

**WYOMING DEPARTMENT OF EDUCATION  
SPECIAL PROGRAMS DIVISION  
DUE PROCESS HEARING**

**In Re the Matter of:**

**Petitioner,**

**Case #: H-005-18**

**(RD) (the Student) by and through**

**his/her parent and/or guardian,**

**DECISION and ORDER**

**v.**

**Respondent,**

**Natrona County School District #1.**

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**APPEARANCES:**

For Petitioner:

Donna Sheen Esq. and Katherine Osten, Esq.

Wyoming Children's Law Center, Inc.

112 South 5th Street

For Respondent:

Kathleen Dixon, Esq. and Jennifer Reece, Esq.

Laramie, Wyoming 82072

Dixon & Dixon, LLP

**HEARING OFFICER:**

Robert "Bob" Mullen

104 South Wolcott, Suite 600

Casper, Wyoming 82601

## **DECISION and ORDER**

**Case#: H-005-18**

### **Page 2**

(Note about the Record: The Record consists of all filings received by the Hearing Officer, correspondence between the Parties and the Hearing Officer, correspondence between the Wyoming Department of Education (WDE) the Hearing Officer related to the case, Transcripts of all proceedings, and Exhibits (both admitted and offered but declined). Transcripts and Exhibits are placed at the back of the Record. Otherwise, the Record is assembled chronologically.)

Key to Acronyms:

ADHD Attention Deficit Disorder

BASE Behavior, Academic, and Social Education

BIP Behavioral Intervention Plan

CFR Code of Federal Regulations

CYMS CY Middle School

DMJH Dean Morgan Junior High

ED Emotional Disability

FAPE Free and Appropriate Public Education

FBA Functional Behavioral Assessment

IDEA Individuals with Disabilities Education Act

IEP Individualized Education Program

LRE Least Restrictive Environment

MDR Manifestation Determination Review

ODD Oppositional Defiant Disorder

PTSD Post Traumatic Stress Disorder

USC United States Code

WBI Wyoming Behavioral Institute

WDE Wyoming Department of Education

## **DECISION and ORDER**

**Case #: H-005-18**

**Page 3**

### **CASE SUMMARY**

Unquestionably, it is the responsibility of a school district to promote and try to assure a safe environment for its students and staff. A number of devastating events across the nation in recent years must certainly have heightened the concern of all school administrators and educators about safety in and around school facilities. The matter before me, however, is not about school safety. The only questions which I am authorized to address were established by Petitioner's Request for Due Process Hearing ("Petitioner's Request") (Record, tab 2). The sufficiency of that Request has not been challenged by Respondent, nor has Respondent expanded upon those issues by filing its own Request in the case.

Petitioner's Request was filed with the Wyoming Department of Education ("WDE") on March 27, 2018. The Student, then (RD), is now (RD) years old, enrolled with Respondent, and eligible for specialized instruction and related services under the Emotional Disability ("ED") category of the Individuals with Disabilities Education Act ("IDEA"), its implementing regulations under the Code of Federal Regulations ("CFR"), and the counterparts to those federal provisions adopted by the WDE.

An incident involving the Student on March 8, 2018 resulted in a Manifestation Determination Review ("MDR") on March 15, 2018. Those attending the MDR were unable to come to consensus on the issue of whether the Student's conduct was caused by or had a direct and substantial relationship to the Student's disability, or whether the conduct was the direct result of Respondent's failure to implement the Student's IEP, pursuant to 34 CFR 300.530(e). However, Respondent's Director of Special Services, who attended the MDR as a member of the review team, made the decision that the Student's conduct was not caused by the Student's disability, that the conduct did not have a direct and substantial relationship to the Student's disability, and that the conduct was not the direct result of Respondent's failure to implement the Student's Individualized Education Program ("IEP").

Petitioner has challenged the March 15, 2018 MDR conclusion as well as other matters related to the Student's and the Student's Parent's rights pursuant to the IDEA. Among other things, Petitioner asserts that Respondent failed to provide the Student with a free and appropriate public education ("FAPE") between April 2017 and March 27, 2018, and questions the legitimacy of several of Respondent's actions following an earlier MDR which took place April 21, 2017.

## DECISION and ORDER

Case#: H-005-18

### Page 4

Petitioner's allegations were summarized and agreed to by the Parties at a Scheduling Conference on April 6, 2018. Those allegations were broken into subparts (e.g., 3.a, 3.b., etc.) at the Scheduling Conference and then recited in the Order Following Scheduling Conference which was issued April 8, 2018 (Record, tab 22).

