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MAY 18 2011

STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION  
SEATTLE-OAH

IN THE MATTER OF:

YELM COMMUNITY SCHOOLS

SPECIAL EDUCATION  
CAUSE NO. 2010-SE-0098X

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

A due process hearing in the above matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Yelm, Washington, on February 1 - 2, and March 8 - 10, 2011. The Parents of the Student whose education is at issue<sup>1</sup> appeared and were represented by Jackie Kettman-Thomas and Jeannette Cohen, attorneys at law. Yelm Community Schools (the District) appeared through Gary Potts, director of special services, and was represented by David Hokit, attorney at law.

**STATEMENT OF THE CASE**

**Procedural History**

The Parents filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on November 15, 2010, which was assigned Cause No. 2010-SE-0098X. The Parents were represented by Jackie Kettman-Thomas, attorney at law. The Complaint was forwarded to the Office of Administrative Hearings (OAH) for assignment of an ALJ. A Scheduling Notice was entered November 15, 2010, which assigned the matter to ALJ Andrea Conklin. On November 19, 2010, ALJ Conklin entered an Order of Recusal, recusing herself as the ALJ *sua sponte*. On November 22, 2010, a Notice of Reassignment was entered, reassigning the matter to ALJ Matthew D. Wacker.

On December 3, 2010, the Parties filed their written waiver of a resolution meeting. A prehearing conference was held December 3, 2010. A Prehearing Order was entered December 8, 2010, striking expedited status and setting a schedule to hear the District's motion in *limine*. A prehearing conference was held December 21, 2010, followed by entry of an Order on District's Motion in *Limine* on January 14, 2011. Prehearing conferences were held January 18 and 28, 2011.

<sup>1</sup> In the interest of preserving individual privacy, this decision does not identify by name the parent(s), student, other family members, or other students in the District. Instead, they are identified as "Parent(s)," "Mother," "Father," "Sibling," or "Student." In order to preserve the identities of other District students, a name key was created by the ALJ during hearing, assigning each District Student an identifying number; Student #1, Student #2, etc. The court reporter's transcript uses the name key to identify these other District students. The parties' representatives were present during assignment of all identifying numbers. With respect to exhibits, the parties submitted redacted copies of all proposed exhibits which included names of any other District student. The parties agreed these redacted copies would replace any original proposed exhibits which identified other District students.

The due process hearing commenced February 1, 2011. On February 2, 2011, the Parents moved for a continuance of the hearing in order to seek additional or new legal counsel. The motion was granted after hearing the District's objection. On February 9, 2011, Jeannette Cohen filed her Notice of Appearance as Parents' co-counsel. A prehearing conference was held February 14, 2011. A Prehearing Order was entered February 15, 2011, setting the hearing to reconvene March 8-10, 2011. On March 15, 2011, a Notice of Post-Hearing Conference was entered. A post-hearing conference was held March 25, 2011, followed by entry of an Order on Issues April 1, 2011.

In order to accommodate the requested dates for due process hearing, the Parents moved to extend the due date for a written decision in the above matter to thirty (30) calendar days after the close of record. The record closes on the last day of hearing or filing of post-hearing briefs. The motion was granted. Post-hearing briefs were filed April 18, 2011. Thirty calendar days from April 18, 2011, is May 18, 2011. Therefore, the due date for a written decision in the above matter is **MAY 18, 2011**.

### Evidence Relied Upon

#### Exhibits Admitted:

**Parent's Exhibits:** P1 - P4, P13, P15, P18, P26, P33 - P36, P41 - P45, P47, P51, P55, P62 - P73, P75 - P77, P80 - P88, P90 - P94, P97, P105, P107 - P109.

**District's Exhibits:** D1 - D13.

**Joint Exhibits:** J1 - J14.

#### Witnesses Heard (in order of appearance):

The Mother

Steve Bigelow, District assistant director of special services, school psychologist

Steven Altabet, Ph.D., licensed clinical psychologist

Becky Cox, District para-professional

Gary Potts, District director of special services

Michael Penley, former District school psychologist

Stephen Wilson, MSW, counselor

### **STATEMENT OF THE ISSUES**

1. Whether the District denied the Student a free appropriate public education (FAPE) from May 11, 2010, through June 17, 2010, by:
  - a. Denying the Parents an opportunity to participate in meetings on May 20, 2010, and May 25, 2010, where the District:
    - (1) Determined the Student's conduct leading to his expulsion on May 11, 2010, was not a manifestation of his disability or disabilities;

- (2) Made changes to the Student's behavior intervention or improvement plan (BIP), resulting in a change in the Student's educational placement, and;
  - (3) Conducted an evaluation meeting; and by,
    - b. Making the incorrect decision for the manifestation determination on May 25, 2010: i.e., that the Student's conduct leading to his expulsion on May 11, 2010, was not a manifestation of his disability or disabilities.
2. Whether the Student's IEP implemented as of May 11, 2010, was appropriate because it:
  - a. Was not reasonably calculated to produce progress in the Student's behavioral goal, and;
  - b. The District did not respond to the Parents' concerns about its appropriateness.
3. Whether the District committed a procedural violation of the IDEA by failing to request a due process hearing to determine if maintaining the Student's educational placement as of May 11, 2010, was substantially likely to result in injury to the Student or others pursuant to WAC 392-172A-05160.
4. And, whether the Parents are entitled to their requested remedies:
  - a. A decision that the May 25, 2010, manifestation determination was incorrect and the Student's conduct leading to his expulsion on May 11, 2010, was a manifestation of his disability or disabilities;
  - b. A decision that the Student should have been returned to a full-time schedule of classes in the District;
  - c. An order to expunge the Student's emergency expulsion and long-term suspension from his education records with the District;
  - d. Or other equitable remedies, as appropriate.

See, April 1, 2011, Order on Issues.

## FINDINGS OF FACT

### Asperger's Disorder

1. The essential features of Asperger's Disorder<sup>2</sup> (Asperger's) are severe and sustained impairment in social interaction and the development of restricted, repetitive patterns of behavior,

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<sup>2</sup> Asperger's Disorder is referred to in some sources as Asperger's Syndrome.

interests, and activities. The disturbance must cause clinically significant impairment in social, occupational, or other important areas of functioning. The impairment in reciprocal social interaction is gross and sustained. There may be failure to develop peer relationships appropriate to developmental level. Asperger's must cause clinically significant impairment in social adaptation, which in turn may have a significant impact on self-sufficiency or on occupational or other important areas of functioning. Asperger's has been reported to be associated with a number of other mental disorders, including Depressive Disorders. Motor clumsiness and awkwardness may be present but usually are relatively mild, although motor difficulties may contribute to peer rejection and social isolation (e.g., inability to participate in group sports). Symptoms of overactivity and inattention are frequent in Asperger's, and many individuals with this condition receive a diagnosis of Attention-Deficit/Hyperactivity Disorder prior to the diagnosis of Asperger's. In contrast to Autistic Disorder, there are no clinically significant delays or deviance in language acquisition. Individuals with Asperger's are typically verbose. A child's relatively good verbal skills may lead teachers and caregivers to erroneously attribute behavioral difficulties to willfulness or stubbornness. Diagnostic criteria for Asperger's include: failure to develop peer relationships appropriate to development level; lack of social or emotional reciprocity, clinically significant impairment in social, occupational, or other important areas of functioning. Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). Exhibit D5.

2. Autism Spectrum Disorders (ASD) are a set of disability groups that are identified under the heading of Pervasive Developmental Disorders (PDD). PDD are characterized by severe and pervasive impairment in several areas of development, including reciprocal social interaction skills, communication skills, or the presence of stereotyped behavior, interests, and activities. PDD includes Pervasive Developmental Disorder Not Otherwise Specified, Asperger's Syndrome, Autistic Disorder, Childhood Disintegrative Disorder, and Rett's Disorder. ASD account for three of the five PDD: Pervasive Developmental Disorder Not Otherwise Specified, Asperger's Syndrome, and Autistic Disorder. In contrast to Autistic Disorder, people with Asperger's do not display clinically significant delays in language acquisition, although there may be deficits in the practical use of language and social-communication skills. The Educational Aspects of Autism Spectrum Disorders, Revised November 2008, Exhibit J2, pp. 10-11.

