he needed it. Dykstra at T123.

32. In her general education language arts/social studies classroom, Ms. Foster had the Student sit close to her desk with his paraeducator. There was another classroom close by, which the Student could use if he felt he needed a quiet space. Ms. Foster would also work one-on-one with the Student in her classroom. Foster at T166-167. The Student had his adult paraeducator sitting with him in the classroom. The Student's paraeducator provided him with both verbal and instructional support. Foster at T183.

⁸ As with the IEP from the same day, Ms. Foster's signature appears on the BIP, while there is no evidence she attended the meeting regarding the Student's BIP. But again for the same reasons as apply to the IEP (See Footnote 6) it is not necessary to resolve this particular matter.

33. The Parents assert the District failed to implement the Student's BIP. The Parents, however, offered very little in the way of evidence at the due process hearing to support this assertion. The Mother opined that if the Student was having interactions with other students that were increasingly inappropriate, the Student should have had more paraeducator support. Mother at T205. The Mother believes that the interventions in the Student's BIP were not implemented because "there was an incident in the classroom that should have been easily diverted."⁹ Mother at T232. The only other reason articulated by the Mother for believing the interventions in the Student's BIP were not being implemented was testimony from Ms. Foster and Ms. Dykstra concerning the degree of proximity between the Student and his adult paraeducator.¹⁰ Mother at T234.

34. On November 28, 2016, the Student received a Disciplinary Referral. Exhibits D5p1; D10p3. On that day, the Student was walking down a hallway at school with an adult paraeducator when another student walked out of a classroom. As the Student and his paraeducator were passing the other student, the Student said to the other student "Hey [N-word]. You're a big [N-word]." The Student began to laugh. *Id.* The Student received a one-day out-of-school suspension for this incident. Exhibits D5p2; D10p3.

The Student's Last Day Attending School During the 2016-2017 School Year

35. The third and final incident during the 2016-2017 school year when the Student used the N-word at school occurred in Ms. Foster's general education language arts/social studies classroom on February 24, 2017. Exhibits D6p1; D10p3. This was also the last day the Student attended school during the 2016-2017 school year.

36. Only three individuals who were physically present during this final incident testified at the due process hearing: the Student, Ms. Dykstra, and Ms. Foster. There are written statements from, or attributed to, other individuals in the record who were apparently present in Ms. Foster's classroom and witnessed the incident. Many of the written statements are attributed to other students who were in Ms. Foster's classroom when the Student used the N-word. See Exhibit D6. However, the written statements from the other students, while not necessarily inconsistent with the testimony of Ms. Foster and Ms. Dykstra, are given little weight because they did not appear and testify at the due process hearing.

37. The Student testified to his recollection of what occurred on February 24, 2017, in Ms. Foster's classroom. For the following reasons, however, it is found that while the Student was a generally *credible* witness (i.e. there is no reason to find the Student had any ill intent to deceive or deliberately misstate his recollection), it is also found that the Student is generally not a

⁹ The incident the Mother was referring to occurred on February 24, 2017, in Ms. Foster's classroom. See later Findings of Fact.

¹⁰ Both Ms. Dykstra and Ms. Foster testified that over the course of the school year and as the Student's behavior appeared to improve, the adult paraeducator would, for example, sit further away from the Student in Ms. Foster's classroom. To what degree this occurred, however, is not material to resolution of the issues of whether the District failed to implement the Student's BIP, or whether the District failed to provide the Student with his paraeducator on February 24, 2017. This will be discussed further in the Conclusions of Law that follow.

reliable witness (i.e. the Student's recollection and reporting of events cannot be relied upon as accurate). See FOF 38-40.