A Response to Petitioner's Request was filed on April 6, 2018 (Record, tabs 20 & 21). Among other things, the Response describes Respondent's "actions, rationale, and options" in response to each allegation. As established at the Scheduling Conference and in the Order Following Scheduling Conference, a Due Process Hearing was scheduled. The Hearing commenced April 18, 2018, and continued April 19, 20, 23, 26, and 27, 2018.

The allegations in Petitioner's Request were not arranged in chronological order. The same is true of the allegations as reiterated, with subparts, in the Order Following Scheduling Conference. Upon consideration of the evidence presented at the Due Process Hearing, however, in my judgment the Parties' dispute involves interrelated disagreements, rather than distinct disagreements. Therefore, I have arranged the allegations ("Issues"), as described below, chronologically. Number and letter designations appearing in parenthesis following each Issue coincide with the numbered allegations in Petitioner's Request and as reflected in the Order Following Scheduling Conference.

### ISSUES and DECISION

A. Following the MDR of April 21, 2017, did Respondent impermissibly remove the Student from the regular educational setting? (3.a.)

Decision: No. The Student's Mother failed to prove that she did not consent to the placement for the Student which occurred immediately following the MDR of April 21, 2017, and her apparent consent continued until the school summer recess.

FINDINGS OF FACT: (26)

CONCLUSIONS OF LAW: (1) (11) (20 through 24) (26 and 27) (29 and 30) (33 through 36)

B. Did the MDR of April 21, 2017, impermissibly violate 34 CFR 300.530(e) in that Respondent imposed a 10-day suspension and subsequent change of placement to homebound

**DECISION and ORDER**

**Case#: H-005-18**

**Page 5**

placement, rather than returning the Student to the regular educational setting, conducting a functional behavior assessment ("FBA"), and implementing behavior supports? (3.c.)

Decision: No and Yes. The Student's Mother failed to prove that she did not consent to the placement for the Student which occurred immediately following the MDR of April 21, 2017. However, Respondent misread or misinterpreted 34 CFR 300.530[i] and the related WOE provisions, both of which required a review and, perhaps, revision of the Student's behavioral intervention plan ("BIP"). That review/revision did not occur.

FINDINGS OF FACT: (21 and 22} (26} (45}

CONCLUSIONS OF LAW: (1) (11} (16 through 24} (26 through 30}

C. Did the 10-day suspension of the Student following the MDR of April 21, 2017, constitute an impermissible change in placement in violation of 34 CFR 300.536? (3.d.)

Decision: No. The Student's Mother failed to prove that she did not consent to the placement for the Student which occurred immediately following the MDR of April 21, 2017.

FINDINGS OF FACT: (26}

CONCLUSIONS OF LAW: (1) (11} (20 through 24} (26 and 27} (29 and 30} (33 through 36}

D. Did Respondent fail to conduct an FBA after the MDR of April 21, 2017? (2.c.)

Decision: No. An FBA had been made and was in place on April 21, 2017.

FINDINGS OF FACT: (2 through 22}

CONCLUSIONS OF LAW: (1) (14} (16 through 24}

## **DECISION and ORDER**

**Case#: H-005-18**

**Page 6**

E. Did Respondent impermissibly fail to develop and implement a BIP addressing the Student's behavior needs after the MDR of April 2017? (2.d.)

Decision: No and yes. A BIP had been developed, but was not reviewed for possible revision, contrary to the requirements of the IDEA and its WOE counterpart.

FINDINGS OF FACT: (19) (21 and 22) (45)

CONCLUSIONS OF LAW: (1) (14) (16 through 24)

F. After the MDR on April 21, 2017, did the Student's IEP team impermissibly fail to develop positive behavioral interventions? (4.)

Decision: No. See the Decision in relation to Issue E, above. Furthermore, Petitioner has not proven that additional behavioral supports were required by IDEA and its WDE counterpart to be in place after April 21, 2017.

FINDINGS OF FACT: (19) (21 and 22) (45)

CONCLUSIONS OF LAW: (1) (14) (16 through 24)

G. Following the MDR of April 21, 2017, did Respondent impermissibly fail to provide the Student with services to allow the Student to meet his IEP goals? (3.b.)

Decision: No. The Student's Mother failed to prove that she did not consent to the placement for the Student which occurred immediately following the MDR of April 21, 2017, or that the IEP goals were improperly supported during the summer 2017 school recess, or that the IEP goals expressed almost immediately following the Parties' Mediation Agreement ("Mediation Agreement") were deficient in light of the Agreement and those goals.