3. Among all the possible behavior characteristics in ASD, some common behaviors do occur. While not all of these characteristics will be the same in all diagnosed cases, they will include difficulties in the areas of social interaction, communication, behavior, sensory/motor processing, and learning new skills. The characteristics will vary at different ages for individual children with ASD. Social characteristics may include: a narrow range of emotions and inappropriate displays of emotions; difficulty reciprocating emotionally and socially and have difficulty relating to others; difficulty in developing and maintaining friendships; may lack understanding of how others feel/express needs; may exhibit stereotyped and repetitive use of language or idiosyncratic language; and may perseverate on certain activities. Exhibit J2, pp. 12-13.

4. Challenging behaviors, such as self-injurious behavior, stereotypic behavior, physical aggression, tantrums, defiance, and property destruction are among the most difficult and stressful issues faced by parents and educators of children with ASD. Research has supported the use of functional behavior assessments (FBA) or functional analysis and positive behavior supports (PBS) in the treatment of challenging behaviors for children with ASD. This includes use of a token system

or token economy, where a student earns tokens for targeted behaviors. Once the student has collected a predetermined number of tokens, they can be traded for an item or activity the student desires. FBAs are found by research to reduce maladaptive skills while enhancing adaptive skills. This is because seventy to eighty percent of challenging behaviors have a communicative function. Exhibit J2, pp. 31, 36-37.

### **General Background; Educational History With the District**

5. The Student was determined eligible for special education and related services at approximately age 6 as a student with a health impairment due to Attention-Deficit/Hyperactivity Disorder (ADHD) and sensory integration disorder. This initial eligibility determination was made in another school district. The Student transferred to the District in 2003, for the beginning of third grade. Exhibit P1.

6. The District first evaluated the Student during October 2004, when the Student was in fourth grade. The evaluation noted the Student had a history of difficulty staying on task, becoming easily frustrated, and becoming uncontrollable with hyperactivity, tantrums and verbal outbursts. The Student required significant behavioral support to maintain behavior that allowed him to function well in a classroom setting. The Student's general cognitive ability was assessed within the high average range of intellectual functioning. The evaluation concluded the Student remained at risk for additional degeneration of his behavior without support and behavioral instruction. Exhibit P1.

7. The District developed an IEP for the Student in May 2005 (fourth grade). The IEP noted that the Student continued to have a full-time, one-on-one supportive assistant. The Student continued to display conduct problems that included off-task behavior, loud verbal outbursts with foul language, withdrawal, low self-esteem and disruptive classroom behavior. The IEP noted these behaviors may stem from symptoms of anxiety, frustration, over stimulation, or aggression (mostly verbal). Exhibit P2.

8. The District developed an IEP for the Student in June 2006 (fifth grade). The Student continued to qualify for special education due to the Health Impairments of ADHD and sensory integration disorder. The IEP noted that the Student had a history of social difficulties and behaviors that disrupted the classroom setting, including noise-making, loud verbal outbursts in class, and arguing with staff. Once upset, the Student would show aggression by slamming doors, hitting walls, breaking pencils, and throwing small objects. He began the school year with a full-time, one-on-one supportive assistant. The Student demonstrated some improvement in his behavior during the school year. However, the Student would often become angry if a teacher asked him to take a time-out, resulting in a verbal outburst before the Student left the classroom. Once angered, the Student required time to calm down before returning to the classroom. Exhibit P3.

9. Any IEP for the Student for sixth grade is not part of the record.

10. On June 26, 2007, Penny Tanner, Ph.D., ARNP, the Student's treating ARNP, wrote on a prescription pad:

Dx: R/O Autism - Asperger's  
R/O Mood Disorder NOS  
R/O OCD  
Learning disabilities may need to be ruled out

Exhibit D3, p. 17. The Parent provided this to the District for the upcoming triennial evaluation of the Student.

11. The District conducted a triennial evaluation of the Student, culminating in an evaluation report dated October 10, 2007. The report noted the Student previously qualified for special education and related services under the category health impaired, with a diagnosis of ADHD. The report does not identify or make note of any diagnosis of sensory integration disorder. Exhibit D3, p. 1.

12. The report states, "Penny Tanner, Ph.D., ARNP, has noted that [the Student] was possible Aspergers, ADHD, mood disorders NOS, and learning disabilities. She completed the Yelm School District Health Impairment Form." Exhibits D3, pp. 1, 16-17, J3.

13. The District developed an IEP for the Student in October 2007 (seventh grade). The Student continued to qualify for special education under the category of health impaired with a diagnosis of ADHD. Unlike prior District IEPs for the Student, this IEP did not identify or make note of any diagnosis of sensory integration disorder. The IEP noted that the Student has begun to engage in disruptive behaviors identified by his teachers. While in past years the Student had a full-time, one-on-one supportive assistant, he started the 07-08 school year without an assistant, but did check in with a behavior assistant on a regular basis. Exhibit P4.

14. Evaluation and IEP team meetings were held October 10, 2007, to consider the triennial evaluation and develop the October 2007, IEP. The Mother was present and participated in both meetings.

15. Any IEP for the Student for eighth grade is not part of the record.

16. District staff aware of the Student graphically expressing violent themes at school through the use of drawings depicting, for example, a person with a sword driven through their head. Exhibit P43; Testimony of Becky Cox.

17. The District developed an IEP for the Student in October 2009 (ninth grade). The Student continued to qualify for special education under the category of health impaired with a diagnosis of ADHD. The IEP did not identify or make note of any diagnosis of sensory integration disorder. The IEP noted the Student's behaviors included loud verbal outbursts in class and arguing with staff. The Student showed aggression by slamming doors, hitting walls, breaking pencils, throwing small objects, making off-color comments, screaming or pounding on lockers, and refusing to work. Exhibit J4.

18. The October 2009 IEP included an annual goal for behavior management. The annual goal was to improve the Student's behavior from requiring staff intervention five times per day to three times per day or less, on average. It provided 30 minutes per week of services in a therapy room,

and access to an educational assistant (Para-professional Becky Cox) on an as-needed basis. Exhibit J4, p. 6.

19. The Mother was present and participated in the IEP meetings on October 2, 14, and 23, 2009. She requested the District provide a full-time one-on-one supportive assistant for the Student. No decision was made on the Mother's request. Exhibits J4, p. 3, P45, P97, D12.

20. On October 22, 2009, ARNP Tanner wrote on a prescription pad:

Diagnosis:

Asperger's Disorder  
Attention Deficit Disorder.

Exhibit J5.

21. The Mother attempted to give the prescription form with ARNP Tanner's diagnoses for the Student to Michael Penley, then a District school psychologist, but Mr. Penley refused to accept it. The Mother then mailed the prescription form to the District. This all occurred on or about the date ARNP wrote the diagnosis. Testimony of Mother.

22. On October 23, 2009, the Parent signed a Supplemental Page to IEP Behavior Management Plan (Supplement). The Supplement added a "token economy" to help support the behavior management goal in the Student's October 2009 IEP. The token economy was intended to help the Student learn socially acceptable behaviors at school. The token economy included both positive (earning extra money for good behavior) and negative (fines for misbehaving) reinforcements. The Student would receive \$3.00 per week on Monday. Any money the Student had left at the end of the work could be spent at the program store on Fridays. Notes would be mailed home at the end of each week to reflect the Student's performance for the week. Becky Cox, District para-professional, who had worked with the Student since seventh grade providing behavioral support services, would remain available to the Student on an on-call basis or at a regularly scheduled time. Exhibit P47.

23. On December 7, 2009, ARNP Tanner wrote a letter to the District. The letter set out ARNP Tanner's recommendations for accommodations and modifications to the Student's educational program to assist him in being successful in school. Exhibit P63. The Mother asked ARNP Tanner to write the letter after the District requested the Parents provide their consent for the District to contact ARNP Tanner regarding any recommendations she might have for the Student's educational program. The Parents opted to have ARNP write a letter rather than give their consent because the Parents believed it would be less expensive for them to have ARNP Tanner write a letter as opposed to provide the District with a written report.

