

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

MAILED

NOV 10 2011

IN THE MATTER OF:

RENTON SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2011-SE-0063X

SEATTLE-OAH

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Michelle C. Mentzer in Seattle, Washington, on October 4 and 5, 2011.¹ The Parents of the Student whose education is at issue² appeared and represented themselves. The Renton School District (District) was represented by James Dionne, attorney at law. The following is hereby entered:

STATEMENT OF THE CASE

The Parents filed a due process hearing request (complaint) on September 6, 2011. A prehearing conference was held on September 23, 2011. At that conference, the ALJ ruled that no disciplinary matter was at issue and the expedited status previously assigned to the case was stricken. See First Prehearing Order of September 26, 2011.³

Both parties nevertheless elected to proceed to hearing on the date originally scheduled when the case was on an expedited schedule, October 4, 2011. Since both parties filed written waivers of the resolution meeting, there was no bar to the hearing taking place less than 30 days after the complaint was filed.⁴ The hearing began 28 days after the complaint was filed.

Decision Due Date

The due date for the written decision is 21 days after the record of the hearing closed, pursuant to a District request for continuance of the decision due date. See First Prehearing Order of September 26, 2011. The record of the hearing closed on October 24, 2011 with the filing of post-hearing briefs. Twenty-one days thereafter is November 14, 2011. The due date for the written decision is therefore November 14, 2011.

¹ The hearing was scheduled for two additional days, October 6 and 17, 2011, but those days were not needed. The hearing was completed on October 5, 2011.

² 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."

³ Although this order was titled "First Prehearing Order," there were no subsequent prehearing orders.

⁴ See Individuals with Disabilities Education Act (IDEA), 20 U.S. Code (USC) § 1415(f)(1)(B).

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Court Exhibits: C-1 and C-2;
Parent Exhibits: P-1 through P-13, P-15, P-16, P-18 and P-19; and
District Exhibits: D-1 through D-10.

The following witnesses testified under oath: The Mother; John Dunne, M.D.; Kay Hermann (District Interim Special Education Coordinator); and Kathleen (Zanolli) Prosch-Jensen, Ph.D.

ISSUES

1. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by failing to return the Student to a placement in a Renton School District high school for 6.5 hours per day of instruction after the expiration of the interim alternative educational setting (IAES) placement ordered in cause no. 2011-SE-0018X; and
2. Whether the Parents are entitled to the following requested remedies, or other equitable relief as appropriate:
 - a. Return of the Student to a placement in a District high school for 6.5 hours per day of instruction;
 - b. Or in the alternative, provision of instruction in the Student's home for 6.5 hours per day, including the presence of a one-on-one paraeducator during those hours;
 - c. As compensatory education, the District shall make up all instructional hours and services not provided since the time the IAES expired and the Student was not placed in a District high school; and
 - d. Compensation for expenses related to providing paid adult supervision for the Student while the Parents were at work since the time the IAES expired and the Student was not placed in a District high school.

See First Prehearing Order of September 26, 2011.

FINDINGS OF FACT

Background

1. The Parents and the District were parties to a related case that involved three complaints consolidated for hearing: cause nos. 2010-SE-0097, 2011-SE-0017X and 2011-SE-0018X. The Amended Findings of Fact, Conclusions of Law, and Order in the related case were entered on April 11, 2011. D-2. The April 11, 2011 decision is referred to herein as the "prior decision." It was

admitted in evidence by agreement of the parties as Exhibit D-2. The Findings of Fact from the prior decision are adopted and incorporated herein.

2. The prior decision ordered that two evaluations be completed. Those evaluations were started in October 2010, but were interrupted when the Parents withdrew consent for them. Pursuant to the prior decision, Dr. Kathleen (Zanoli) Prosch-Jensen completed her functional behavior assessment (FBA) of the Student in May 2011, and Dr. Hower Kwon completed his psychiatric evaluation of the Student in June 2011. Their professional backgrounds are summarized in the prior decision at footnotes 6 and 7, respectively. D-2.⁵

3. The prior decision also ordered that the Student be placed in an interim alternative educational setting (IAES) of home instruction for up to 43 days, or for a shorter period if the District completed its evaluation and the individualized education program (IEP) team determined an appropriate placement for the Student sooner than 43 days.

4. The Student did well in the IAES, where he was taught by a District special education teacher and paraeducator. A District autism coordinator who has worked with the Student for many years sometimes accompanied them. A community care aide and an adult family member were also present in the home during instruction.

5. Pursuant to the prior decision, the IAES began at 60 minutes per day, five days a week. During the IAES, the District increased that time to 90 minutes per day. The Student also received 30 minutes per week of speech language therapy at home. The Student was 100% compliant during the IAES and made educational progress.

6. On June 17, 2011, the Student's IEP team adopted the following documents: evaluation report (P-10), IEP (P-3), FBA (P-7), and Behavior Intervention Plan (BIP) (P-5).

Evaluation and IEP - June 2011

7. The Parents signed the evaluation report and the IEP,⁶ but submitted written comments on their areas of disagreement. The Parents' comments were attached as part of those documents. The Parents' areas of disagreement with the evaluation and the IEP are not at issue in this case.

8. The evaluation addresses the Student's need for small-group and social interaction. It states:

⁵ In the present case, Dr. Kwon did not testify at the hearing but his evaluation report was admitted by agreement of the parties. P-11. Dr. Prosch-Jensen testified at the hearing but her FBA was not offered in evidence by either party. The District's FBA incorporated material from Dr. Prosch-Jensen's FBA. The District's FBA was admitted by agreement of the parties. P-7.

⁶ Only the Mother's signature appears on the evaluation and IEP, though the Father was present at the meeting. The Father handwrote comments at the end of the FBA and BIP, and submitted written comments on all four documents, both before and after the June 17, 2011 meeting at which the documents were adopted.

Due to difficulties with Social Participation, [the Student] may benefit from role playing, modeling, and practicing appropriate social skills and responses in a variety of functional daily living tasks from 1:1 to small group settings with teachers & classmates. He may also benefit from having a "peer mentor" (another student within the classroom) where a buddy system is formed to facilitate learning social skills. He should be encouraged to engage in small team activities once he is able to demonstrate carry-over in 1:1 & small group interactions.

P-10, p. 23. The Student's current teacher (home instruction) stated in the evaluation that the Student "does best in a structured, small group setting." P-10, p. 25.

9. The IEP likewise contains many provisions for small-group and social interaction. The transition plan provides that in 10th grade (the current school year) and 11th grade, the Student will receive "instruction in the area of following directions, social skills, and communications with peers and adults." This is to prepare him for 12th grade, when he will "gain experience with interactions with the public, navigate public transportation, and accessing [sic] commercial businesses (i.e.- grocery stores)." P-3, p. 2.

10. The IEP's section on present level of adaptive behavior states: "Difficulties within the social domain included basic social skills, expressing feelings, and subtle interpersonal awareness." P-3, p. 7. The section on present level of communication skills states the Student's current needs include "peer interactions and response to questions". P-3, p. 9. The section on curricular adaptations includes: "provide small group instruction" and "encourage participation in group activities". P-3, p. 12.

11. In the IEP's annual goals, nearly all of the Student's objectives are to be delivered in a "small group setting". Some are to be delivered "1:1 and/or small group setting." P-3, pp. 4 - 10.