## **DECISION and ORDER**

**Case#: H-005-18**

**page7**

FINDINGS OF FACT: (26) (29 through 32)

CONCLUSIONS OF LAW: ( 1) (9-14) ( 17 through 19) (22 through 24) (26) (29 through 36)

H. Does the Mediation Agreement constitute an impermissible predetermination of Least Restrictive Environment ("LRE11 ) requirements, in that Respondent impermissibly required the Student's Parent to agree to residential placement or removal of the Student if the Student did not make educational progress in homebound placement? (6.a.)

Decision: No. Although perhaps imprudent, Petitioner has not proven that the Mediation Agreement provision is void under the IDEA or Wyoming law.

FINDINGS OF FACT: (29 through 33)

CONCLUSIONS OF LAW: (1) (29 through 36)

I. Has Respondent impermissibly violated the Mediation Agreement by failing to hold IEP meetings for the Student addressing educational progress? (7.)

Decision: No. Petitioner has not proven that Respondent failed to hold or participate in IEP meetings for the Student contrary to the requirements of the IDEA or the Mediation Agreement.

FINDINGS OF FACT: (29 and 30) (33 through 38)

CONCLUSIONS OF LAW: (1) (8 through 12) (14 and 15) (29 and 30) (33 through 36)

J. Did the MDR of March 15, 2018, impermissibly violate 34 CFR 300.530(e) in that it failed to fully explore the Student's disabling conditions, leading to an erroneous result? (2.a.)

## **DECISION and ORDER**

**Case#: H-005-18**

**Page 8**

Decision: Yes. Even assuming that Respondent's expressed perspective of the conduct of the Student which was under review on March 15, 2018 - a perspective which is contested by Petitioner- was correct, Petitioner has proven that the MDR conclusion of no manifestation was erroneous.

FINDINGS OF FACT: (2 through 9) (12) (14 through 25) (27) (34) (36 through 39) (42 through 44)

CONCLUSIONS OF LAW: (1) (20 through 24) (26) (28)

K. Did Respondent impermissibly predetermine (in advance of the March 15, 2018, IEP meeting) a placement recommendation concerning the Student? (6.b.)

Decision: No. Petitioner has not proven that Respondent made an impermissible predetermination.

FINDINGS OF FACT: (41)

CONCLUSIONS OF LAW: (1)

L. Was the MDR of March 15, 2018, impermissibly flawed because it did not consider whether the Student's behavior was a result of Respondent's failure to properly develop or implement an IEP which met the Student's needs? (2.b.)

Decision: No. Petitioner has not proven that Respondent failed to properly develop or implement an IEP which met the Student's needs such that it resulted in the conduct which was the subject of the MDR of March 15, 2018.

FINDINGS OF FACT: (29 and 30) (39 and 40)

CONCLUSIONS OF LAW: (1) (9 through 15) (20 through 24) (26) (33 through 36)

M. Did the placement decision made at the Student's March 15, 2018, IEP meeting violate the LRE requirements of 34 CFR 300.114? (1.)



**DECISION and ORDER**

**Case#: H-005-18**

**page9**

Decision: No. Petitioner has not proven that the placement decision violated the LRE requirements.

FINDINGS OF FACT: (14) (29 through 32)

CONCLUSIONS OF LAW: (1) (9 through 14) (29 through 36)

N. Did Respondent fail to provide the Student with a free and appropriate public education (FAPE) from April 2017 to the present? (5.)

Decision: No. Petitioner failed to prove that Respondent did not meet its substantive obligations under the

IDEA, in other words, that the IEP formulated for the Student by the IEP team - of which the Student's Mother was a member - was not reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances. An extended school year (ESY) was not part of the Student's IEP in the summer of 2017, and following the Mother's decision against the Student's residential placement at or about the first of June 2017, and her request for mediation, the Parties entered a Mediation Agreement in September 2017, and the Student's IEP was almost immediately modified. The Mediation Agreement described options should the Student not perform academically. Although for the Student that may have been an imprudent plan, as described above, Petitioner has not proved under Wyoming law that the Agreement or any portion of it is void.

FINDINGS OF FACT: (1 through 9) (12) (15 through 17) (19 through 20)

(24 through 26) (29 through 35) (42) (44 through 45)

CONCLUSIONS OF LAW: (1-15) (17) (29 and 30) (33 through 36)

WITNESSES

[in order of initial appearance]

L.A., Petitioner/Student's Mother (Student's Mother)

Reyes Pacheco, M.S.W.