24. On March 29, 2010, the Mother attended a meeting with Mike Penley, Gary Potts, Becky Cox, Mike Riley, and Dave Myers, all District staff. The Mother requested the Student's three-year review be done. Mr. Potts requested another diagnosis and recommendation from ARNP Tanner, as it had been six months since the last one. Mr. Potts stated that the next Diagnostic and Statistical Manual (DSM) would rule out Asperger's to autism spectrum. Exhibit P75; Testimony of Mother.

25. On April 15, 2010, ARNP Tanner wrote a second letter to the District, confirming her diagnoses and recommendations from her December 7, 2009, letter. Exhibit J10.

### **Student's History of Discipline With the District**

26. The Student has a long history of significant disruptive, threatening and violent behaviors leading to discipline with the District, dating to his arrival in the District for third grade in 2003.

27. On February 29, 2008, the Student received a warning for violating the lab safety policy. The Student's behavior in science class was disruptive, dangerous, and interfered with other students' right to learn. Exhibit P13.

28. During September 2009, the Student had fifteen (15) significant discipline infractions. Exhibit D11. These fifteen infractions included the following two incidents.

29. On September 18, 2009, the Student was discovered concealing a pair of scissors in one sleeve of his shirt at school. When asked why he had the scissors, the Student stated he was going to use them on another student because the other student kept bumping him. Exhibit P36. The Student was emergency expelled. The expulsion was later changed to a suspension, and the Student was suspended for a total of six days for this incident. The District did not conduct any manifestation determination regarding this incident. Exhibits D12, P36, P97; Testimony of Potts.

30. On September 30, 2009, the Student was removed from school for disciplinary reasons for two days. He used profanity towards a staff member, displayed dangerous behavior by throwing his binder and slamming doors, was removed from class for swearing and disruptions and refused to follow staff directives. Exhibits D12, P 97.

31. By October 2, 2009, when the District drafted a new IEP for him, the Student had already been removed from classes.

32. During October 2009, the Student had eleven (11) significant discipline infractions. Exhibit D11. These eleven infractions included the following incident.

33. On October 21, 2009, the Student was removed from school for two days for disciplinary reasons. He disrupted classes by pounding on and slamming lockers, kicking doors, using profanity towards others, and wiping spit on the walls. Exhibits D12, P97.

34. During November 2009, the Student had three (3) significant discipline infractions. Exhibit D11. These three infractions included the following incident.

35. On November 4, 2009, the Student was emergency expelled from school for harassing and threatening to kill another student and the student's family, and for using school computers to search for non-school related topics. The expulsion was converted to a short-term suspension, and the Student was suspended for a total of four days. Exhibits D12, J12, P97.

36. The Student's IEP team met on November 9, 2009, to review the Student's educational needs and progress, and conduct a manifestation determination (MD). At least one of the Parents was present and participated. The team determined the behavior which led to his expulsion on November 4, 2009, was a manifestation of the Student's disabilities. Exhibits J6, D12, P97.

37. The IEP team developed a positive intervention plan (BIP) for the Student. The IEP team determined the Student's educational placement should be changed to a reduced school day, and amended his IEP. The IEP team also developed a reentry plan for the Student. The Student attended less than a full day of school from November 10, 2009, until March 1, 2010, a total of sixty-three (63) days. Exhibits J7-J9, D12, P97.

38. The Parents disagreed with the IEP amendment reducing the Student's school day, and informed the District that they disagreed. P67; Testimony of Mother.

39. During March 2010, the Student had eleven (11) significant discipline infractions. Exhibit D11. These eleven infractions included the following four incidents.

40. On March 3, 4, and 5, 2010, the Student was insubordinate at school. He threw a pen at a student, refused to stay on his seat, walked the hallways and closed the hallway doors. All three occasions required intervention by District administration. Exhibit P73.

41. On March 17, 2010, the Student was standing in a school hallway refusing to go to class. He "flipped off" a teacher and other students, then called the teacher an "asshole," and began punching a wall. He was told to go to the principal's office, where he proceeded to throw items off the principal's desk. The Student was emergency expelled from school. District records noted the Student's behavior seems to be getting worse, he is non-compliant and refuses to follow simple requests to make sure the students are safe and accounted for." Exhibits D12, P72-P73, P97.

42. In an Individual Report: Psychologist form dated March 29, 2010<sup>3</sup>, it is noted:

There is a large amount of documentation regarding [the Student's] behaviors at school. [The Student] has engaged in a variety of inappropriate behaviors. He has demonstrated dangerous behaviors. [The Student] has thrown items at student and staff. He has kicked and punched the walls. He has torn posters off walls. [The Student] carried a pair of scissors up his sleeve to threaten a student with. [The Student] has used profanity and [sic] student [sic] and staff. [The Student] has refused to comply with staff directions. He has used the computer inappropriately. He had searched vulgar words on the computer. [The Student] has threatened students. He has yelled at students and staff. [The Student] has spit on other students. [The Student] has sexually harassed students. [The Student] has thrown balls and large rocks at students and portable classrooms on the playground. [The Student] has had many difficulties on the school bus. He has received several bus suspensions. [The Student] has drawn pictures depicting violent themes. To

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<sup>3</sup> Although the report form is dated March 29, 2010, on the first page, references within the evaluation to meeting with the Mother on April 16, 2010, to review an assessment plan confirm it was completed over a period of several weeks. This report eventually became part of the Student's triennial reevaluation dated May 20, 2010. Exhibit D2.

summarize, [the Student] has engaged in dangerous behavior, patterns of misconduct, insubordination, threats, weapons, sexual harassment, bus discipline and disrupt [sic] to students and staff.

Exhibit P75, p. 1.

43. During April 2010, the Student had twelve (12) significant discipline infractions. Exhibit D11. These twelve infractions included the following four incidents.

44. On April 12, 2010, the Student was sent home for one day when he refused to do work in class and was disruptive. He was told to report to in-school suspension, but refused to go. He wrote "you can all go to hell" on the board. Exhibits D12, P76, P97.

45. On April 16, 2010, the Student was removed from class and sent to in-school suspension for one day when he entered school through a door students were not permitted to use. He was observed by a teacher, who could not identify him because he was wearing a sweatshirt with a hood over his head. Students are not permitted to have hoods over their heads in school buildings. When the teacher asked him to remove the hood, the Student refused. When the Student approached the teacher, he exhibited aggressive and intimidating behavior. P80.

46. On April 21, 2010, the Student was removed from class and sent to in-school suspension for two days after he wrote "what is your sexual preference" on a school computer during health class. Exhibit P82.

47. On April 29, 2010, the Student was emergency expelled from school. The Student was walking down a hallway at school, banging his water bottle against the wall. Another student said "knock it off." The Student entered the classroom approached students and shouted "shut the fuck up." The Student left the classroom and threw his water bottle down the hallway. The teacher present in the classroom reported:

In 8 years of teaching, it was the most scared I have been that a student would be physically harmed in my presence. [The Student] was blocking both potential exits from the room and I started considering how I could get the students out without being harmed.

District disciplinary records state, "need to schedule and IEP meeting to find a solution." Exhibits D12, P83, P97.

48. A MD team meeting was held on May 3, 2010, to review the expulsion. The District prepared a draft functional behavior assessment, manifestation determination, prior written notice, and addendum to the Student's IEP. The Parents disagreed with the District's proposed change in the Student's educational placement, and the drafts were not implemented. Exhibits D12, P85 - P87 P97.

49. On May 4, 2010, the Mother wrote to the District, stating the Parents believed the IEP team should update the Student's FBA, review the Student's behavior plan and modify it to address the

Student's behavior. The Parents noted the proposal to reduce the Student's school was confining him to his home. Exhibit P88.