12. The IEP's service matrix provides for full-time special education (1,775 minutes per week out of 1,775), which averages 5.9 hours per day. P-3, p. 16. The Parents testified the full school day is 6.5 hours. Assuming this is correct, the additional 0.6 hour may be for passing time, lunch and/or recess.⁷

13. The IEP sets forth the role of the Student's full-time one-on-one paraeducator:

[The Student] requires one on one paraeducator assistance to provide prompts and assistance during general education day and during SDI (special education) in order for him to be successful. The paraeducator also provides prompts and attends to safety measures during transitional times, lunch, and to/from the bus.

⁷ There is an apparent discrepancy between the number of minutes of special education mentioned in the FBA (300 minutes per day) and the IEP (1,775 minutes per week, or 355 minutes per day). P-7, p. 2; P-3, p. 16. That is because the FBA discusses May 2011, when the Student was in 9th grade under a different IEP. Under that IEP he had one general education class, PE, so he had fewer minutes of special education. Under the current IEP of June 2011, because the Student was placed at a private school for children with disabilities, there are no general education classes so all of his time is in special education.

P-3, p. 16.⁸

14. The IEP placed the Student at a private special day school for the 2011-2012 school year. All other placement options, including home instruction, were marked as considered and rejected. P-3, pp. 16 - 17. The IEP provided for extended school year (ESY) services during the summer of 2011 to prepare the Student for a successful transition to the private school in the fall.

15. The private school agreed upon by the parties was the Children's Institute for Learning Differences (CHILD) on Mercer Island, Washington, a school for children with disabilities. The parties also agreed on the IEP's goals and objectives and on the use of a behavioral consultant for one to three hours per week. The District selected Dr. Prosch-Jensen, who had performed a FBA for the Student in May 2011, as the Student's behavioral consultant for the 2011-12 school year.

16. The summer 2011 transition program was conducted jointly by District and CHILD teachers. It took place at the CHILD school. The presence of District staff familiar to the Student was to aid in the transition. The Student was taught in a CHILD classroom, but with no other children present in the room. The Student was prepared for the transition with social stories,⁹ including pictures of the CHILD school and the CHILD teacher who would work with him. The CHILD teacher viewed videotapes of the Student's home instruction and was briefed on continuing the same curriculum. The Student was to start at 90 minutes per day at CHILD. The CHILD summer program could go up to five or six hours per day for six weeks.

17. The plan for fall 2011 was to move the Student to full-time, one-on-one instruction in a classroom with other children present, but each child having one-on-one teaching. This program at CHILD is called the "Consult" program. It is for students who need a more restrictive and supportive environment than a group-learning classroom.

FBA and BIP - June 2011¹⁰

⁸ The phrase "during general education day" in this quote appears to be a mistaken carry-over from the Student's prior IEP of October 2010, which placed him in general education PE class. D-2, p. 18. The placement in the June 2011 IEP was at a private school for children with disabilities, in which no classes are considered general education. The apparent mistake appears in the goal pages of the June 2011 IEP as well, where the need for a paraeducator and this same description of his role is repeated for each goal. P-3, pp. 4 - 9.

⁹ "Social stories" are a way to develop communication, particularly with autistic students, about upcoming events through the use of pictures and stories about those events. (RP I, p. 203, Hermann testim.)

¹⁰ The FBA and BIP are not mentioned by name in the Issues statement, *supra*, because they were not mentioned by name in the complaint. However, the complaint is essentially a challenge to those two documents, which allow the District to move the Student from school to home instruction under certain circumstances. The propriety of the FBA and BIP were a primary focus of evidence from both parties at the hearing.

18. The IEP provides: "An FBA, BIP, *are included in this IEP* which address specific behaviors which interfere with [the Student's] and [the Student's] classmates' learning." P-3, p. 11 (italics added).

19. The FBA found the Student "requires a program that is both flexible in length of school day and location as well as instructional demands." P-7, p. 2. Based on this, the IEP states: "The school environment should provide . . . a school day that allows the flexibility in both the length of the school day and the intensity of specially designed instruction in order to make progress on IEP goals." P-3, p. 10.

20. The FBA discusses positive behavior and reinforcements as well as behavioral concerns and positive strategies to minimize them (e.g., prompts, awarding points, alternating materials, specific praise, social stories, breaks, physical exercise, preference assessments, sensory opportunities). P-7.

21. The FBA defines the following three terms:

Non-Compliance: This is defined as simply ignoring adult input or purposefully turning his head away, putting hands in pockets. He will refuse to make a verbal choice or to point to the word or picture of what he wants.

[The Student]'s non-compliance has involved refusing to transition in and out of the Special Education classroom and other classrooms in the building, occasionally refusing to leave for lunch or other activities and refusing to participate in fire drills and other urgent transitions.

Aggression: This is defined as any attempted or actual instance of a hit, slap, kick, intent to injure, push or throw objects at a person and or break and then throw pencils.

([The Student] has a special interest in pencils and will often be distracted by them to the point of breaking and throwing)

His behaviors begin slowly and escalate to aggressive challenging behaviors. He shows irritation through non-compliance, wringing his hands, giggling, breaking pencils and frustration that build into outward displays of more serious acts of aggressions that may include kicking, head-butting and hair pulling.

Bolting: This is defined as any instance of [the Student] leaving the immediate environment without teacher permission to do so. Typically it is paired with non-compliance or refusals to communicate.

P-7, p. 2 (italics added). Regarding the definition of "non-compliance," both parties' expert witnesses, Dr. Prosch-Jensen and Dr. John Dunne,¹¹ believe it should be rewritten to clarify that turning one's head away or putting hands in one's pockets, standing alone, are not non-compliant, but are examples of what the Student does in conjunction with ignoring adult input.

¹¹ Dr. John Dunne is a psychiatrist who has treated the Student. His professional background is summarized in the prior decision at footnote 10. D-2.

22. These definitions are used to determine whether the Student should be moved to a more restrictive setting:

If non compliance occur [sic] at a high rate and duration (Over 30%, for 3 out of 5 days, p. 4 on BIP) the school setting needs to be changed to a more restrictive and less stimulating environment. If aggression/bolting occur [sic] [the Student] will be moved to a more restrictive environment (See Settings B and C).

Setting A:

A one/one teaching environment with peers in a school setting. IEP goals do not change.

Setting B:

A one/one teaching environment with no peers present in a school setting. IEP goals do not change.

Setting C:

A one/one teaching environment with no peers present in the home setting for a period of 90 minutes per day. Weekly assessment determines whether to increase minutes in the home setting. IEP goals do not change.

P-7, pp. 4 - 5.

23. Dr. Prosch-Jensen recommended a threshold of 20% non-compliance for moving the Student to a more supportive and restrictive setting. This was based on the Student's history: Once his non-compliance reached approximately 20% he did not turn back, but escalated to more severe behavior. Letting this continue, as occurred in 9th grade, resulted in the Student engaging in very severe and unsafe behavior. This was harmful to the Student and to District staff, and resulted in the Student obtaining no educational benefit. Dr. Prosch-Jensen therefore recommended criteria for moving him promptly, and not allowing an extended period of decline. (RP II, pp. 224 - 225, 240 - 241, 257 - 258, 276 - 278). Although the District initially proposed a 20% threshold, the District raised it to 30% based on the Parents' request. (RP II, pp. 362 - 363). Dr. Prosch-Jensen does not view this as a large change and finds 30% within an acceptable range for the threshold. (RP II, pp. 277 - 279).