38. The Student has significant cognitive and memory deficits that are long-standing and reflected in multiple prior evaluations by different sources. When the ALJ questioned the Mother at the due process hearing, she stated that:

You know, I don't trust my kids' first discussion. I'm critical. When [the] Student had an issue with a little – with a boy...and he said he didn't call him the N-word, and the paraeducator said [the] Student did call him that...I had some questions about my son's story. We questioned it, and had a long discussion about it. We didn't resolve it in the first meeting. We came to a second meeting. I found a flaw in [the] Student's story.

Mother at T229-230. Later, the ALJ asked the Mother, "knowing your son as well as you do, can you – can you characterize for me, how reliable a reporter is your son of events that you don't witness?" The Mother replied:

[The] Student's language skills aren't really very great. So, you know, I have to question him several times and – so I can get a drift of what really is going on. And I – I don't take the first explanation. I have to go talk to him over and over again. And if the same – you know, maybe there's some peripheral circumstances change, but if the main story doesn't really deviate then I know something happened.

Mother at T231.

39. Randy Elsbree is District executive director of federal and special programs. He has held this position with the District for 13 years. Testimony of Elsbree (Elsbree) at T237. He has known the Student since age 3. *Id.* at T238. When the Student returned to school in the District from WDS for sixth grade, there were concerns raised about the Student's veracity. There were occasions when the Student would go home and tell the Parents about something that happened at school which, upon further investigation and meetings with the Parents, was determined not to be true. *Id.* at T239. Mr. Elsbree acknowledged that occasions like this decreased when the Student entered seventh grade. *Id.* at T240.

40. Accordingly, it is found that the testimony of the Student regarding the incident that took place in Ms. Foster's classroom on February 24, 2017, is outweighed by the otherwise credible testimony of Ms. Foster and Ms. Dykstra – the only other individuals who were present during the incident who also appeared as witnesses at the due process hearing. Based upon their testimony, the following facts are found regarding the incident on February 24, 2017.

41. On the morning of February 24, 2017, the Student had his adult paraeducator with him from 8:20 a.m. until 9:00 a.m. Dykstra at T104. Per her usual practice, which she had initiated and maintained since the start of eighth grade, Ms. Dykstra arrived at 9:00 a.m. to spend time with the Student and act as his adult in proximity pursuant to the Student's October 2016 IEP. *Id.* at T107. When Ms. Dykstra arrived, the Student was in an empty classroom right next door to Ms. Foster's classroom to "take a break."¹¹ *Id.* at T102-103. After about 10 minutes, the

¹¹ While not entirely clear from the record, the Student taking a break in the empty classroom next to Ms. Foster's classroom may reflect use of one of the interventions in the Student's BIP, which provided for a

Student wanted to return to Ms. Foster's class so he could go with the class to an assembly. *Id.* at T102, T104. Ms. Dykstra followed the Student to Ms. Foster's classroom, staying within about five feet of the Student. Ms. Dykstra stood outside the door of Ms. Foster's classroom in order to follow the students to the assembly, while the Student and his classmates lined up at Ms. Foster's classroom door.¹² *Id.* at T102. As the students were lining up, the Student turned to another student, who was African-American, and asked him if he was a "[N-word]".¹³ Other students in the line heard the Student say this and told Ms. Foster. Exhibit D6p3; Foster at T149. At that point Ms. Foster called the Student over to her and the other students left the classroom to go to the assembly. *Id.* at T149. Ms. Foster then asked the Student if he had said what the students had reported, and the Student said yes he did. *Id.* at T170; Exhibit D6p4. Ms. Foster told the Student that he was no longer allowed to attend her morning language arts/social studies class.^{14,15} At that moment, it was Ms. Dykstra's understanding that the Student could not return to Ms. Foster's a.m. core language arts/social studies class. Dykstra at T111. Ms. Foster spoke with Ms. Dykstra and said it might be more appropriate to move the Student to her p.m. core language arts/social studies class. At that point, Ms. Dykstra took the Student to the middle school office and Ms. Foster went to the assembly to join the rest of her class. Foster at T171. The Student may have been placed in the "in-school suspension room" for the remainder of the school day. Elsbree at T265.