### **The Student's Expulsion and Manifestation Determination Process**

50. On May 11, 2010, the Student was emergency expelled from school for sending threatening and dangerous text messages to another student. Exhibits J11, D12, P92.

51. On May 12, 2010, District Principal Dave Myers wrote the Parents, informing them that the Student had been given an emergency expulsion from the school for threats towards staff, students, and the school. The letter went on to state the Student sent at least one threatening and dangerous text message to another student stating, "I should just walk into school with an M-16 and end everyone, just give up, just like, fuck you all, I'm tired of you being stup (sic)." Exhibit P92.

52. On May 17, 2010, the District send the Parents a Meeting Notice and Invitation for an IEP meeting on May 20, 2010. Exhibit D2.

53. On May 20, 2010, the Student's IEP team, including the Mother, met and conducted a manifestation determination to determine if the Student's behavior leading to his emergency expulsion, sending threatening and dangerous text message to another student, was caused by or had a direct and substantial relationship to the Student's disabilities. The IEP team also considered the Student's new triennial reevaluation and developed a new behavioral assessment and new BIP.

54. In addition to the Mother, the IEP team included Gary Potts, Steve Bigelow, and Michael Penley, all of whom testified at hearing. The team began with a review and discussion of the Student's triennial evaluation.

55. The evaluation noted that in seventh grade Penny Tanner stated that the Student had a health impairment of possible Asperger's, ADHD, mood disorders, and learning disabilities. Exhibit D2, p. 1.

56. The evaluation noted the Student diagnoses included ADHD and sensory integration disorder, and that "now [the Student] has been diagnosed with Asperger's Disorder." It noted the Student qualified for special education and related services under the category health impaired with his current diagnosis of Asperger's. The evaluation went on to state:

Many of his behaviors are associated with Asperger's and may be remediated with educational strategies such as those listed by Penny Tanner in the letter of December of 2009. Behaviors more typical of Asperger's are eccentric and one-sided approaches to others. The letter from Penny Tanner does not address violent, threatening, and criminal behavior. The aggressive, dangerous, and threatening behaviors are not typically associated with Asperger's.

Exhibit D2, p. 3.

57. The IEP team decided to accept the evaluation. The Mother dissented, stating she disagreed when she signed the signature page. Exhibit D2, p. 5. The Mother explained during the meeting that she did not believe the evaluation addressed the Student's Asperger's.

58. By the time the team had completed discussion and consideration of the Student's triennial reevaluation, the Mother was exhausted and could not continue. The team agreed to meet again on May 25, 2010. There was no discussion of the FBA or the manifestation determination at the May 20, 2010, meeting.

59. The team, including the Mother, Mr. Potts, Mr. Bigelow, and Mr. Penley met again on May 25, 2010. The team reviewed the FBA, behavior plan and a draft Manifestation Determination form. Exhibit D13.

60. There was conflicting testimony at hearing whether the form as presented to the Mother was completed in its entirety except for signatures, or was only completed through Section A. After review and comparison of Exhibits J12 and D13, and consideration of the testimony, it is concluded the Mother was given Exhibit D13 at the start of the meeting on May 25, 2010.

61. The Mother requested but was not provided a copy of the transcript of the text messages the Student sent to a female student in his school. At the time, the District was unsure if it could release the transcript to the Mother, as the District had obtained the text messages from the parents of the female student. The Mother repeatedly stated during the meeting she could not meaningfully respond or participate without knowing the verbatim contents of the texts. She needed to know the verbatim contents in order to place the texts in "context."

62. Mr. Potts accurately summarized the contents of the text messages for the Mother on May 25, 2010, but the Mother was not provided a copy of the transcribed text messages until June 6, 2010.

63. The text messages were very broadly summarized in Section A of the MD form given to the Mother on May 25. Exhibit D13.

64. The text messages were sent by the Student over a period of several days, beginning at 4:56 p.m. on Friday, May 7, 2010, intermittently through Tuesday, May 11, 2010. None of the texts were sent during regular school hours. Exhibit J11.

65. The text messages included statements about the Student: walking into school with an M-16 and ending everyone, killing the female student's boyfriend; tearing the boyfriend's body into "chunks of flesh," wanting to die, suicide being great and everyone should try it, taking more pills than he is supposed to and wanting to end his suffering and if he died that night he probably wouldn't regret it, swearing he will kill the female student's boyfriend, burning the boyfriend's house down, selling his soul to Satan, cutting off the lips and skinning the face of the female student's boyfriend, walking into a store with a knife and killing as many people as he could, taking all 11 of his pills and being ready to fuck everyone up, going to attack someone and getting himself shot, and having alternate personalities, and referencing black magic, satanic spells, 12 gauge shotguns, lots of drugs, and not fucking with a drugged up Satanic lunatic, Excerpts from Exhibit J11.

66. The MD team meeting on May 25, 2010, was recorded, and a transcript of the recording is part of the record herein. Exhibit P107.

67. The meeting began with Mr. Potts reviewing drafts of the FBA and the MD forms. After discussion and consideration of the Student's disabilities and his behavior in sending the text messages, the team determined the behavior was not a manifestation of the Student's disabilities. The MD form noted the Mother felt she could not respond to the reported behaviors because she was not able to view the text message transcripts. Exhibit J12. The Mother disagreed with the MD team's decision.

68. Based upon the MD that the text messages were not caused by or had a direct and substantial relationship his disabilities, the Student was excluded from school from May 11, 2010, through the end of the school year. However the Student received services from June 1, 2010, through the end of the school year in an alternative setting. Exhibit P97.

### **Testimony of Expert Witnesses at the Due Process Hearing**

69. Steve Bigelow is employed by the District as both the assistant director of special education and as a school psychologist. He holds a Bachelor of Arts degree in developmental psychology, and is presently enrolled in a program at Central Washington University to earn a Masters Degree in School Psychology. He has been employed by the District since 1993. Mr. Bigelow's curriculum vitae appears at Exhibit D7. Mr. Bigelow offered opinion testimony whether the Student's behavior in sending the text messages was caused by or had a direct and substantial relationship to the Student's disabilities. Based upon his education, training, and experience, it is found Mr. Bigelow's opinion merits some weight.

70. Mr. Bigelow first came to know the Student during the end of the Student's fourth-grade year in 2005. He participated in the May 20 and May 25 meetings with the Student's IEP team. To Mr. Bigelow's knowledge, the District never requested or obtained any psychological evaluation of the Student prior to May 2010. In preparation for the May meetings, Mr. Bigelow reviewed the DSM-IV-TR section on Asperger's and The Educational Aspects of Autism Spectrum Disorders, Revised November 2008, what Mr. Bigelow identified as the state Autism Manual. Mr. Bigelow did not find any reference in either source that children with Asperger's typically exhibit symptoms including violence or threats violence. Mr. Bigelow opined the Student's behavior in sending the text messages was not caused by or had a direct and substantial relationship to his disabilities because the texts were not spontaneous or impulsive, were sent over a long period of time apparently from the Student's home, did not appear to be in response to any triggering event with in a social context. Mr. Bigelow contrasted the sending of the text messages with the Student's disciplinary history at the District where the Student's behaviors occurred in a "face-to-face" social setting.

71. Gary Potts has been employed by the District as director of special education for approximately four years, and immediately prior to that as the assistance director for four years. He has been employed by the District as a school psychologist since 1991. He holds a Masters in Education degree, is certified as a school psychologist, and has experience working with students with Autism Spectrum Disorder in the District. Prior to earning his degree, Mr. Potts was employed as an educational assistant in a school behavior program. His curriculum vitae appears at Exhibit D6. Mr. Potts offered opinion testimony whether the Student's behavior in sending the text messages was caused by or had a direct and substantial relationship to the Student's disabilities.

Based upon his education, training, and experience, it is found Mr. Potts' opinion merits some weight.