Joseph Brazfield, M.A., Respondent staff, BASE room teacher, former teacher of the Student

Rainey Auen, Respondent staff, BASE room teacher, former teacher of the Student

## **DECISION and ORDER**

**Case#: H-005-18**

**page 10**

Stephen Walters, M.A., school psychologist and independent functional behavior assessment evaluator

Charles Powell, Ph.D., licensed clinical psychologist

Katherine Osten, Attorney for Petitioner

Lori Cetak, Respondent staff, Special Education Coordinator

Valerie Braughton, Respondent staff, Principal at CY Middle School

Ted Hanson, M.A., Respondent staff, Director of Special Services

Chase Nash, Police Officer, Casper, Wyoming

Charles Simons, Police Officer, Casper, Wyoming

Kathleen Dixon, Attorney for Respondent

Heather Avery, Respondent staff, special education teacher

Julia Humphries, Respondent staff, BASE educational support staff member

Brett Thielbar, Respondent staff, Assistant Principal at CY Middle School

The Student

### **FINDINGS OF FACT**

The following findings of fact were relied upon in reaching this Decision and are adopted. The basis for each Finding is stated with transcript references indicated by the name of the witness(s), "Tr.11, and pertinent transcript page number(s), and exhibits indicated by "Ex.11 and the identifying exhibit designation.

1. The Student now lives with the Student's mother and siblings. The Student's biological father has not been much a part of the Student's life, lives in another State, and is more of a friend than a father figure for the Student. (Student's Mother, Tr. p. 26.)
2. The Student began exhibiting behavior problems as an infant and experienced difficulty as a student beginning in preschool. At its inception, the Student's public school experience was pretty rough.

Sitting in the hallways, the Student would scream and cry, often only spending half-days at school. Keeping

## **DECISION and ORDER**

**Case#: H-005-18**

**page 11**

the Student in school and engaged has been the main challenge. (Student's Mother, Tr. pp. 26, 27, 284;

Ex.'s P-12, R-44.)

3. The Student has been variously diagnosed as having attention deficit hyperactivity disorder (ADHD), audio processing disorder, post-traumatic stress disorder (PTSD), generalized/unspecified anxiety disorder, major depressive disorder, conduct disorder, intermittent explosive disorder, seriously emotionally disturbed, emotional disability (ED), oppositional defiant disorder (ODD), and specific learning disorder with impairment in mathematics. (Student's Mother, Tr. pp. 27-28, 33, 39, 43, 52; Ex.'s P-2, P-12, R-7, R-44.)

4. Child abuse of the Student by the Student's step-father is alleged to have occurred. (Student's Mother, p. 42.)

5. According to Respondent's witness and records, the Student was first enrolled with Respondent in August of (RD), as a kindergartener, and has been qualified for special education under IDEA since first grade. When the Student was in kindergarten, according to the Student's Mother, a behavior plan was implemented for the Student. (Cetak, Tr. 588; Ex. R-1; Student's Mother, Tr. 28.)

6. The Student entered residential treatment for the first time during the Student's fifth grade year (REDACTED) after he was suspended from school. At the time, things were not going well for the Student at home and fights had occurred between the Student and the Student's step-father. The Student's mother was worried about the Student's mental health and academic work. Behaviors to be addressed in residential treatment included anger management. The Student remained in residential treatment until June or July of (REDACTED). The placement was initiated by the Student's Mother and was at the Yellowstone Boys and Girls Ranch, outside Billings, Montana. (Student's Mother, Tr. pp. 29-34.)

7. Upon the Student's discharge from initial residential treatment and return to Respondent's school, the Student was in (RD) grade and placed in a BASE classroom at Dean Morgan Junior High. (Student's Mother, Tr. pp. 34, 37.)

## DECISION and ORDER

Case#: H-005-18

Page 12

8. In (RD) grade, the Student's Mother was told that since the Student was in special education the Student would need to be on special transportation. The perception of the Student's Mother is that the Student hated the special transportation, that the Student began being made fun of at school, and the Student began getting into more trouble at school. (Student's Mother, Tr. pp. 37-39.)