42. The following Monday, February 27, 2017, the Parents along with the Student met with the principal of the middle school, Darren Benson, and the assistant principal, Cabe Vander Yacht, at the middle school. At the Mother's request, Ms. Foster also came to the meeting. Mother at T207-208. At the meeting, the Parents were told the Student could return to the middle school, but not to Ms. Foster's a.m. core language arts/social studies class. The Parents were offered

quiet space for the Student when needed. See Finding of Fact 30. This is also consistent with Ms. Dykstra's testimony that she talked with the Student about how he was having a difficult day and had taken time to "cool down" before returning to Ms. Foster's classroom. Dykstra at T104-105.

¹² The testimony of Ms. Dykstra and Ms. Foster disagreed on one point. Ms. Dykstra testified the door to Ms. Foster's classroom was open. Dykstra at T102. Ms. Foster testified the classroom door was closed as the students were lining up to go to the assembly. Foster at T151. What is not disputed, however, is that whether the classroom door was open or shut, Ms. Dykstra remained within a matter of a few feet of the Student.

¹³ The Student characterized his remark to his African-American classmate as, "It just came out. I didn't catch myself." Testimony of Student (Student) at T60.

¹⁴ There was reference in the record to Ms. Foster's "a.m." core language arts/social studies class and her "p.m." core language arts/social studies class. Ms. Foster taught the same class and the same curriculum twice each day: once in the morning and once in the afternoon.

¹⁵ The exact words used by Ms. Foster are unclear from the record. Depending upon the particular piece of evidence, Ms. Foster may have said the Student "no longer had privileges" in her classroom and was "no longer allowed to be in" her core class with the African-American student to whom he directed the racial epithet (Exhibit D6p4), or that the Student has "lost permission to be in" her first core class but could come to her second core class (the p.m. core class)(Foster at T153), or that she told the Student that "he could not be in the classroom at that moment" (Dykstra at T110), or that she told the Student "You are out of the class. You are out." (Foster at T171).

the option of having the Student attend Ms. Foster's p.m. core language arts/social studies class, or the Student could attend a different core language arts/social studies class taught by a teacher other than Ms. Foster. *Id.* at T215-216.

43. Apparently still believing that Ms. Foster had told the Student *in front of the other students in his class* that he was not allowed to be in the classroom any longer, and believing they "needed to repair [the Student's] social setting," before he could return to the middle school, which the Parents believed would have to include Ms. Foster apologizing to the Student in front of all his classmates, the Parents left the meeting. Mother at T215; Father at T76.

44. On March 28, 2017, the Mother signed and the District received an Annual Declaration of Intent to Provide Home-Based Instruction in Lieu of Public School Enrollment form. Exhibit D12. To date, the Student has never attended school in the District since February 24, 2017. It was the Parents' decision to remove the Student from the middle school. Father at T78.

45. The Parents assert that they feared for the Student's safety if he were to return to school in the District because the Student has now been labeled a "racist" by Ms. Foster. Father at T78; Mother at T205. But the Parents offered no substantial evidence to support their assertion. The Parents' assertion is, at best, highly speculative and unfounded in any evidence of record. It is found that the Parents have failed to offer sufficient credible evidence to find the Student's safety would have been placed at risk had he returned to the middle school.

Use of Curricula in Ms. Foster's Classroom

46. The Parents assert that Ms. Foster used curricula in her classroom that caused the Student to become frustrated and act out in class. Specifically, the Parents believe that Ms. Foster used curriculum related to the Black Lives Matter organization or movement, and another curriculum called "American Experience." The only basis for the Parent's belief these curricula were used by Ms. Foster are the Student's reports to the Parents. For the same reasons as discussed above, it is found that the testimony of the Student cannot be relied upon as an accurate report of events, particularly without any independent evidence to corroborate the Student's testimony.