24. The FBA also provides criteria for returning the Student to a less restrictive setting after a six-week retreat to a more restrictive one. Included are procedures to ease the transition and increase the likelihood of success on the re-attempt:

[The Student] should remain in the less restrictive environment (B or C) for 6 weeks and demonstrate 80% compliance and zero aggression/bolting behavior before attempting to transition back to the least restrictive environment.

Implement procedures for ensuring a smooth transition from Settings C to B and B to A.

Provide social stories, photos and visual daily schedule that will be used in the new classroom. Review appropriate classroom behavior and predictable outcomes in a social story format.

P-7, p. 5. The six-week success criterion is supported by Dr. Prosch-Jensen's testimony about the importance of establishing a strong history and pattern of success in a setting before moving on, because the Student had so much difficulty the prior year. (RP II, p. 252).

25. The BIP contains these same definitions and step criteria. P-5, pp. 1, 4. Some witnesses at the hearing stated the FBA and BIP have no criteria for the Student to move to a *less* restrictive setting -- only to a more restrictive one. That is not correct. The two paragraphs quoted immediately above are the criteria and methods to be used for moving the Student back to a less restrictive environment after a six-week period of stabilization in a more restrictive one.

26. The BIP indicates that settings A, B and C are not an exclusive list. They are among the environments on a continuum that may be considered:

If non compliance behaviors occur at a high rate and duration over time, the setting and length of day needs to be changed to a more restrictive and less stimulating environment.

Enviornments [sic], listed in order of least restrictive to more restrictive, *include* a classroom with peers in a school setting (A), a classroom with no peers in a school setting (B), and tutoring in the home for a 90 minute period (C).

P-5, p. 3 (italics added). One example of an environment not on the list is a public library. As discussed below, CHILD used this setting for instructing the Student during part of its summer transition program.

27. The BIP instructs staff how to redirect the Student so that even after aggression or bolting occur, he can still be considered compliant if he responds to redirection. P-5, pp. 4 - 5.¹²

28. The Parents refused to sign the FBA and BIP. They submitted written comments concerning their areas of disagreement. Their comments (identical for both documents) were attached as part of those documents. P-5, pp. 8, 11; P-7, pp. 9, 13. Their objections are summarized as follows.

29. The Parents objected that the non-compliance, aggression and bolting behaviors for which the Student can be removed to home instruction under the FBA and BIP are common behaviors for him at school, and are manifestations of his disabilities. They agree the Student needs help managing his behaviors, but behaviors that are manifestations of disability should not serve as the basis for removing him from school. Echoing this objection, the Mother testified repeatedly to a penal analogy: The Student served his time in the IAES following his expulsion in early 2011, and should not be imprisoned at home again due to his disabilities. The Parents objected that the FBA and BIP set the Student up for failure -- for landing back in the home -- because the target behaviors are ones that he regularly engages in at school. The Parents also objected to the definition of non-

¹² The BIP also instructs staff how to deal with non-compliance, aggression and bolting in the home setting. P-5, p. 5. However, such behavior has not occurred during home instruction.

compliance as overly broad. They noted that putting hands in one's pockets, for instance, is normal behavior and not necessarily non-compliant. Finally, they objected to the threshold of 30%-non-compliance as being too low to warrant removal from school. *Id.*

30. The Mother also testified about the Student's family relationships and the impact on him of not going to school: He is kind and loving toward his five siblings. He watches in confusion as the school-age ones leave for school in the morning and he does not. While he is happy and generally well-behaved at home, the Mother believes he misses going to school. In past years he would talk about assemblies, field trips, and birthday celebrations at school.

Summer transition program at CHILD - July and August 2011

31. The District and CHILD decided to begin with 90 minutes per day of teaching, an amount the Student had successfully tolerated at home. July 6, 2011 was the Student's first day at CHILD. He was transported on a District bus. He was taught by his District home instruction teacher, a District autism coordinator with whom he was very familiar, and his CHILD teacher. The Student engaged in bolting, aggression and non-compliance for 60 of the 90 minutes.

32. On July 7, 2011, the Student was transported to CHILD in a District car instead of a bus. He was taught by his District teacher and the CHILD teacher. He was compliant for only four of the 90 minutes.

33. July 8, 2011 was similar to July 7. In addition, on July 8, the Student succeeded in leaving the campus during a bolting incident.

34. On Monday, July 11, 2011, at the request of CHILD, the Mother accompanied the Student in a District car. Staff met the Student at the car with a pre-planned social story to aid in his transition that day. The Student was compliant for the first two minutes, then engaged in bolting, aggression and non-compliance for the remainder of the time. The Mother could not calm the Student, so the Father was called to assist in picking up the Student. The Father came, but asked CHILD staff to physically put the Student in his car. Four CHILD staff did so.

35. On July 12 and 13, 2011, CHILD requested that the Student not attend while they planned revisions to his program. The Mother informed the District that she wanted to keep the Student at home for the remainder of the week for medication stabilization reasons.¹³

36. The new program involved a more gradual transition from home instruction to attendance at CHILD. For the next nine teaching sessions, between July 14 and 28, 2011, the CHILD teacher came to the Student's home and taught him together with District staff on most days. The Student was 100% compliant with the teaching.

¹³ The Student's psychiatrist, Dr. John Dunne, explained that on July 7, 2011, the Student had started two anti-anxiety medications, one immediate-acting and one that takes six to eight weeks to reach peak effect. On July 21, the Student was switched to an atypical anti-psychotic medication to better deal with aggression. The hope was that the switch in medication would help the Student's second trial at the CHILD school be more successful than the first.

37. The next steps in the transition were to move the teaching location successively to: (1) a neighborhood public library with which the Student was familiar; (2) an unfamiliar public library on Mercer Island near CHILD; (3) the library at the CHILD school; (4) a classroom at CHILD with no other students present (setting B, where the Student started at the beginning of the summer); and (5) a classroom at CHILD with other students present, but all being taught one-on-one (setting A, which had not yet been attempted).

38. On August 1 and 2, 2011, the Student was instructed at his neighborhood library. Instruction was then moved to a Mercer Island library for four days between August 4 and 9, 2011. The Student was 100% compliant with the teaching at both public libraries. On one occasion at the Mercer Island library he needed to be redirected, but the redirection was successful. For unknown reasons, CHILD's library sessions were 60 minutes, whereas sessions at the CHILD school were 90 minutes. CHILD has a half-day on Wednesdays, and on that day CHILD was unable to provide staff at off site locations. (RP II, pp. 351 - 352) Therefore, the Student received four hours per week of library sessions in early August.

39. On August 10, 2011, the Student returned to school at the CHILD campus, driven by the Mother in her own car. The Student was compliant with teaching for all but five minutes of the 90-minute session.

40. On August 11, the Student came to CHILD in a District car without the Mother. He was non-compliant and engaged in bolting for all but three minutes of the session. The Mother came and picked the Student up. No assistance was needed for the Student to enter her car.