72. Mr. Potts first came to know the Student during fifth grade in 2005 or 2006. He participated in the May 20 and May 25 meetings with the Student's IEP team. In preparation for the meetings, Mr. Bigelow reviewed the text messages, the Student's IEP, discipline incident records, and evaluation, and the DSM-IV-TR section on Asperger's. Mr. Potts opined the Student's behavior in sending the text messages was not caused by or had a direct and substantial relationship to his disabilities for materially the same reasons as Mr. Bigelow identified. Mr. Potts opined that violence and threats of violence are not characteristic of children with Asperger's.

73. As of May 2010, Michael Penley was employed as a school psychologist with the District for approximately 18 years. He holds a Masters Degree in psychology, with an emphasis in school psychology. Mr. Penley's curriculum vitae appears at Exhibit D9. Mr. Penley offered opinion testimony whether the Student's behavior in sending the text messages was caused by or had a direct and substantial relationship to the Student's disabilities. Based upon his education, training, and experience, it is found Mr. Penley's opinion merits some weight.

74. Mr. Penley first came to know the Student during seventh grade in 2007. He helped design, create and implement the Student's behavior programs from seventh through ninth grades. Mr. Penley supervised the Student's one-on-one para-professional, Becky Cox. He met with the Student for one-on-one counseling. He drafted portions of the Student's IEPs and was responsible for leading the Student's May 2010 triennial reevaluation. Mr. Penley drafted the May 2010 manifestation determination form. Mr. Penley agrees that aggressive, dangerous and threatening behaviors are not typically associated with Asperger's. Mr. Potts opined the Student's behavior in sending the text messages was not caused by or had a direct and substantial relationship to his disabilities.

75. Stephen Wilson holds a Masters of Social Work (MSW) degree, and is presently a doctoral student in social work. He is a licensed independent clinical social worker, children's mental health specialist, minority mental health specialist, and developmental disabilities mental health specialist. Since 1992, Mr. Wilson has provided family, group, and emergency crisis mental health services to adolescents in his private practice. He has worked with and provided services to children on the Autism Spectrum since 1998. From 1988 to 1991, Mr. Wilson developed treatment planning, structure, and intake processes jointly with the educational team for adolescents in a self-contained special education classroom in the Focus program at Washington Middle School. This included involvement as a member on the students' IEP teams. Mr. Wilson's curriculum vitae appears at Exhibit P109. The Student was referred as a psychotherapy client to Mr. Wilson, and Mr. Wilson provided services to the Student from September to December 2010. As part of those services, Mr. Wilson received and reviewed the Student's educational records from the District. Mr. Wilson offered opinion testimony on the Student's behavior in sending the text messages and his disabilities. Based upon his education, training, and experience, it is found Mr. Penley's opinion merits some weight.

76. Mr. Wilson received the transcript of the text messages from the Mother. Mr. Wilson opined the language in the texts is consistent with an individual who has Asperger's. Many individuals with

Asperger's present with extremes in communication because their ability to self-monitor their use of language and their understanding of how their language or statements are perceived by others is impaired when they are upset. Mr. Wilson noted the DSM-IV-TR section on Asperger's identifies impairment in social communication, lack of judgement, and lack of understanding of social consequences as characteristics of individuals with Asperger's. In the Student's case, when he becomes angry or upset he tends to "blow up," and could engage in threats. The Student would not appreciate or understand how his such threatening statements would be perceived by others. Mr. Wilson opined the difference in settings between behaviors the Student has exhibited at school and sending the text message from home is not significant. The Student's inability to appreciate or understand the effects of his use of language on others does not change across settings.

77. Dr. Steven Altabet holds a Ph.D. in clinical and school psychology. His is licensed clinical psychologist in Washington State. Dr. Altabet holds a New York State Professional License in Psychology. He is licensed to practice as a psychologist and credentialed to practice Applied Behavior Analysis in Tennessee. He holds a national certificate in school psychology from the National Association of School Psychologists. From December 2008 through the present time, Dr. Altabet has been the clinic director for the University of Washington Autism Center in the Tacoma clinic. His prior work experience includes employment as director of clinical services, psychologist, behavioral medicine unit coordinator, school psychologist, and applied behavior specialist. Dr. Altabet has conducted research and authored or co-authored peer-reviewed publications. He has made professional presentations on topics including: Autism Spectrum Disorders, childhood behavior disorders, emotional regulation and social skill development for children and adolescents, functional behavioral analysis, needs of young adult with Autism Spectrum Disorders, teaching emotional recognition and coping skills to individuals with Autism Spectrum Disorders, positive behavior practices for individuals with ADHD, and the use of behavioral and psychotherapy for individuals with ASD. Dr. Altabet has worked professionally in the area of Autism since the 1980s. Dr. Altabet's curriculum vitae appears at Exhibit P108.

78. Dr. Altabet examined and evaluated the Student as part of an independent educational evaluation (IEE) over a three-day period in October 2010. Dr. Altabet observed the Student to exhibit difficulty with decision making and judgment as well as poor insight, and was highly prompt dependent. Assessment of the Student determined he had relative weaknesses in expressive communication and interpersonal relations. The results were consistent with individuals diagnosed with Autism Spectrum Disorders. Assessment using the Child Behavior Checklist found clinically significant impairment regarding anxiety, depressed mood and thought problems. Social problems, aggression and oppositional problems were rated as borderline. The Student exhibited difficulty recognizing subtle emotions, as well as expressing his own emotions relative to his age and intellectual ability. Dr. Altabet diagnosed the Student with Asperger's Disorder, with a rule-out for Depressive Disorder - Not Otherwise Specified. Dr. Altabet concluded the Student's level of impairment along the communication, social and behavioral dimensions was severe and pervasive enough to meet the criterion for an Autism Spectrum Disorder. The Student has high average intelligence and well developed verbal skills, but poor social and emotional insight. Exhibit J14.

79. Dr. Altabet provided opinion testimony at hearing regarding the Student and the impact of the Student's Asperger's in relation to the text messages. Based upon his education, training,

experience and evaluation of the Student, it is found that Dr. Altabet opinions merit very substantial weight, and more weight than any other opinion testimony of record.

80. Dr. Altabet opined that responses like the Student's text messages are consistent with a person who has an Autism Spectrum Disorder and is severely depressed. Individuals with Asperger's who are depressed think a lot about death. Dr. Altabet opined it is highly likely the Student was depressed at the time he sent the text messages. In Dr. Altabet's opinion, the text messages did not reflect impulsivity on the part of the Student so much as they reflected an obsessive element. When the Student did not receive the answers he desired from the female student, he kept persisting. The Student could not just "let it go." He could not get over it on an emotional level. This single-minded inability to adapt and lack of flexibility is characteristic of Asperger's. Dr. Altabet opined it was likely the Student was willing to say anything in the text messages to get what he wanted in terms of a response from the female student.

81. Both Dr. Altabet and Mr. Wilson confirmed the use of a token economy as an element of a behavior improvement for students on the Autism Spectrum is generally accepted within the professional community. Dr. Altabet opined the BIP in the Student's October 2009 IEP is typical of BIPs for individuals with Asperger's.

### **Request for Due Process Hearing**

82. The Parents filed a Due Process Hearing Request on November 15, 2010.

## **CONCLUSIONS OF LAW**

### **Jurisdiction and Burden of Proof**

1. OAH has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 U.S.C. §1401 *et seq.* (Individuals with Disabilities Education Improvement 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) §300 *et seq.*, 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 US 49 (2005). The party seeking relief in this case are the Parents. The Parents therefore have the burden of proof.

### **Free Appropriate Public Education and Educational Benefit**

3. A student determined eligible to receive special education and related services is entitled to a free appropriate public education (FAPE). FAPE means special education and related services that have been provided to the student at public expense and without charge, that meet State educational standards, and that are provided in conformity with the student's individualized education program (IEP). 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; WAC 392-172A-01080.

4. There are both procedural and substantive tests to determine if a school district has complied with the IDEA and provided a student FAPE. Reviewing courts must inquire:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

*Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176 (1982). "If a violation of the IDEA is found in either regard, the court shall 'grant such relief as [it] deems appropriate.'" *Hacienda La Puente Sch. Dist. of L.A. v. Honig*, 976 F.2d 487, 492 (9<sup>th</sup> Cir. 1992). In this case, the Parent has alleged both procedural and substantive violations of the IDEA.