9. An IEP report prepared by Saint Joseph's Children's Home in relation to an IEP meeting for the Student on November 9, 2016, recites that the Student "was admitted to Saint Joseph's Children's Home on 11/6/2015 through an IEP team decision in Natrona County School District due to concerns for the safety of others after [the Student] exhibited total loss of self-control (yelling, property destruction and assault) on multiple occasions. (The Student's) behavior in the school setting at Saint Joseph's Children's Home was very good from the time of [the Student's] admission (November 2015) through May of 2016. Saint Joseph's Children's Home and Natrona County School District worked on a discharge transition plan for [the Student]. While implementing the transition plan, during a home visit, [the Student] exhibited significant loss of self-control by physically attacking a female teacher at Dean Morgan Junior High School. The transitioning was terminated at that point and [the Student] returned, full time to Saint Joseph's Children's Home." (Ex. R-4)

10. The Student's Mother's recollection of the circumstances resulting in the Student's first and second residential placements at St. Joseph's Children's Home (St. Joseph's), in Torrington, Wyoming differs somewhat from what is described in the Saint Joseph's IEP meeting report. The Student's Mother testified that she initiated the first placement, although she did not remember what happened to cause her to think the Student needed to be in this residential placement. She does recall that the Student was making some poor choices both inside and outside of school, and that the Student frequently needed to be picked up early from school because of headaches, or because school was too loud for the Student. However, she testified, the Student did not want to come home. She recalls members of Respondent's teaching staff telling her that it might not be a bad idea to get the Student more specialized help than what the school could offer. (Student's Mother, Tr. pp. 38-40; Ex. R-4)

## **DECISION and ORDER**

**Case#: H-005-18**

**page 13**

11. According to the Student's Mother: after some initial difficulty adjusting to St. Joseph's, the Student began to do really well; the Student's success she attributes to the classroom at St. Joseph's being more structured and the use of the Mandt technique, a specific program of communication between kids and adults, which she believes includes emphasis on clarity around expectations and consequences; the Student returned to St. Joseph's and was there from May (RD) to January(RD); this placement began ten days to a month after the end of the Student's first residential placement at St. Joseph's and was prompted by an allegation that the Student assaulted a teacher at Respondent's Dean Morgan Junior High by pushing a kidney-shaped table around toward her and pinning the teacher into a corner. (Student's Mother, Tr. pp. 41, 46-47, 49, 186, 190-191.)

12. The Mandt program was described by Joseph Brazfield, the Student's BASE classroom teacher at CY Middle School ("CYMS"). He said that he had been trained in Mandt, as had all the individuals in the special education classroom. It is a program to monitor the escalation cycle and deescalation cycle, both nonphysically and physically. It is intended to help assist students, and also involves restraints for use in the case of an aggressive student which limits the ability to hurt and be hurt. It teaches the best response during phases of escalation. It had been unnecessary to use Mandt with the Student. (Brazfield, Tr. pp. 322-323.)

13. According to the Student's Mother: when the Student returned from the second residential placement at St. Joseph's in January(RD), the Student had completed all of that placement's requirements; the Student had done well at St. Joseph's academically and seemed to have matured a lot; upon discharge from St. Joseph's, the Student began attending Respondent's CY Middle School (CYMS), which the Student seemed to enjoy; and, the Student's educational setting at CYMS was in a BASE classroom, which, as the Student's Mother understood it, had less hustle-bustle than a regular classroom, and allowed more time to complete assignments. To the Mother's knowledge a personalized behavior plan was not in place for the Student at CYMS, but the BASE classroom goal was behavior based, and if the Student did well, a reward would follow. (Student's Mother, Tr. pp. 49-51.)

## **DECISION and ORDER**

**Case#: H-005-18**

**page 14**

14. Respondent's Director of Special Services, Ted Hanson, testified that his familiarity with the Student began at or about the time of the Student's initial residential placement at the Yellowstone Boys and Girls Ranch, that over the last year he has attended over a dozen meetings concerning the Student, and that he had reviewed and was generally familiar with the special education records and some of the general education records of Respondent pertaining to the Student. Director Hanson characterized manifestations of the Student's disabilities to include "a pattern of behavior that has persisted over the last six months ... in relationship to multiple areas ... behavior instances where there's maybe aggression and/or violence, inability to maintain personal or interpersonal relationships, persistent mood of depression" all of which relate to poor educational outcomes that cannot be explained by intellect or other poor functioning areas. When the Student returned to Respondent District after the second residential placement at St. Joseph's, he was returned to the BASE program at CYMS. The BASE program supports students with behavioral needs. "BASE" stands for Behavior, Academic, and Social Education. In determining the least restrictive environment (LRE) for the Student, the Student's IEP team held meetings from Spring 2017 through April 2018, which Director Hanson attended, and at which historical information about the Student's behaviors was considered. (Hanson Tr. pp. 797, 799-802.)