41. August 12, 2011 was the last day of CHILD's six-week summer program. At CHILD's request, the Mother again drove the Student to the school. He was compliant with teaching for nearly 100% of the time.

Return to Home Instruction - Fall 2011

42. On or about August 23, 2011, CHILD informed the District that it would not be able to serve the Student for the 2011-2012 school year as previously planned due to his behavioral challenges. The District immediately scheduled an IEP meeting. The new school year was to begin August 31. The District offered to renew home instruction with District staff on August 31, pending the IEP meeting on September 2, 2011.

43. The Parents objected by email to a return to home instruction. They asserted that the ALJ's prior decision required that the Student be returned to a District high school after expiration of the IAES if a private school could not be found. They also objected to home instruction because both Parents work outside the home and no adult would be present to supervise the Student during the day. The Parents stated that the timeframes the District offered for instruction (9:00 - 10:30 a.m. or 4:00 - 5:30 p.m.) did not work with the family schedule. They also stated that 5:30 - 7:00 p.m. would not work because of their children's extracurricular activities. The Parents stated that under the minutes of service in the IEP, the District was responsible to provide a full day of instruction, or at a minimum to ensure the Student's safety for the full day via his one-on-one paraeducator. They stated they were not necessarily opposed to home instruction for less than a full day, as long as their concerns were addressed. P-1, pp. 6 - 10.

44. The IEP meeting on September 2, 2011 was attended by two CHILD staff along with the Parents and District staff. D-7. The purpose was to discuss the events of the summer and the next steps for the Student. The District stated it would follow the IEP/BIP by moving the Student to Setting C, home instruction. The Parents raised the option of placing the Student in the District's Hazen High School GOALS program. The District rejected this option on the ground that the Student needed a more restrictive setting at that time. The decisions made at this IEP meeting were set forth in a prior written notice issued September 6, 2011. P-16.¹⁴ The Parents filed their due process complaint that same day.

45. To obtain supervision for the Student, the Parents purchased a round-trip ticket for his paternal grandmother to fly from Texas and stay with the family for a time. P-12, p. 1. The Grandmother began supervising the Student during the day while the Parents were away at work. The District had offered home instruction beginning August 31, but instruction did not begin until September 7, 2011, after the Grandmother arrived. The Student missed four school days as a result.

46. The Parents pay the Grandmother \$7.00 per hour for 6.5 hours per day of supervision, five days a week. P-12, p. 2. At the time of the hearing, the Grandmother was scheduled to leave town from October 18 to November 9, 2011.¹⁵ During her absence, the Parents planned to obtain home supervision from a care-giving agency at a significantly higher rate than they pay the Grandmother. P-13.¹⁶

47. During home instruction in September 2011, the Student was 100% compliant and made educational progress. P-19; D-10. Beginning September 23, the District increased his instructional time from 90 minutes to 120 minutes per day. D-9. At the time of the hearing in early October, 2011, that is what the Student was receiving, along with weekly speech language therapy.

48. The Mother testified the District is responsible for traumatizing the Student to the point where he no longer tolerates school, whereas prior to high school he readily attended school. This appears to be part of the basis for the Parents' argument that the District should be financially responsible for the Student's full-day supervision at home.

¹⁴ It appears the District did not issue a prior written notice before the September 2, 2011 IEP meeting because a move to Setting C, pursuant to the BIP, was not a change of placement and did not require the amendment of any document, in the District's view. However, during the meeting the Parents raised the option of changing the Student's placement to the Hazen High School GOALS program. The District therefore issued a notice on September 6, 2011, explaining its rejection of that option, as well as why it chose to stay with the current IEP/BIP options.

¹⁵ The Grandmother's flight itinerary lists a departure date of September 30, 2011. P-12, p. 1. That was apparently delayed because the Mother testified the Grandmother would be leaving October 18, 2011. (RP I, pp. 114 - 115).

¹⁶ At the time of the hearing the Parents did not yet know which agency they would use. In their Closing Argument they state the hourly rate they ultimately paid to a care-giving agency, but that is not evidence in the record so no finding is made concerning the rate.

49. No evidence has been presented to support the Mother's assertion that the District inflicted trauma on the Student. All three experts involved in the hearing (Dr. Dunne and Dr. Prosch-Jensen, who testified, and Dr. Kwon who submitted a written evaluation), found no support for this speculation and cited other possible causes for the change in the Student's behavior. The Student is quoted as saying that his paraeducator Brock hit him with a book. (There is no other evidence to corroborate the Student's statement.) The Mother asserts that repetitive hitting by Brock could be a trauma that made the Student unable to tolerate the school environment. However, The Student's behavior had already severely deteriorated, first at Lindberg High School (LHS) then at Renton High School (RHS), before Brock even started on the job. The Student transferred to RHS on November 1, 2010. D-2, p. 13. Brock's first day on the job was the day Dr. Prosch-Jensen observed the Student at Renton High School, November 16, 2010. (RP II, p. 217) The Student's behavior had severely deteriorated at both schools before Brock started on the job.

50. Another possible source of trauma according to the Mother is the Student spending long periods in an intervention room. However, the Student's behavior severely deteriorated before he spent long periods in the intervention room, where he was offered the opportunity for other choices every 15 - 20 minutes. It was the Student's unsafe behavior, however, that occurred first and required he be removed from his regular classroom pursuant to the BIP. D-2. The Mother's speculation about District-inflicted trauma is not supported by the evidence.

51. Dr. Prosch-Jensen and Dr. Dunne agree the Student should not return to a high school setting at this time. They also agree the Student needs more than just instruction inside the home. Now that CHILD has declined further enrollment of the Student, his homebound placement is a longer-term situation and the instruction must be broadened. Dr. Prosch-Jensen recommends the Student be taken into the community by his tutors, to the extent he is able to participate appropriately and safely, to practice the skills he is learning. She also recommends the in-home instructional time be increased, as tolerated, up to three hours per day. (RP II, pp. 253 - 255).¹⁷ Dr. Prosch-Jensen has discussed several options for the Student's program with District staff, though not yet with the Parents. Dr. Dunne noted that the Student's IEP goals requiring small-group settings and interaction with peers cannot be implemented in the home. He recommends the Student go to community settings and participate in community activities, such as daytime programs for disabled youth offered by the City of Kent Parks and Recreation Department. (RP I, pp. 34 - 38). There is no evidence the Student has engaged in aggressive behavior in community settings.

CONCLUSIONS OF LAW

The IDEA

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 USC §1401

¹⁷ Dr. Prosch-Jensen recommends no more than three hours per day of in-home instruction primarily because in that setting, virtually all of the Student's time is spent engaged with instructional material. In the school setting a lot of time is spent making transitions between locations and on other matters. At home the Student can derive educational benefit and meet his IEP goals in less time. Also, "[h]e can't just sit with a tutor for five hours a day. I mean, nobody does that." (RP II, pp. 253 - 254).

et. seq. (Individuals with Disabilities Education Improvement Act (IDEA, sometimes referred to as IDEIA), formerly Education for All Handicapped Children Act), 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 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 *Hendrick Hudson District Board of Education vs. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 553 IDELR 656 (1982), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

First, had 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.