An inquiry must be made into whether a school district has met the "rigorous procedural requirements of the IDEA" and any "State standards that impose a greater duty." *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9<sup>th</sup> Cir. 1994). If a school district cannot demonstrate that it has complied with the procedures in the IDEA and state education laws, the question of whether its proposed program meets the substantive benefit test need not be addressed. *W.G. v. Target Range Sch. Dist. No. 23, Bd. of Trustees*, 960 F.2d 1479, 1485 (9<sup>th</sup> Cir. 1992).

5. Procedural violations do not automatically require a finding of a denial of FAPE. However, procedural violations that impede the student's right to FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefit clearly result in the denial of FAPE. 34 C.F.R. § 300.513(a)(2); WAC 392-172A-05105(2).

6. The second prong of the *Rowley* test to determine whether a district has substantively complied with the IDEA and provided FAPE is whether the IEP was reasonably calculated to enable a student to receive educational benefit. *Rowley*, at 207. The standard is met if a district provides personalized instruction with sufficient supportive services to permit a student to benefit from the instruction. *Id.* at 189. Whether an IEP was reasonably calculated to provide educational benefit is measured at the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9<sup>th</sup> Cir. 1999). The pertinent question is whether the IEP was "appropriately designed and implemented so as to convey [a student] with meaningful benefit." *Id.*

7. A district is not obligated to provide the best instruction. FAPE does not mean the absolutely best or potential-maximizing education for the individual child. Districts must provide "'a basic floor of opportunity' through a program 'individually designed to provide educational benefit to the handicapped child.'" *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9<sup>th</sup> Cir. 1987), citing *Rowley*, 458 U.S. at 201. FAPE is provided if the student derives more than minimal or trivial progress in a placement, considering the student's unique characteristics. *Florence County Sch. Dist. Four v. Carter*, 950 F.2d 156, 160 (4<sup>th</sup> Cir. 1991), *affd.* 510 U.S. 7 (1993).

8. In the Ninth Circuit, educational progress is not only measured by a student demonstrating competence in the academic setting, but also by the progress a student makes on the central goals of the IEP. *County of San Diego v. Calif. Special Education Hearing Office*, 93 F.3d 1458, 1467 (9<sup>th</sup> Cir. 1996). Educational needs are to be construed to include not only a student's ability to score

well on a test, but also "the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs." *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9<sup>th</sup> Cir. 1996).

#### **Whether the Student's IEP Implemented as of May 11, 2010, was Appropriate**

9. The Parents assert the Student's IEP implemented as of May 11, 2010, was not appropriate because it was not reasonably calculated to produce progress in the Student's behavioral goal, and because the District did not respond to the Parent's concerns about its appropriateness. Resolution of this issue first requires a determination of what IEP was implemented as of May 11, 2010. It is concluded the IEP implemented as of that date was the October 2009 IEP (Exhibit J4) as modified by the Supplemental Page to IEP Behavior Management Plan (Exhibit P47). Although there was an "IEP Addendum" implemented November 9, 2009, which materially changed the Student's educational placement by reducing his school day, the Student returned to a full day of school on March 1, 2010, effectively negating implementation of the IEP Addendum.

10. Whether an IEP was reasonably calculated to provide educational benefit is measured at the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (1999, 9<sup>th</sup> Cir.). The pertinent question is whether the IEP was "appropriately designed and implemented so as to convey [a student] with meaningful benefit." *Id.* Therefore, the appropriateness of the IEP implemented as of May 11, 2010, must be determined based upon a review of the IEP as of October 23, 2010, when the IEP was modified by the Behavior Management Plan (BMP).

11. The IEP as modified by the BMP provided the Student with 30 minutes per week of services in a therapy room, access to a para-professional to assist with behavior management on an as-needed basis, established a token economy and regular progress reports for the Parents. Both of the Parents' expert witnesses confirmed that use of a token economy is a recognized tool to help improve targeted behaviors for people with Asperger's. The District made reasoned choices when it proposed the behavior components of the Student's IEP. The Parents have failed to offer evidence to prove the IEP in effect as of May 11, 2010, was not reasonably calculated or designed to provide the Student an educational benefit vis-a-vis his behavioral goal.

12. The Parents assert the IEP implemented as of May 11, 2010, was not appropriate because the District did not respond to their concerns about its appropriateness. This is an argument precluded by the "snapshot" analysis mandated in *Adams*. The appropriateness of the behavioral goal and the services and supports provided to help the Student achieve progress toward that goal is determined at the time the IEP is developed.

#### **Whether the District Denied the Parents an Opportunity to Participate in Meetings on May 20 and May 25, 2010**

13. The Parents assert they were excluded from meaningful participation in the two meetings in May 2010 because the District predetermined the result or outcome of the meetings, and did not provide the Mother with a verbatim transcript of the text messages at the meetings.

14. The IDEA requires that parents be given the opportunity to actively participate in their child's education, both in the formulation and review of the student's IEP. WAC 392-172A-03040, -03050, -03095, -03100, and -03115. The appendix to the Federal Regulations gives further definition to the parents' role in the process:

The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing and revising the IEP for their child. This is an active role in which the parents (1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; (2) participate in discussions about the child's need for special education and related services and supplementary aids and services; and (3) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting.

Fed. Reg. 64:48, page 12473 (1999).

The importance of parental participation in the special education process was discussed at length by the Ninth Circuit Court of Appeals in *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9<sup>th</sup> Cir. 2001). The Court of Appeals stated:

Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed. In *Target Range*, for example we held that the Target Range School District "failed to fulfill the goal of parental participation in the IEP process and failed to develop a complete and sufficiently individualized educational program according to the procedures specified by the Act. 960 F.2d at 1485. Because Target Range had developed the IEP without the involvement of the child's parents, his teacher, or the school in violation of 20 U.S.C. §1401(a)(19), its decision to place the child in its special education class did not take into consideration the recommendations from those who best knew the child. *Id.* at 1484. We therefore held that Target Range's refusal to include the child's parents in the IEP process denied the child a FAPE and that his parents were entitled to reimbursement for the cost of providing an appropriate education *id.* at 1485-86.

*Id.* at 892. In *Amanda J.*, the Court of Appeals ultimately determined that the school district's failure to provide the parents with information of the student's previously unknown diagnosis of autism resulted in a denial of FAPE because it infringed upon the parents' ability to meaningfully participate in the IEP process. *Id.* at 892-894.

15. Parents have the right and are mandatory participants for manifestation determinations. WAC 392-172A-05145(5)(a)(i).

16. Courts have recognized that professional educators will prepare for IEP team and MD meetings, discuss matters in advance, and have an opinion. See, *T.P. and S.P. Ex rel. S.P. v.*

*Mamaroneck Union Free Sch. Dist.*, 51 IDELR 176 (2<sup>nd</sup> Cir. 2009); *Fitzgerald v. Fairfax County Sch. Bd.*, 50 IDELR 165 (E.D. Va. 2008). Members of the team are expected to attend a meeting with a mind that is open, but not blank. They can know about and discuss the facts in a particular case, and have opinions about it before the team meeting. The fact that draft documents are created in advance of a team meeting does not alone establish that decisions are predetermined. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115 (9<sup>th</sup> Cir. 2007).

17. The Mother asserted the MD form was completed when it was given to her either before or at the May 20 or 25 meetings. It is found as fact, however, that the form was completed only as to Section A. Finding of Fact 60. The partial completion of the FBA and MD documents in draft form is insufficient evidence to establish the District predetermined the outcome of the MD process.

18. The Parents assert Mr. Potts' statements reviewing the draft documents at the beginning of the May 25 meeting establish the District predetermined the MD decision. Review of the transcript in its entirety does not inevitably lead to that conclusion. Reasonable minds can differ as to the correct interpretation of Mr. Potts' statements. Absent more compelling evidence, it is concluded Mr. Potts' statement at the May 25 meeting does not establish the District predetermined the manifestation determination.