47. Ms. Foster is familiar with the Public Broadcasting Service (PBS) program "We Will Remain," which involves the history of Native Americans, but it is not part of eighth-grade curricula at the middle school, and it was never assigned to the Student in Ms. Foster's class.¹⁶ Foster at T160-162. As part of the middle school eighth-grade social studies curricula, the Student, along with all the other eighth-grade students at the middle school, had been assigned to read a book called "The Lynching of Louie Sam," a piece of historical fiction based in part upon actual historical events. Foster at T157. The book includes a description of the lynching of a young Native American boy. However, Ms. Foster was not discussing this book in class on February 24, 2017, the final day the Student attended school in the District. Nor was Ms. Foster discussing or using any material regarding the Black Lives Matter organization or movement that day. Foster at T163-164.

¹⁶ The Student is part Native American, as are the Parents.

CONCLUSIONS OF LAW

The IDEA and Jurisdiction

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

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

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

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

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

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 . . .

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

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

M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1201 (9th Cir. 2017).

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

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

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

7. Procedural violations of the IDEA amount to a denial of FAPE only if they:

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

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

Whether the District Violated the IDEA and Denied the Student FAPE by Failing to Provide the Student With His 1:1 Aide on February 24, 2017.

8. There were two annual IEPs for the Student in effect during the 2016-2017 school year. The first of the two IEPs would have been developed circa October 2015, based upon the development of a new annual IEP for the Student in October 2016. But as already noted, neither party offered a copy of the annual IEP developed circa October 2015 for this due process hearing. The very limited evidence of record about the October 2015 IEP indicates the Student received 1:1 adult support while he was at school. Finding of Fact (FOF) 15. The October 2016 IEP called for the Student to have adult proximity and paraeducator support throughout (i.e. for all parts of) the school day to aid in social interactions and implementation of the Student's BIP. FOF 24. But just as important is what these IEPs do not require. These IEPs do not require the *same* adult individual to be in proximity and provide support for the Student every school day, all school-day long. Nor do these IEPs require two individuals, one the adult in proximity and the second a paraeducator, to be present at all times during the school day with the Student. Thus the District's implementation of these IEPs through the use of one or more adult paraeducators and Ms. Dykstra herself for one hour each day is not inconsistent or in conflict with the IEPs.

9. The IEPs also do not require an adult in *close* proximity to the Student. Nor do the IEPs require that an adult maintain so-called "*arm's length*" proximity to the Student, where an adult would literally have to follow the Student around such that at every minute of the school day the adult would be able to reach out and touch the Student.

10. With respect to February 24, 2017, the single day on which the Parents have raised the issue of whether the District failed to provide the Student with the adult in proximity and paraeducator support required by the Student's October 2016 IEP, the facts are clear. On that day and during the time the incident leading to the Student's removal from Ms. Foster's a.m. language arts/social studies class occurred, Ms. Dykstra was present and filling the role

required by the IEP for both an adult in proximity and paraeducator support. Following the daily practice she had implemented since the start of the school year, Ms. Dykstra met the Student at 9:00 a.m. when he was in an empty classroom next to Ms. Foster's classroom. When the Student was ready to return to Ms. Foster's classroom so he could go an assembly with his classmates, Ms. Dykstra followed within a matter of a few feet of the Student. Ms. Dykstra was present just outside the door to Ms. Foster's classroom when the Student uttered the racial epithet to his African-American classmate.

11. It is also concluded that the Parents have not offered sufficient credible evidence to find that even if Ms. Dykstra was closer to the Student it would have made any difference or prevented the Student from using the racial epithet. On the contrary, the evidence of record points to just an opposite conclusion. In November 2016, the Student was walking down a hallway followed by his adult paraeducator. When the Student encountered another student in the hallway, the Student used the same racial epithet. How having an adult in any *closer* proximity to the Student, even at arm's length, would prevent such a spontaneous utterance is difficult to conceive. Even the Student characterized his use of the same racial epithet on February 24, 2017 in Ms. Foster's classroom as something that just came out, stating "I didn't catch myself." FOF 41, Footnote 11.