Rowley, supra, 458 U.S. at 207; 102 S. Ct. at 3051.

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

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

Rowley, 458 U.S. at 188-189; 102 S. Ct. at 3041-3042.

4. For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but instead a "basic floor of opportunity" that provides "some educational benefit" to the student. *Rowley*, 458 U.S. at 200-201; 102 S. Ct. at 3048. "District must provide Student a FAPE that is 'appropriately designed and implemented so as to convey' Student with a 'meaningful' benefit". *J.W. v. Fresno Unified School Dist.*, 626 F.3d 431, 432-433, 55 IDELR 153 (9th Cir. 2010); see also *J.L. v. Mercer Island School Dist.*, 575 F.3d 1025, 1038, n. 10, 52 IDELR 241 (9th Cir. 2009).

5. 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 US 49, 126 S. Ct. 528, 163 L. Ed. 2d 387, 44 IDELR 150 (2005).

Appropriateness of the BIP when adopted

6. The Parents correctly point out that the BIP's definition of "non-compliance" could be misapplied as it is currently written. It reads, in pertinent part:

Non-compliance:

This is defined as ignoring adult input or purposefully turning his head away, putting hands in pockets. He will refuse to make a verbal choice or to point to a word or picture of what he wants. . . .

P-5, p. 1. Common acts like turning one's head or putting hands in one's pockets, standing alone, signify nothing. Both Dr. Prosch-Jensen and Dr. Dunne recommend the definition of non-compliance be rewritten. The District should clarify that these two behaviors are examples of what the Student does in conjunction with ignoring adult input.¹⁸

7. If the Student's rate of non-compliance in summer 2011 had been close to 30% -- the threshold for moving him to a more restrictive setting -- then one might want to scrutinize the behavioral data and question his teachers on whether the definition was misapplied. However, the Student was either 100% compliant or nearly 100% non-compliant on different days, depending on the setting and on whether his Mother accompanied him. On his non-compliant days he usually engaged in aggression or bolting behavior as well. Those are separate grounds for changing settings under the BIP, and his setting would have been changed based on those alone, even absent non-compliance.

8. Furthermore, the risk of misapplication was low. The Student had one-on-one instruction from certified special education teachers (often two teachers simultaneously, one from the District and one from CHILD). Based on their professional education and credentials, it is quite unlikely they would score the Student as non-compliant if he was responding to their input, making choices, and participating in instruction, but happened to have his hands in his pockets or turn his head. For all of these reasons, the BIP's definition of non-compliance did not render the BIP inappropriate.

9. The Parents also argue that the threshold for moving to a more restrictive setting -- non-compliance over 30% of the time for three out of five days -- is too low. However, Dr. Prosch-Jensen testimony on this matter was persuasive: setting the threshold higher would allow the Student to re-enter the downward spiral that he experienced the previous year. The Parents have not established that the 30% threshold was inappropriately low.

¹⁸ This sentence is not meant to suggest wording for the new definition. It is an effort to summarize what Dr. Prosch-Jensen and Dr. Dunne suggested was needed. The IEP team, working with Dr. Prosch-Jensen, will rewrite the definition.

10. Nor have the Parents established that the inclusion of setting C (home instruction) in the BIP was inappropriate. Home instruction was the only setting in which the Student experienced success and made educational progress in 9th grade. In the other two settings attempted that year he entered a steep decline. It was appropriate to include home instruction as one of three options in the 10th grade BIP, to be used if the Student was unable to tolerate the other settings. Those other settings were significantly more supportive than his 9th grade placements, so it was reasonably anticipated he would be more successful in them and not need to return to home instruction.

11. The Parents next argue the Student's behavior at CHILD was his typical "transitional" behavior in a new environment, which behavior was known at the time the IEP was drafted and cannot be used to remove him from school or reduce his hours of service. This is contrary to the evidence and findings in the prior decision. First, prior to high school, the Student's transitions to several new elementary schools and middle schools were unremarkable, according to the Mother. D-2, pp. 17 - 18. Even after his severe behavioral problems developed in high school, he did not experience those behaviors in other new environments, such as the Mercer Island library or Dr. Dunne's office. Second, the Parents' use of the term "transitional" implies the behavior will recede after a transition period. However, as noted above, the Student's maladaptive behavior in school last year did not recede with time, but rather escalated to extreme severity.

12. The Parents also argue that non-compliance, aggression and bolting are manifestations of the Student's disabilities, and he cannot lawfully be removed from school for them. They see the BIP as punishing the Student based on his disabilities. These arguments confuse disciplinary procedures (which may result in home instruction) with appropriate movement to a more restrictive environment (which may be home instruction). Home instruction is not a punishment for bad behavior in the BIP. It is a setting where the Student has experienced success, both behaviorally and in terms of educational progress. He has also experienced that success in public library settings. Unfortunately, the Student has experienced failure in three school settings since the fall of 2010: LHS, RHS and CHILD. Each school provided a progressively more supportive environment: The Instructional Learning Center class at LHS, then the Instructional Learning Center-severe class at RHS, and finally the one-on-one teaching "Consult" program at CHILD. D-2. Moving the Student to home instruction after the failure at CHILD was not a disciplinary removal. It was an effort, provided for in the BIP, to find the least restrictive environment appropriate for the Student.

13. The Parents next argue that the 90 minutes per day of home instruction provided in the BIP is too little, and the Student is entitled to full-time instruction regardless of the setting: His needs as defined in the evaluation and IEP do not change whether he is at home or at school.

14. The District's position is that it made an individualized determination to begin with 60 minutes per day of home instruction in the IAES based on the Student having tolerated zero instruction at school (see D-2) and it has subsequently increased that to 90 and then 120 minutes per day based on the Student's success.

15. The duration of instruction in the homebound setting must be based on an individualized determination, not a pre-set amount for all homebound students. See *Oceanside City Unified School Dist.*, 25 IDELR 170 (OCR 1996). However, as discussed below, there is no requirement that homebound instruction be for the full school day, nor that it provide the same number of special education minutes the student received while attending school.

16. Neither party cited any cases supporting its position on this question. The ALJ searched for cases supporting the Parents' position and found none. All of the following cases support the District's position on this question. See *Georgetown Independent School Dist.*, 45 IDELR 116 (SEA TX 2005) (6 hours per week, increased to 15 hours per week, provided FAPE to high school student on homebound instruction due to aplastic anemia); *Montrose County School Dist.*, 37 IDELR 207 (SEA CO 2002) (district provided 4.5 to 6 hours per week of homebound instruction in a library to 12 year old with emotional disabilities, and student made some academic progress; FAPE was denied not due to number of hours, but because instructor had never seen the student's IEP and did not address its goals); *Greenville Independent School Dist.*, 102 LRP 12471 (SEA TX 2001) (homebound instruction given to high school student with multiple physical and emotional disabilities was appropriate; "Clearly, homebound instruction is a reduced version of weekly classroom instruction. Where the typical ninth grader at Greenville High School might spend thirty or more hours per week in classroom instruction, [REDACTED] would have eight hours per week of instruction."); *Independent School Dist. of Boise*, 35 IDELR 147 (SEA ID 2001) (district provided two hours per week of homebound instruction at a library to 7th grade student with emotional disabilities, with goal of transitioning her back to school in 6 to 12 months; FAPE was provided); *East Stroudsburg School Dist.*, 30 IDELR 211 (SEA PA 1999) (two hours per day of compensatory instruction awarded for each day a 7th grade student received no homebound instruction when he was psychiatrically unable to attend school).¹⁹

17. For the reasons discussed above, the Parents have not established that the Student's June 2011 BIP was inappropriate or denied the Student a FAPE.