19. The Parents assert the District's refusal to provide the Mother with a verbatim transcript of the text messages for the May meetings prevented her from meaningfully participating in the MD process. Mr. Potts accurately described the text messages for the Mother and the MD form described the nature and general content of the text messages. While it would have been preferable if the Parents had the verbatim transcript for the May meetings, it cannot be concluded the Mother was denied a meaningful opportunity to participate in the meetings because she was unable to place the text messages in context. A determination of whether the text messages constituted actual threats is not relevant to the MD process. The MD process is concerned with whether the text messages were caused by or had a direct and substantial relationship to the Student's disabilities. It is concluded the District's failure to provide the Parents verbatim transcripts of the text messages did not significantly impede the Parents' opportunity to participate in the May 2010 meetings.

### **Emergency Expulsion - Manifestation Determination**

20. Whether particular conduct justifies an emergency expulsion under a district code of student conduct is not an issue under the IDEA. It is outside the jurisdiction of this tribunal, and is governed by other procedures. WAC 392-400-300 et seq.

21. The issue under the IDEA is whether the District team correctly determined that the conduct in question was not a manifestation of the Student's disabilities. The pertinent regulation provides that conduct is a manifestation of 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.

WAC 392-172A-05145(5)(a)(i) and (ii).

22. School districts are required to consider not only the disability(ies) upon which a student's special education eligibility is based, but "must review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parents" in making a manifestation determination. WAC 392-172A-05145(5). In addition, school districts "may consider any unique circumstances on a case-by-case basis when determining whether a change in placement . . . is appropriate for a student eligible for special education services, who violates a code of student conduct." WAC 392-172A-05145(1).

23. Cases from Washington and other jurisdictions have established that districts violate the IDEA when their manifestation determinations are restricted to the disability(ies) upon which a student's special education eligibility is based, to the exclusion of other considerations. See *Richland Sch. Dist. v. Thomas P.*, 32 IDELR 233 (W.D. Wisc. 2000) ("At the time of the vandalism incident, P. was determined to be eligible for such education and related services, albeit for a different disability than the one he asserts led to his misconduct. Under the statute's plain language, however, it appears that [former 20 USC] § 1415(k)(4)(C) applies to students alleging both a disability for which services are already being provided and a 'new' disability for which they are not."); *Murrieta Valley Unified Sch. Dist.*, 53 IDELR 108 (Calif. SEA 2009) ("The manifestation determination team was obliged to consider all relevant information in Student's education files, relevant observations of teachers and relevant information from Student's parents, in determining whether Student's conduct was caused by, or had a direct and substantial relationship to Student's disability. This the team did not do. . . . The evidence was strong that to the extent the team did consider any of Student's disabilities as potential causal factors of Student's conduct, the team only considered Student's speech and language deficiencies, not Student's cognitive impairment or mental age"); *Quincy (WA) Sch. Dist.*, 52 IDELR 170 (OCR Seattle 2009) (School district significantly changed the student's placement based on incomplete information. It failed to consider a pending medical evaluation or evaluative data regarding a possible additional disability. Instead, its decision was based merely on whether the student's misconduct was a reflection of his specific learning disability, which was his eligibility category.); *Snohomish Sch. Dist.*, 103 LRP 38279 (Wash. SEA 2003) (the student's episode of depression that occurred at the time of the misconduct can be considered a disability for the purposes of the manifestation determination, even though it is not the disability for which he previously received special education).

24. School districts have a duty to reconvene the manifestation determination team to reconsider a determination of no-manifestation if new evaluative information arrives while a student is still expelled. See *Quincy (WA) Sch. Dist.*, *supra*, 52 IDELR 170 (OCR Seattle 2009) ("Although additional evaluative information arrived during the time the student was excluded from school, the district did not reconsider the manifestation determination or the student's alternative placement after receiving the additional information" and this was a violation of law.)

25. Administrative law judges are not restricted to considering only the information known at the time the team made its manifestation determination. Rather, ALJs may consider new information that has since become available. See *Richland Sch. Dist. v. Thomas P.*, *supra*, 32 IDELR 233 (W.D. Wisc. 2000) ("Under the terms of the IDEA, it was not improper for the ALJ to consider evidence of P.'s attention deficit disorder and mood disorder even though P. was not diagnosed with

such disorders until after the district's manifestation determination." The "snapshot" rationale of *Adams v. Oregon*, 195 F.3d 1141, 1149 (9<sup>th</sup> Cir. 1999) does not apply to manifestation determinations which, unlike IEPs, are by their nature retrospective, not prospective); *In re: Student with a Disability*, 53 IDELR 173 (Wisc. SEA 2009) ("Although the therapist's diagnosis of post-traumatic stress disorder was not known at the time of the misconduct and the first manifestation determination, it is admissible and credible evidence that is relevant to the determination of whether the Student's misconduct was a manifestation of his disability."); *see also, Quincy (WA) Sch. Dist., supra*, 52 IDELR 170 (OCR Seattle 2009) (OCR considered diagnoses made after the school team made its manifestation determination).

26. The regulation on manifestation determinations does not require that the conduct at issue be solely or exclusively caused by a disability. Other causative factors may be present in addition to the disability. The regulation presents two possibilities: either the conduct "was caused by" a disability or it "had a direct and substantial relationship to" a disability. The latter is something less than sole causation. WAC 392-172A-05145(5)(i). A disability may not have a direct or substantial relationship to a student's disability if the relationship is "attenuated," such as a behavior associated with a loss of self-esteem that arises from the disability. *Doe v. Maher*, 793 F.2d 1470, 1480 (9<sup>th</sup> Cir. 1986), *aff'd as modified sub nom. Honig v. Doe*, 484 U.S. 305 (1988).

27. The Parents assert the District erred when it determined the Student's behavior in sending the text messages was not caused by or had a direct and substantial relationship to his disabilities. Resolution of this issue clearly hinges on analysis of the expert opinion testimony presented by both sides at hearing. The opinions and the bases for the opinions of the parties' experts have been carefully set out and weighted in the Findings of Fact. Before further consideration of those opinions, however, an important issue warrants discussion. The District argued that neither Dr. Altabet or Mr. Wilson expressed an opinion based on the correct legal standard for the causal connection between a student's conduct or behavior and a student's disability. The correct legal standard, set out above, is whether the behavior is *caused by or had a direct and substantial relationship to the disability*. This is both the correct legal standard and the ultimate legal question which this Tribunal must determine. A careful review of the record in this matter supports the District's argument that neither Dr. Altabet or Mr. Wilson were clearly posed a question setting out the precise legal standard. That does not, however, preclude any consideration of the testimony of these two witnesses. The role of expert testimony is to assist the Tribunal in understanding the evidence. The failure of an expert witness to express an opinion on the ultimate legal issue(s) does not preclude consideration of the expert witnesses' testimony.

28. There is no question based upon his very relevant education, training, experience, and evaluation of the Student, that Dr. Altabet is clearly the most qualified witness to provide expert opinion testimony in this matter. While the District's three witnesses have relevant credentials and experience, none have the documented expertise in the assessment, diagnosis and treatment of individuals with ASD or Asperger's to compare with Dr. Altabet. Mr. Wilson's credentials and experience more closely compare with those of the District witnesses. Dr. Altabet gave a nuanced and clear explanation connecting symptoms of Asperger's to the Student's text messages.

29. It is troublesome the extent to which the District witnesses relied upon a review of the DSM-IV-TR section on Asperger's to support their opinions the Student's behavior was not caused by or had

a direct and substantial relationship to his disabilities. The witnesses' interpretation of the information in the DSM, that there was no express identification of Asperger's being associated with threatening or dangerous behaviors, appears simplistic. The DSM clearly states a essential feature of Asperger's is severe and sustained impairment in social interaction. There is failure to develop appropriate peer relationships. Mr. Wilson pointed out where the DSM identifies impairment in social communication, lack of judgment and a lack of understanding of social consequences as features of Asperger's. The so-called state autism manual (Exhibit J2), referenced by Mr. Bigelow, notes that characteristics of Asperger's will vary at different ages for individual children, and that challenging behaviors including physical aggression, defiance, and property destruction are among the most difficult and stressful issues faced by parents and educators of children with ASD. It is also troubling how all the District witness opined that threatening and dangerous behaviors are not "typical" or "commonly associated" with Asperger's. The MD team is required to review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parents in making a manifestation determination. WAC 392-172A-05145(5), above. In addition, school districts may consider any unique circumstances on a case-by-case basis. This bespeaks of a careful, detailed, and *individualized* determination process. Relying on the fact that a particular behavior may not be typical or commonly associated with a diagnosis or disability runs counter to such an individualized MD determination.