15. On Friday April 14, 2017, two weeks before the Student was expected to graduate from the BASE classroom and be allowed to transition into the regular school setting, an incident involving the Student occurred, according to the Student's Mother. She was subsequently told by Casper Police Officers that the Student was (REDACTED). The Student denied the allegation, but following an investigation the Student was suspended from school and, based upon (REDACTED) , was taken to the Wyoming Medical Center, and then admitted for observation to Wyoming Behavioral Institute (WBI) where he remained for 16 days. (Student's Mother, Tr. pp. 52-60, 195,201; Ex.'s P-2, R-6.)

16. Director of Special Services Ted Hanson described his understanding of the April 14, 2017, incident, which was that prior to leaving school for the Easter 2017 weekend (Easter was April 16, 2017), the Student made comments within the school setting in which

## **DECISION and ORDER**

**Case#: H-005-18**

**page 15**

(REDACTED). Over the intervening weekend, the Director testified, (REDACTED) , occurred. As a result, GYMS Principal, Valerie Braughton, proposed to suspend the Student for ten days. Consistent with IDEA, the school scheduled a manifestation determination meeting. Director Hanson came to that meeting to present options and keep all parties informed of the process. The meeting involved the Student's IEP team, including the Student's Mother, and it resulted in a completed Manifestation Determination form, which was admitted into evidence (as two separate exhibits) and about which the Student's Mother and Director Hanson testified. The information reviewed by MDR team included all relevant information from the Student's files, a part of which was information related to the Student's residential treatment at St. Joseph's Children's Home. Importantly, part of that information concerned the Student's discharge from St. Joseph's, including the Student's diagnoses of intermittent explosive disorder which Director Hanson noted, may involve episodes of disproportionate aggression and anger – anxiety disorder, post traumatic stress disorder, and then the discussion around what each one of those entails. Based on a review of the information, the Student's conduct in question was determined to have been caused by or to have had a direct and substantial relationship to the Student's disability. At the MDR meeting, however, the Student was doing really well in the BASE classroom, achieving scores that "look respectful, responsible, and safe," up until about three weeks before the April 14th incident. (Hanson, Tr. 804-810; Student's Mother, Tr. pp. 75-76; Ex.'s P-2, R-7.)

17. The Student's attendance record between January 2017 and April 17, 2017, included 15 days of absence. The Student's deteriorating behavior in the several weeks prior to the April 14, 2017 incident was noted by BASE classroom teacher Joseph Brazfield. Mr. Brazfield also testified that during that time the Student's Mother shared concerns about the Student's behavior outside of school during the last of March and first few weeks of April 2017, that the Student was being bullied online, and that the Student had complained of more headaches. School records indicate that the Student's monthly behavior scores since transitioning from St. Joseph's Children's Home to CYMS had been 98% in February, 98% in March, and 79% in April, and that the Student's Mother had contacted the school on February 6, 2017, February 23,

## **DECISION and ORDER**

**Case #: H-005-18**

**page16**

2017, March 9, 2017, and April 3, 2017, asking about the Student's behavior at school, and expressing concerns about challenging home behavior. Mr. Brazfield affirmed his recognition that a student's off campus behavior is related to what the school needs to address. (Brazfield, Tr. 315-321, 326-328; Student's Mother, Tr. 1297-1298; Ex. P-2.)

18. The Student's Mother was not convinced of the truth of the allegations which were the subject of the April 21, 2017 MDR, that is to say she was concerned that the Student had not in fact engaged in the threatening behavior and had been wrongly accused. However, after a description of a manifestation determination had been given to her at the meeting, she understood that the purpose of the MDR meeting was to determine the best options for the Student. Although at the Due Process Hearing the Mother took exception with some of the entries in the Manifestation Determination (Exhibit P-2), her participation in the MDR and agreement with the conclusion that the Student's behavior was a manifestation of the Student's disability is indicated by her signature on the Manifestation Determination, along with that of the other MDR team members. Notably, she also understood that the Student was suspended. (Student's Mother, Tr. pp. 80-83; Ex. P-2.)

19. After the MDR team determination on April 21, 2017 that the Student's conduct on April 14th had been a manifestation of the Student's disability, Director Hanson and the team, according to Mr. Hanson's testimony, believed that they did not have enough information to move forward in determining whether they wanted an FBA and/or a review of the Student's behavior plan and/or to look at placement options. Director Hanson testified that he said to the team, in effect, that they would need to wait for the Student's discharge from Wyoming Behavioral Institute (WBI) and a review of WBI reports and recommendations in order to support determining an appropriate placement for the Student. Director Hanson and Respondent have misread or misinterpreted 34 CFR 300.530(ij) and the companion provision at page 12 of the WDE Notice of Procedural Safeguards issued January 2015. 34 CFR 300.530(ij) appears verbatim in the Conclusions of Law section, under "Manifestation Determination Review," below. (Hanson, Tr. pp. 814-816, 975-976, 1007-1010; Response to Due Process Complaint pp.6-7.)