Financial responsibility for supervising the Student outside his hours of home instruction

18. The Parents also argue, in the alternative, that the District is financially responsible for supervising the Student for the full school day if his home instruction is for fewer hours than that. Neither side presented any case authority on this question. The ALJ searched for cases supporting the argument that school districts, rather than parents, are financially responsible for all-day supervision of a child who receives homebound instruction for part of the day. No such cases were found, either requiring district supervision for the full school day, or for the number of special education hours the student received while attending school. Several cases were found that support the District's position on this matter.

19. In *Daniel O. v. Missouri State Bd. of Educ.*, 30 IDELR 588 (W.D. Mo. 1999), *affirmed*, 210 F.3d 378 (table citation), 32 IDELR 113, 2000 U.S. App. Lexis 13816 (full decision) (8th Cir. 2000 unpublished), the parents incurred costs to remain at home during 30 hours per week of homebound instruction, or to provide another adult to be at home during that time. They challenged a district rule requiring the presence of such an adult during home instruction. They asserted they

¹⁹ The only pertinent case found within the Ninth Circuit Court of Appeals on homebound instruction is not particularly enlightening for the present case. It did not address the number of hours of homebound instruction (which were not mentioned), but only the fact that the home teacher was not credentialed in special education and the student went without a home teacher for several months. See *Everett v. Santa Barbara High School Dist.*, 32 IDELR 175, 2000 U.S. Dist. Lexis 22774 (C.D. Cal.2000), *affirmed*, 36 IDELR 35, 28 F. App'x 683 (9th Cir. 2002 unpublished).

could leave the home and the teacher could administer the Student's medications. They did not argue that giving medication was a "related service" under the IDEA, but rather they opposed having to bear the cost of the district's rule that a parent or other adult remain in the home during instruction.

20. The district court in *Daniel O.* held that the "free" criterion in FAPE "is met if the *instruction and support services* provided Daniel are provided at public expense." *Id.* (italics added). The court further stated: "Therefore, because Daniel's medication may be administered to him by his parent or the other adult, the homebound instructor's administration of medication is not necessary to aid Daniel to benefit from special education." *Id.* The Eighth Circuit, in affirming the district court decision, made it clear that the parents wished to leave the home during the hours of the student's instruction. The costs they incurred were the costs of remaining at home or obtaining another adult to do so.

21. In the present case, the Parents argue they should not have to jeopardize their employment to remain at home (or pay another adult to remain at home) either during the hours of home instruction or during any of the 6.5 hours of the normal school day. Although administering medication is not at issue here, *Daniel O.* stands for the proposition that under home instruction, the District is financially responsible only for the instruction and support services provided to the student. In the present case, the District funds the teacher, paraeducator, and speech language pathologist who come to the home.²⁰ The one-on-one paraeducator is required only for the hours of the Student's instruction, so that the Student will benefit from that instruction and remain safe during it. See P-3, p. 16.

22. The District has a rule similar to the school district's rule in *Daniel O.* Therefore, when no adult was present in the home for the first four days of the 2011-2012 school year, home instruction did not proceed. Under *Daniel O.*, the District is not liable for the lack of instruction on those days.

23. The parents' scheduling needs likewise did not determine the propriety of homebound instruction in *Falzett v. Pocono Mountain School Dist.*, 152 F. App'x 117, 44 IDELR 121 (3rd Cir. 2005 unpublished). In *Falzett*, the parents would not accommodate the district's homebound teacher at times when the student's private tutors were scheduled. The court held the parents could not claim a failure to implement homebound instruction for hours when their scheduling needs did not allow the instruction to proceed.

24. In *School Dist. of Wisconsin Dells v. Z.S.*, 295 F.3d 671, 37 IDELR 34 (7th Cir. 2002), a 10 year old student had symptoms of autism and displayed abnormal aggression and withdrawal. After unsuccessful placements at a public school and a specialized day school, the District placed him in home instruction. It provided six hours per week of instruction plus one hour of occupational therapy. The District hoped to make another trial at public school in the future. The grandmother (the student's guardian) wanted him returned to public school with a one-on-one aide. The district was concerned that returning him to school at that time might irreparably damage the prospects of his being able to do so successfully in the future. The court found "there was no basis for believing

²⁰ The record does not reflect who pays for the community care aide who is present during instruction in the home.

that, after he had to be removed from [the specialized day school], he could function successfully in a regular school environment." *Id.*, 295 F.3d at 676.

25. The grandmother in *School Dist. of Wisconsin Dells v. Z.S.* did not want the student to be at home all day. The court found her desire not to have to provide daytime supervision for the student irrelevant to the propriety of the placement. "The desire of Z.S.'s guardian not to have this difficult child at home all day was entirely understandable but could not be allowed to sway the balance." *Id.* The grandmother's desire to have the district, rather than herself, provide daytime supervision was apparently due to the student being "difficult" rather than to her having employment outside the home, as in the present case. However, regardless of her motivation, the school district was not required to take care of the child outside of his hours of home instruction. That holding is equally applicable here.

26. The District is not financially responsible for the fact that the Student is unable to attend school, where he would be supervised for the full day. If a special education student cannot attend school due to a *physical* illness or disability, the school must provide FAPE via homebound services. If FAPE is provided in less than a full school day, the district is not liable for care of the child for the remainder of the day. The same is true when the student's inability to attend school is due to an *emotional* disability. It is unfortunate that the financial burdens associated with a disabled child often fall on the family, which may not be equipped to meet them. The IDEA does not provide the family relief in this situation.

27. The Mother's assertion that the District caused this situation by traumatizing the Student, and is now washing its hands of the matter and leaving the financial burden on the family, is not supported by the evidence. See Findings of Fact, *supra*.

Compliance with IEP and BIP in moving Student to home instruction - August 31, 2011

28. The IEP explicitly incorporates the FBA and BIP. P-3, p. 11. The BIP provides variable locations and length of school day depending on the Student's tolerance and need for behavioral support. This does not constitute a failure to implement the IEP. Rather, it is a contingency incorporated into the IEP.

29. The District complied with the Student's IEP and BIP when it moved him to home instruction on August 31, 2011, the first day of the new school year. (The Parents were unable to begin home instruction until September 7, 2011, because they did not have an adult at home during the daytime until that date, but the effective date of the change was August 31, 2011.) The District had only learned five business days earlier, on August 23, that CHLD would not accept the Student for the 2011-12 school year. The District properly relied on the BIP to move the location of instruction to Setting C (home) so that the Student would have instruction when the school year started. It then promptly convened an IEP meeting on September 2, 2011.

30. The complaint alleges the ALJ's prior decision required the District to return the Student to a school in fall 2011 – either to CHLD or a District high school. The complaint further alleges home instruction was impermissible after the IAES expired. That is not correct. The prior decision required not a return to school at the end of the IAES, but completion of a District reevaluation, followed by a determination of the Student's placement based on that evaluation. D-2.