30. The District witnesses generally agreed the text messages were not caused by or related to the Student's Asperger's because they were sent when the Student was outside of school, were not sent in the context of a face-to-face social situation, and there did not appear to be any triggering event. Dr. Altabet addressed these points in his testimony, providing a reasonable explanation of how these factors are not inconsistent with the text messages being caused by symptoms of the Student's Asperger's. The District witnesses also identified the intensity or severity of the threats in the text messages as being qualitatively different than the behaviors exhibited by the Student at school. This intensity or severity argument has been addressed and dismissed as relevant when otherwise consistent with a disability. *Jonathan G. v. Caddo Parish Sch. Bd.*, 875 F. Sup. 352, (W.D. La. 1994). Nevertheless, the District had a clear and well documented history for the Student evidencing examples of extreme graphic, verbal, and physical aggression and threatening behaviors. The District witnesses also cited the fact that the text messages were written, whereas the Student's behaviors at school were verbal outbursts and threats. Again, this analysis appears superficial. Verbal or written, the Student's outbursts at school and the text messages both involve use of *language*, albeit in different forms. Language is part and parcel of social communication. It is clear the Student's ability to communicate in social interactions, be it verbal or written communication, is severely impacted by his Asperger's.

31. Viewing all the evidence as a gestalt, a clear picture emerges. The Student has a long and well documented history of aggressive, threatening, and dangerous behaviors at school. It encompasses both verbal and physical behaviors. On at least one occasion the District determined such behavior was a manifestation of the Student's disabilities. The factors identified by the District witnesses at hearing to support a determination the text messages are not a manifestation of the Student's disabilities are not compelling, and have been rebutted by Dr. Altabet's testimony, which is deserving of greater weight than that of the District witnesses. Dr. Altabet, and to a lesser but not insignificant degree Mr. Wilson, have provided sufficient credible evidence to support a conclusion the Student's behavior in sending the text messages had a direct and substantial relationship to his

Asperger's. It is concluded the District erred when it determined otherwise. It is concluded the Student's behavior in sending the text messages has a direct and substantial relationship to his disabilities.

32. The District MD team, including the Parents, should have conducted a FBA and implemented a BIP for the Student. If a BIP already existed, the team should have reviewed it and modified it as necessary to address the Student's behavior, and return the Student to the placement from which he had been removed. WAC 392-172A-05145(6)

**Whether the District Committed a Procedural Violation by Failing to Request a Due Process Hearing**

33. WAC 392-172A-05160 provides:

Appeal of placement decisions and manifestation determinations.

(1) The parent of a student eligible for special education who disagrees with any decision regarding placement under WAC 392-172A-05145 and 392-172A-05155, or the manifestation determination under WAC 392-172A-05145(5), or a school district that believes that maintaining the current placement of the student is substantially likely to result in injury to the student or others, may appeal the decision by requesting a due process hearing. The hearing is requested by filing a due process hearing request pursuant to WAC 392-172A-05080 and 392-172A-05085.

(2)(a) An administrative law judge under WAC 392-172A-05095 hears, and makes a determination regarding an appeal under subsection (1) of this section.

(b) In making the determination under (a) of this subsection, the administrative law judge may:

(i) Return the student to the placement from which the student was removed if the administrative law judge determines that the removal was a violation of WAC 392-172A-05145 through 392-172A-05155 or that the student's behavior was a manifestation of the student's disability; or

(ii) Order a change of placement of the student to an appropriate interim alternative educational setting for not more than forty-five school days if the administrative law judge determines that maintaining the current placement of the student is substantially likely to result in injury to the student or to others.

(c) The procedures under subsection (1) of this section and (b) of this subsection may be repeated, if the school district believes that returning the student to the original placement is substantially likely to result in injury to the student or to others.

(3) Whenever a hearing is requested under subsection (1) of this section, the parents and the school district involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of WAC 392-172A-05080 through 392-172A-05090 and 392-172A-05100 through 392-172A-05110, except:

(a) The due process hearing must be expedited, and must occur within twenty school days of the date the due process hearing request is filed. The administrative law judge must make a

determination within ten school days after the hearing.

(b) Unless the parents and school district agree in writing to waive the resolution meeting described in (b)(i) of this subsection, or agree to use the mediation process:

(i) A resolution meeting must occur within seven days of receiving notice of the due process hearing request; and

(ii) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within fifteen days of the receipt of the due process hearing request.

(4) The administrative hearing decisions on expedited due process hearings may be appealed, by initiating a civil action consistent with WAC 392-172A-05115.

The Parents assert the District violated the above rule when it did not request a hearing to determine if maintaining the Student's placement as of May 11, 2010, was substantially likely to result in injury to the Student or others. This argument is misplaced. This is not a case that arose where a school district believed maintaining a student in a current placement was substantially likely to result in injury to the student or others. The District carried out a manifestation determination. The purpose of the manifestation determination was not to reach any decision regarding whether the Student was dangerous. The fact that a manifestation determination has subsequently been determined incorrect does not implicate WAC 392-172A-05160.

#### **The Parent's Requested Remedies**

34. Given the conclusions above, the Parents' requested remedies of a determination the text messages were a manifestation of the Student's disabilities and a decision he should have been returned to his educational placement in the District should be granted.

35. The Parents have requested an order to expunge the Student's emergency expulsion and long-term suspension from his educational records with the District. This remedy should be denied. Both the IDEA and Washington Administrative Code provide parents with a process to seek amendment of a student's educational records. 34 C.F.R. § 300.618; WAC 392-172A-05215, *et. seq.* The Parents may pursue a hearing under those authorities to have the Student's records expunged based upon this decision and order.

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## ORDER

1. The Student's behavior in sending the text messages has a direct and substantial relationship to his disabilities. The District's May 25, 2010, manifestation determination is incorrect.
2. The Student should have been returned to his educational placement with the District in effect as of May 11, 2010, when the Student was emergency expelled from the District.
3. The Parents' request for an order expunging the Student's emergency expulsion and long-term suspension from his educational records with the District is denied.

Signed at Seattle, Washington on May 18, 2011.



MATTHEW D. WACKER  
Administrative Law Judge  
Office of Administrative Hearings

### Final Decision

### Further Appeal Rights: Information About Your Right To Bring A Petition For Reconsideration And Your Right To Bring A Civil Action

#### Reconsideration

This is a final administrative decision. Pursuant to RCW 34.05.470, either party may file a petition for reconsideration within 10 days after the ALJ has served the parties with the decision. Service of the decision upon the parties is defined as the date of mailing of this decision to the parties. A petition for reconsideration must be filed with the ALJ at his/her address and served on each party to the proceeding. The filing of a petition for reconsideration is not required before bringing a civil action under the appeal provisions of the IDEA.

#### 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. If a timely petition for reconsideration is filed, this ninety-day period will begin to run after the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). 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



Gary Potts, Director, Special Services  
Yelm Community Schools  
107 - 1<sup>st</sup> St N/PO Box 476  
Yelm, WA 98597-0476

Jackie Kettman-Thomas, Attorney at Law  
Futurity Legal Services, PLLC  
2952 Limited Lane NW, Suite A  
Olympia, WA 98502

David Hokit, Attorney at Law  
Curran Law Firm  
555 W Smith St / PO Box 140  
Kent, WA 98035

Jeannette A. Cohen  
17826 1<sup>st</sup> Avenue NW  
Shoreline, WA 98177

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