## **DECISION and ORDER**

**Case#: H-005-18**

**page 17**

20. Director Hanson believed that the Student's behavioral and mental health issues were materially interfering with the Student's educational process at the time of the April 21, 2017, MDR. (Hanson, Tr. p. 977.)

21. A FBA of the Student was not conducted between the time of the Student's return to Respondent school in January 2017 and the incident on April 14, 2017, and the behavior supports for the Student which were in place were those provided generally in the BASE classroom at CYMS and the behavior intervention plan as it carried over from St. Joseph's Children's Home. The Student's Mother did not understand, as of May 31, 2017, what an FBA was. (Hanson, Tr. 1003-1010; Student's Mother, Tr. 98-99; Ex. R-4.)

22. The behavior supports that were in place for the Student in the BASE classroom and the IEP Report prepared on or about November 9, 2016, by St. Joseph's Children's Home and relied upon by Respondent as a BIP on April 14 2017, were required to be reviewed and modified, as necessary, by the Student's team to address the conduct which the MDR team found to have been a manifestation of the Student's disability. That requirement is clearly stated on page 5 of Exhibit P-2, which is the completed MDR form used by the Student's team on April 21, 2017, and is consistent with 34 CFR 300.530(ij and its WDE counterpart. (Hanson, Tr. 1003-1010; Ex. R-4; Conclusions of Law, Manifestation Determination Review, below.)

23. In light of the requirements under 34 CFR 300.530 and its WDE counterpart, and because it was relied upon by Respondent as the Student's behavioral intervention plan, the St. Joseph's IEP Report of November 19, 2016, (IEP Report) is of particular significance. (It is noted that some language in Exhibit R-4 is unreadable. The exhibit appears to be a copy and the document from which it was made apparently had a perforated left border. The exhibit was admitted, without objection, in that condition. The Hearing Officer has not guessed at what is missing from or obscured in the exhibit.) The IEP Report notes on page 1 that, in addition to the Student's Math skills, St. Joseph's perspective of educational concerns for the Student were "distress tolerance and intermittent explosiveness." On page 2 the IEP Report notes, in relation to the

## DECISION and ORDER

Case#: H-005-18

page 18

annual review of the Student's social/emotional functioning, that the Student "can become easily frustrated and overreact," and "at times, became very teacher dependent and lacking in confidence," that the Student's "biggest academic struggle ... pertains to [the] ability to respond in healthy ways when presented with new information, concepts, etc." which the Student "perceived to be too challenging," and that the Student "can be very over-reactive in these situations through verbal and physical aggression." "For several months" the Student's "teachers rated" the Student "as 'proficient' in each of the six basic social skills" but "this October" the Student "reached 'proficiency' in only one of the six." The Student "rarely requires formal behavior interventions ... but has lost self-control on three separate occasions (July, August, September). Each of these incidents involved a different female teacher ... each also had an academic link ... Criticism in general is a trigger ... the aggression we've observed (verbal and physical) has almost entirely been with female authority figures ... " The Student "does continue to make isolated, attention seeking comments, seemingly for shock value." The Student "has also struggled to take full responsibility for physical aggression toward" the "teacher at Dean Morgan, as well as Saint Joseph's." The Student has said [the Student] "would continue with much of the same types of behavior when" the Student "returns to Casper." Also on page 2 of the IEP Report, under the heading Consideration of Special Factors, 34 CFR 300.324(a)

(2), the IEP Report notes that the Student's behavior impedes the Student's learning or the learning of others, that a behavioral intervention plan is needed, and that there are annual IEP goals addressing the Student's behavior. Problem behaviors of the Student are noted on the 11th page of the IEP Report, as follows: "Physical aggression: Very intermittent, isolated instances usually against female, adult authority figures as well as property; Verbal aggression: Isolated instances when [the Student] has lost self-control; Defiance of authority: Some instances of purposeful, passive defiance, as well as isolated verbal refusals; Accepting criticism: Sensitive in general to criticism, but hyper-sensitive to criticism/expectations that involve mathematics." On page 12, the IEP Report describes "Replacement Behaviors" and "Behavior Supports." Staff Supports are described on page 13 of the IEP Report. The most notable "Staff Supports" are: Suicide - Initial one day training and subsequent tune-ups; Corrective Thinking - Initial training and subsequent tune-ups; Quarterly parent trainings (Friday evening, all day Saturday and Sunday morning) using the Boys Town Psychological Model; Monthly consultation meetings held by the Student's teachers and the Education Director to share observations, score the Student on the nine basic social skills using a