31. The District completed both of these steps. It placed the Student at CHILD, with a summer program jointly staffed by the District and CHILD to try to ensure a successful transition to the new school, with contingencies to return to home instruction (and make another attempt at CHILD) if unsuccessful.

32. We must determine whether placement at a public high school, even in the highly restrictive environment of a self-contained class, was the Student's least restrictive environment (LRE) at the beginning of the 2011-12 school year. The Ninth Circuit uses a four-factor balancing test to determine LRE. See *Sacramento City Unified School Dist. v. Rachel H.*, 14 F.3d 1398, 1404, 20 IDELR 812 (9th Cir. 1994). The test was written to decide whether the student in that case should be mainstreamed into a general education class.²¹ That is not advocated by either party and is not an appropriate option for the Student at this time. The four factors are translated to more general terms as follows. To determine whether a given setting is a student's LRE, we must consider: (1) the educational benefits of placement in the less-restrictive setting; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the less-restrictive setting; and (4) the costs of placing the student in the less-restrictive setting.

33. These factors are applied to the present case as follows: (1) The Student derived no educational benefit from his placement at two District high schools in 2010-11. There is no evidence to suggest a different result would occur in 2011-12. On the contrary, the evidence indicates the Student has rigid thinking and does not forget negative experiences. D-2, p. 18. (2) The Student was unable to participate in the non-academic benefits of his public high school placements in 2010-11. D-2. There is no evidence to suggest a different result would occur in 2011-12. (3) The Student had a disruptive effect on teachers in his high school placements in 2010-11. D-2. There is no evidence to suggest a different result would occur in 2011-12. (4) The record does not contain information on the relative costs of placement at a District high school versus home instruction, so this factor is not considered.

34. The conclusion from this analysis is that placement in a District high school, even in a highly restrictive self-contained class, is not the Student's LRE at this time. This conclusion is supported by testimony from both the District's and the Parents' expert witnesses, neither of whom recommended the Student return to a public high school at this time. See *School Dist. of Wisconsin Dells v. Z.S.*, *supra*, 295 F.3d 671; see also *B.S. v. Placentia-Yorba Linda Unified School Dist.*, 306 F. App'x 397, 51 IDELR 237 (9th Cir. unpublished) ("We noted nearly 25 years ago that mainstreaming 'is a policy which must be balanced with the primary objective of providing handicapped children with an "appropriate" education.'")

35. WAC 392-172A-02060(2) provides that LRE is only one of the factors to be considered in deciding whether a placement is appropriate. Also to be considered are: (1) The student's IEP; (2) whether the placement option provides a reasonably high probability of helping the student attain his

²¹ The four factors considered in *Sacramento City Unified School Dist. v. Rachel H.*, *supra*, 14 F.3d at 1404 were: "(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect Rachel had on the teacher and children in the regular class, and (4) the costs of mainstreaming Rachel."

IEP goals; and (3) any potential harmful effects on the student or on the quality of services that he needs. See also 34 Code of Federal Regulations (CFR) §300.116(d).

36. Regarding (1), the Student's IEP could be delivered in a District high school if the Student could tolerate that environment. Regarding (2), a District high school does not provide a reasonably high probability of helping the Student attain his IEP goals: He made no educational progress in two high school environments recently attempted. Finally regarding (3), there are significant potential harmful effects on the Student if he were now returned to a high school setting, as testified to by Dr. Prosch-Jensen.

37. For these reasons, the Parents have not established that the District violated the IDEA by failing to return the Student to a District high school on August 31, 2011, and by instead placing him on home instruction pending the September 2, 2011 IEP meeting.

Appropriateness of decisions made at IEP meeting - September 2, 2011

38. The Student's BIP states that his IEP goals do not change regardless of the setting in which they are delivered. P-5, p.4. However, his IEP goals in social skills, adaptive behavior and communication cannot, by their terms, be delivered solely one-on-one with an adult. They require some degree of small-group and peer interaction. Also, the Student's academic objectives for the most part state they are to be delivered in a small-group setting.

39. When home instruction was only a 43-day IAES pending reevaluation and a new placement, this situation was temporary and acceptable. Homebound instruction must deliver access to the curriculum and provide educational benefit in order to provide FAPE, but it cannot deliver the full array of in-school experiences and non-academic benefits. See cases cited in Conclusion of Law 16, *supra*. Likewise when homebound instruction was a retreat available, if necessary, before re-attempting a return to CHILD six weeks later, it was an acceptable short-term situation. It was also an acceptable short-term situation from August 31, 2011 until a longer-term placement decision could be made at the September 2, 2011 IEP meeting.

40. However, after CHILD declined to accept the Student on August 23, 2011, and he was placed on home instruction on August 31, 2011, the District knew or should have known that home instruction was no longer merely a short-term temporary placement. Yet the District took no steps at the September 2, 2011 IEP meeting to amend the IEP and BIP to change the placement from "private school" to "home instruction" (P-3, p. 16), or explain how those aspects of the Student's IEP goals which would have been addressed in the school environment at CHILD, and which cannot be addressed in the isolation of the home, would now be addressed. Nor did the District schedule a follow-up IEP meeting after September 2, 2011 to address these matters. As of the last day of hearing, October 5, 2011, no such step had been taken.

41. Behind the scenes, the District's contracted behavioral consultant, Dr. Prosch-Jensen, has raised with District staff some options for addressing these matters. But no IEP meeting has been scheduled, and as far as the Parents know, the District stands firm on its position that the IEP will be implemented solely through instruction inside the home, as provided in the BIP. There was no testimony from District staff concerning their reaction to Dr. Prosch-Jensen's suggested options, either positive or negative.

42. Promptly upon the Student returning to home instruction at the beginning of the 2011-12 school year, the location of instruction could have been moved to a less restrictive environment: a public library. At his neighborhood library the Student would have the opportunity to practice greetings and requests with library staff, have chance encounters with library patrons, and perhaps encounter neighbors and community members he recognizes, or who recognize and greet him. The Student was successful and had no behavioral problems at two public libraries the previous month. On September 2, 2011, the District failed to offer the Student placement in his LRE, which was a public library. If some of the Student's learning activities cannot be done at a library (such as cooking), or there are other significant reasons to spend partial time at home, instruction could have been divided between the two locations. (If it would have been disruptive to divide time between settings on a single day, the days of the week could have been divided so that some were spent at the library and some at home.)

43. It was reasonable for the District to need planning time in this complex case. Had it scheduled another IEP meeting even a month after September 2, 2011, and taught the Student in the less restrictive setting of a library in the interim, no violation of the IDEA and no denial of FAPE would have been found. It is reasonable to take one step at a time with this Student, and a move to the library would have been sufficient for that period.

44. The Parents correctly assert that the IEP cannot be delivered as written in the isolation of the home, and that the needs found in the evaluation cannot be met solely in that location. The evidence, including the testimony of both expert witnesses, supports that assertion. The District therefore denied the Student a FAPE beginning September 2, 2011.