12. Given Ms. Dykstra's presence fulfilling the roles of an adult in proximity and paraeducator support when the incident occurred in Ms. Foster's classroom on February 24, 2017, it is concluded that the District did not fail to implement the requirements of the Student's October 2016 IEP, and did not fail to provide the required support and proximity to the Student. The Parents have failed to prove any violation of the IDEA or denial of FAPE regarding this issue.

13. The Parents also raised an argument related to the issue of the Student having an adult in proximity and paraeducator support. While not necessary for resolution of the issue, it merits some discussion for clarification purposes. The Parents argued that leading up to the incident on February 24, 2017, the District had not been faithfully implementing the IEP's requirement that the Student have an adult in proximity and paraeducator support because the District had started to "fade" that support by allowing the paraeducators working with the Student to be further and further away from him. Assuming for the sake of argument that is true, it does not change the conclusion that the District did not commit the violation the Parents have alleged. This is because on the day in question, Ms. Dykstra was in fact present and providing the services the Student's IEP required. To the extent the Parents may be arguing that some residual effect of fading the Student's paraeducator contributed to the Student's use of the racial epithet on February 24th, the record simply does not include the type or quantum of evidence that would be necessary to support such a conclusion.

Whether the District Violated the IDEA and Denied the Student FAPE by Failing to Inform the Student's General Education Teacher (Ms. Foster) About Interventions for the Student in his IEP.

14. As observed in the District's Post-Hearing Brief, the Parents have not clearly identified what interventions in the Student's IEPs they believe were not communicated to Ms. Foster or, for that matter, what interventions were not implemented. Rather, the Parents seem to argue that interventions must not have been communicated to Ms. Foster or not implemented because the Student used the same racial epithet on three occasions during the school year. It is important to note that even when a student has a BIP that provides for interventions and an IEP

that provides for modifications and those interventions and modification are faithfully implemented by a school district, there is no guarantee that a student will *never* act out or display undesirable behaviors.

15. Here again, the District has offered substantial evidence which is undisputed that although Ms. Foster apparently did not attend the meeting on October 5, 2016, she was informed of the interventions in the Student's BIP and IEP. Ms. Dykstra communicated on a regular if not daily basis with Ms. Foster regarding the Student's IEP over the course of the school year. Ms. Dykstra provided a copy of the Student's IEP to the Ms. Foster. And Ms. Foster did in fact implement at least some of those interventions and modifications for the Student in her classroom. See FOF 31-32. In opposition to this evidence from the District, the Parents have offered what is best characterized as more argument than evidence. FOF 33. Such arguments unsupported by corroborating evidence are insufficient to carry the Parents' burden of proof. Accordingly it is concluded that the Parents have not established Ms. Foster was not informed of the interventions, nor proven any violation of the IDEA or denial of FAPE to the Student with respect to this issue.

Whether the District Violated the IDEA and Denied the Student FAPE by Failing to Implement the Student's October 2016 Behavioral Intervention Plan.

16. Similar to the last issue considered, the Parents have offered very little evidence to establish any failure on the part of the District to implement the interventions in the Student's October 2016 BIP. Rather, the Parents *speculate* that because there was a behavioral incident in Ms. Foster's classroom (i.e. the Student's use of the racial epithet) interventions must not have been implemented. Such speculation cannot substitute for evidence. Arguing that any incident of "bad" behavior must be attributed to or caused by a failure to implement a student's BIP ignores the reality that even when interventions are faithfully implemented there is no *guarantee* that a student will never act out. In contrast, the District established implementation of many of the interventions in the BIP, including preferential seating, a quiet area or room where the Student could take a break, and verbal and instructional support from the Student's paraeducators. If there were other interventions that the District did not implement, the Parents did not produce the evidence necessary to establish any such failures. A party asserting a fact, like a failure to implement an intervention or any other component of a student's education under the IDEA, must do more than merely present argument and speculation. The Parents have not done so with respect to this issue. It is concluded that the Parents have failed to establish the District did not implement the interventions in the Student's BIP.