45. The Parents put on evidence about two additional subjects not mentioned in their complaint and not included in the Issues statement, *supra*: The Mother testified that the District failed to properly consider the Parents' input in adopting the documents finalized at the June 17, 2011 IEP meeting, and that the District has failed to provide physical education as part of the Student's home instruction. "The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process hearing request unless the other party agrees otherwise." WAC 392-172A-05100(3); *see also* 34 CFR §300.511(d). The District has not agreed to these issues being added to the hearing. Because they were not raised in the complaint they cannot be adjudicated here.²²

Prospective relief

46. Within 15 school days after the date of this decision,²³ the IEP team must meet to amend the Student's IEP and BIP to: (1) reflect his current home placement and the use of a public library

²² While it may be advisable for the District, in light of WAC 392-172A-02030(1) and 34 CFR §300.108(a), to notify the Parents how it plans to deliver physical education now that the Student is no longer placed at CHILD, it is beyond the scope of the ALJ's authority to enter such an order because the issue was not raised in the complaint.

²³ Because of the intervening Veteran's Day and Thanksgiving holidays, 15 school days (instead of three weeks) is allowed for compliance. School days include partial school days.

for as much of his instruction as is appropriate; (2) address how the Student's need for social, small-group and peer interaction (as identified in the June 2011 evaluation and IEP) will be met now that he is no longer placed at CHILD; and (3) amend the definition of "non-compliance" in the BIP, as discussed above.

47. Within three school days after the date of this decision, the District must offer the Parents the option to move as much of the Student's instruction to a public library as is appropriate during the intervening weeks prior to the IEP meeting referred to above. The offer shall include a provision for return to the home setting if the Student's behavior at the library (or in transit to or from the library) meets the criteria in the current BIP for return to the home setting. If the Parents consent, amendments to the Student's IEP and BIP to provide for instruction in a library may be made prior to the IEP meeting referred to in the preceding paragraph. See WAC 392-172A-03110(2)(c); 34 CFR §300.324(a)(4). Such amendments would fulfill requirement (1) in the preceding paragraph.

48. The BIP should include safety measures and transition steps for the Student's introduction to community activities, including the compensatory education activities discussed below. The safety contingencies may include a return to solely library or even solely in-home instruction in the event the Student is not able to tolerate the community activities or library location. As in the current BIP, there must be a provision for re-attempting less restrictive environments after retreating to a more restrictive one.

Compensatory education

49. Compensatory education is an equitable remedy, taking into account the relative conduct of the parties. See *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1089, 50 IDELR 1 (9th Cir. 2008); *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497, 21 IDELR 723 (9th Cir. 1994); *Reid v. District of Columbia*, 401 F.3d 516, 524, 43 IDELR 32 (D.C. Cir. 2005). In the present proceeding, neither party acted unreasonably or in a manner that would influence an award of compensatory education. (This is differentiated from the prior proceeding. See D-2, p. 30.)

50. The Parents are entitled to an award of compensatory education in a setting or settings where the Student can work on those portions of his IEP goals and objectives that relate to social, small-group and peer interaction (as differentiated from one-on-one adult instruction in social or adaptive skills). The compensatory education must address these areas of need, which are also identified in the June 2011 evaluation.

51. The Parents are awarded four hours per week of compensatory education for the period September 7, 2011²⁴ through the date the IEP and BIP are amended pursuant to either section (c) or section (d) of the Order below, whichever occurs first. Four hours per week is appropriate because the Student successfully received that amount of instruction in a community setting (public library) in the recent past. Although that instruction was one-on-one adult teaching rather than

²⁴ Although the District's violation occurred on September 2, 2011, the first date thereafter that the Parents were able to make the Student available for instruction was September 7, 2011. Between those two dates the Parents had no loss to be compensated, because the Student was not available for instruction.

small-group or peer interaction, it shows the Student is comfortable being in a community setting in the company of teaching staff for that amount of time.

52. Four hours per week is also appropriate based on the proportion of the Student's specially designed instruction that is devoted to social, emotional, behavioral and adaptive skills. That proportion is 40%.²⁵ The Student's current home instruction is 120 minutes per day, or 10 hours per week (plus 30 minutes per week of speech language therapy). Forty percent of 10 hours is four hours. A compensatory education award of four hours per week reflects the relative importance of social/emotional/behavioral and adaptive skills in the Student's program. While much of that instruction is conducted one-on-one under the IEP, the Student's academic goals (the remaining 60% of his time) were to be taught in a small-group setting under the IEP, so these matters balance out.

53. Compensatory education is in addition to the Student's regular program. It may be delivered at any time during the calendar year following the date of this decision, as determined appropriate by the IEP team. Compensatory education activities do not necessarily need to be confined to the school day, but may take the form of extracurricular activities, summer activities, or any activity selected by the IEP team to address the Student's identified need for appropriate social, small-group and peer interaction.

54. The Parents have not established entitlement to the other forms of relief requested in their complaint.

ORDER

a. The District did not violate the IDEA or deny the Student a FAPE prior to the September 2, 2011 IEP meeting.

b. The District violated the IDEA and denied the Student a FAPE by failing to amend the Student's IEP and BIP at the September 2, 2011 IEP meeting, or schedule a follow-up meeting to do so.

c. Within 15 school days after the date of this decision, the IEP team shall meet to amend the Student's IEP and BIP to: (1) reflect his current home placement and the use of a public library for as much of his instruction as is appropriate; (2) address how the Student's need for social, small-group and peer interaction (as identified in the June 2011 evaluation and IEP) will be met now that he is no longer placed at CHILD; and (3) amend the definition of "non-compliance" in the BIP, as discussed herein.

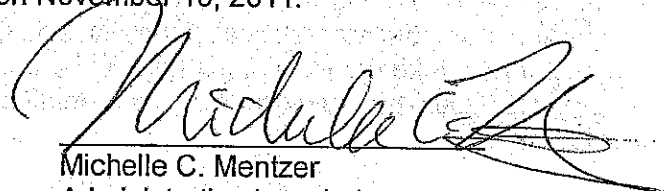
d. Within three school days after the date of this decision, the District shall offer the Parents the option to move as much of the Student's instruction to a public library as is appropriate during the intervening weeks prior to the IEP meeting referred to in paragraph (c) of this Order. The offer shall include a provision for return to the home setting if the Student's behavior at the library (or in

²⁵ In the Student's June 2011 IEP, 710 out of 1,775 minutes per week of specially designed instruction is devoted to social, emotional, behavioral and adaptive skills. P-3, p. 16. That is 40%.

transit to or from the library) meets the criteria in the current BIP for return to the home setting. If the Parents consent, amendments to the Student's IEP and BIP to provide for instruction in a library may be made prior to the IEP meeting referred to in paragraph (c) of this Order. Such amendments would fulfill the requirement in paragraph (c)(1) of this Order.

e. The Parents are awarded four hours per week of compensatory education for the period September 7, 2011 through the date the IEP and BIP are amended pursuant to either section (c) or section (d) of this Order, whichever occurs first. The compensatory education shall take place in a setting or settings where the Student can work on those portions of his IEP goals and objectives that relate to social, small-group and peer interaction (as differentiated from one-on-one adult instruction in social or adaptive skills). The compensatory education may be delivered at any time during the calendar year following the date of this decision, as determined appropriate by the IEP team.

Signed at Seattle, Washington on November 10, 2011.



Michelle C. Mentzer
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

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