Whether the District Violated the IDEA and Denied the Student FAPE by Using Curriculum in the Student's General Education Classroom That was not Appropriate for the Student. Causing the Student to Become frustrated and act out in Class.

17. After review and consideration of the evidence of record, it is concluded that the Parents have failed to offer sufficient evidence to find that Ms. Foster used any curricula regarding the Black Lives Matter organization or movement, the PBS program "We Will Remain," or "American Experience" in her class either prior to or on February 24, 2017. The Student's testimony, standing alone, does not outweigh the credible and reliable testimony of Ms. Foster. While the Student, as had all other eighth-grade students at the middle school, was assigned to read The Lynching of Louie Sam, that book was not the subject of any instruction or discussion in Ms. Foster's classroom on February 24, 2017.

18. It is concluded that even had the Lynching of Louie Sam been the subject of instruction or discussion in Ms. Foster's classroom that day, the Parents' argument that such instruction or discussion caused or was part of the cause for the Student directing the racial epithet towards his African-American classmate is not compelling. The Student had used the same racial epithet on at least two other occasions during the school year without any apparent connection to curricula or instruction. Furthermore, the Student's October 2016 IEP contained provision for, or restriction on, curricula to be used with the Student. Even had some curriculum been used in Ms. Foster's classroom on the Student's last day that contributed to the Student using the racial epithet, it is entirely unclear how that would lead to a legal conclusion the District violated the IDEA.

Whether the District Violated the IDEA and Denied the Student FAPE by Removing the Student From his General Education Language Arts Class in 2017.

19. In resolving this issue, it is critical to first note that while the Student was removed from Ms. Foster's general education language arts/social studies classroom on February 24, 2017, the record is exceptionally clear that by no later than the very next school day, February 27, 2017, the District stood ready to allow the Student to return, either to Ms. Foster's other language arts/social studies class in the afternoon, or to a language arts/social studies class taught by another teacher. It is only the Parents' unilateral decision not to allow the Student to return to school that has kept him out of school for now almost seven months, excluding the summer vacation. While removing a student eligible for special education from one or more classes for some extended period of time could constitute a change in a student's educational placement and at least create the potential for an IDEA violation, such is not the case here. The undersigned ALJ is unaware of any authority that would, under the facts in this case, permit a conclusion the District violated the IDEA or denied the Student FAPE by excluding the Student from Ms. Foster's class for one day, while at the same time offering the Parents reasonable options for returning the Student to middle school the very next school day. The facts do not support a conclusion that by compelling the Student to return to either Ms. Foster's afternoon language arts/social studies class or the same class taught by another teacher, the District would be materially changing the Student's educational placement set forth in his October 2016 IEP, or failing to implement that IEP. And as already been found as fact, the Parents' belief that the Student's safety would be at risk were he to return to the District is at best highly speculative, and not supported by any meaningful evidence. It is concluded that the Parents have not proven any violation of the IDEA or denial of FAPE to the Student by this one-day removal from Ms. Foster's classroom.

Whether the District Violated the IDEA and Denied the Student FAPE by Failing to Consider the Results of a Psychological Reevaluation of the Student That Took Place at the University of Washington Medical Center (UWMC) in April 2010.

20. The Parents argue or assert that the District failed to consider the results of the April 2010 CDC evaluation because if they had considered that evaluation, the District would know how to handle the Student with respect to his behavioral needs and learning disabilities. FOF 9. First, this argument seems to assume that once an evaluation of a student eligible for special education and related services is conducted and recommendations from such an evaluation are implemented in a school or classroom through an IEP, one should not expect any further behavioral or academic problems to arise. Such an assumption is unrealistic, and unsupported

in the law. Evaluations leading to development of IEPs for students with special needs cannot guarantee the results the Parents apparently believe must inevitably follow.

21. Furthermore, the evidence of record clearly reflects the CDC evaluation *was* considered by the District. The District's reevaluation of the Student in 2014 reflects multiple references to the CDC evaluation. FOFs 10-11. The Mother attended the meeting on May 19, 2014, and signed the reevaluation report. FOF 13. Additionally, the Parents have not offered evidence going to prove when or during what period of time the District allegedly failed to consider the CDC evaluation. Finally, if the Parents are asserting that the District failed to consider the CDC evaluation of the Student during development of the Student's IEP in October 2016, which would fall within the IDEA statute of limitations (WAC 392-172A-05080; 32 CFR §300.507), the Parents have offered absolutely no evidence to find that the results of an evaluation of the Student carried out in April 2010 would be relevant to development of his IEP *6½ years later*. It is concluded that the Parents have not proven any violation of the IDEA or denial of FAPE to the Student with respect to this issue.

Whether the District Violated the IDEA and Denied the Student FAPE by Failing to Have a General Education Teacher Attend the Student's IEP Meetings.

22. School districts must ensure that the IEP team for each student eligible for special education includes not less than one general education teacher of the student if the student is, or may be, participating in the general education environment. WAC 392-172A-03095(1)(b); 34 CFR §300.321(a)(2).

23. It has already been found as fact that no general education teacher attended the Student's IEP team meeting on October 5, 2016. FOF 23. It is concluded that this was a *procedural* violation of the IDEA because the Student was participating in the general education environment at his District middle school. FOF 16; *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479 (9th Cir. 1992). However, such a procedural violation standing alone will not result in a denial of FAPE; there must be the loss of educational opportunity for a student, or serious infringement on parents' rights to participate in the decision-making process for the IEP. *Id.* at 1484; *See* COL 7, above.

24. First, it must be concluded that the Parents have failed to present evidence establishing or proving that the Student lost educational opportunity or was deprived of an educational benefit because of the District's procedural violation. There is no evidence of record to conclude that the absence of Ms. Foster or another general education teacher of the Student from the IEP meeting resulted in any failure to implement the October 2016 IEP, somehow denied the Student any educational opportunity, or otherwise negatively impacted the Student's receipt of an educational benefit. The record is clear that Ms. Foster was provided a copy of the October 2016 IEP, discussed it on multiple occasions with Ms. Dykstra, and implemented the IEP in her classroom for the Student. FOF 26.

25. Second, it also must be concluded that the Parents have not offered sufficient evidence to find their right to participate in the decision-making process leading to the Student's October 2016 IEP was seriously or significantly impeded. Both Parents attended the meeting, and signed the IEP. Absent other potentially compelling circumstances not present in this case, this is *prima facie* evidence that the Parents participated in the development of the IEP and placement decision. FOF 21. The Parent offered no testimony of their own or from another witness to prove that Ms. Foster's absence somehow had a negative impact on their opportunity

to participate in the development of the Student's IEP. Therefore, it must be concluded that while the District committed a procedural violation the IDEA, no remedy for the violation is warranted, and no remedy will be ordered.

26. All arguments made by the parties have been considered. Arguments not specifically addressed herein have been considered, but are found not to be persuasive or not to substantially affect a party's rights.

ORDER

1. The Blaine School District violated the Individuals with Disabilities Education Act by failing to have a general education teacher of the Student attend the October 5, 2016, IEP meeting.
2. No remedy is awarded to the Parents for the Blaine School District's violation of the Individuals with Disabilities Education Act.
3. The Parents have failed to prove any other violation of the Individuals with Disabilities Education Act.

Signed at Seattle, Washington on October 28, 2017.



Matthew D. Wacker
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C. 1415(i)(2), any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be brought within ninety days after the ALJ has mailed 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. *mw*

Parents



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