## **DECISION and ORDER**

**Case#: H-005-18**

**page 19**

rubric, determine the progress made on IEP goals, treatment plan goals and objectives, and brainstorm ideas for better serving the Student; and, Monthly Treatment Plan Reviews. Among the Supplementary Aids and Services described at page 16 of the IEP Report is: "Daily" use of a "Master Treatment Plan to guide treatment and determine social, emotional and behavior progress." The least restrictive environment for the Student is noted at page 17 of the IEP Report as follows: 'The Student is unable to be satisfactorily educated in the general education environment for the entire school day ... Removal from the regular environment is necessary based on the nature or severity of the Student's disability ... ' (Hanson, Tr. 1003-1010; Ex. R-4; Conclusions of Law, Manifestation Determination Review, and Functional Behavior Assessment [FBA] and Behavioral Intervention Plan [BIP], below.)

24. The Student's BIP - which was prepared by St. Joseph's Children's Home (Ex. R-4) - was not followed by Respondent, reliance instead having been placed on the BASE classroom protocol. Mr. Brazfield works with students in Respondent's BASE classroom, was the Student's case manager during the Student's tenure in that classroom, and relatively quickly established rapport with the Student. Mr. Brazfield has a master's degree in special education, specifically in learning disabilities, and began work with Respondent in 2011. The protocol utilizes a positive behavioral support program to help students with emotional disabilities. It's a reward-based program, and involves multiple tiers of support. Every reward is based on behavior with greater need for support warranting for a higher tier, tier one being the lowest tier. The Student started really well in the BASE classroom and did not receive individualized behavior supports through the BASE classroom because he was being successful, in Respondent's opinion, with Tier 1 BASE protocol support. However, he was struggling with academic work and at two to three weeks prior to the April weekend incident, the Student displayed conduct which Mr. Brazfield saw as "red flags." However, the majority of directions given to the Student were being followed and the Student's behavior was not a sufficiently different pattern, in his estimation, to warrant an FBA. (Brazfield, Tr. pp. 272-277, 279-282, 289-293, 301-302, 309-310, 316, 320, 323-324.)

25. On May 31, 2017, the Student's IEP team conducted a three year re-evaluation of the Student's specialized education and IEP. The resulting Report (5/31/2017 Report) observes that the Student's

## **DECISION and ORDER**

**Case#: H-005-18**

**page20**

disability affects the Student's ability to maintain emotional regulation without aides and that the Student communicates that the Student feels pressure while in school which impacts all school settings. The 5/31/2017 Report indicates that summer school (i.e., extended school year ["ESY"]) is not necessary in order for the Student to receive FAPE - although the Student apparently received tutoring services from Respondent until at least June 17, 2017 - but that the Student requires a measurable annual goal in the area of compliance with school and community rules. The Student is to identify and develop self-calming strategies to be used in the classroom and unstructured times, and the provider will record daily progress. The goal established is that "in 36 instructional weeks the Student will demonstrate self-calming strategies to maintain emotional control (no physical aggression toward self or others) 90% of the time by identifying what physical responses are necessary in order to understand that [the Student] is angry, frustrated or upset." Supplementary services called for included "Social Skills" five times a week between 06/07 /17 and 05/30/18 in a resource location, and that the least restrictive location is a residential facility. (Ex. P-2; Student's Mother, Tr. p. 223.)

26. At and for a period of time after the MDR on April 21, 2017, it was reasonable for Respondent to understand that the Student's Mother would consent to a residential placement for the Student. The Prior Written Notice of April 21, 2017, states that the Student "is currently on a 10 day involuntary hold at WBI. The team is waiting for more information before deciding placement decisions from there." The Student's Mother agreed to the Student receiving school at Respondent's Special Education offices at Jefferson School in Casper until June 2017, the end of the school year. WBI subsequently recommended residential treatment for the Student. The Student's Mother also recalled that at the April 21, 2017 meeting, she said that if the Student "made this threat, then I would hope that I could put" the Student "into a facility to keep" the Student "safe and other kids safe." Her memory of some other details and meetings is hazy. For example, when asked by her attorney whether there was another IEP meeting after May 23, 2017, about the Student's placement, the Student's Mother said there was, although she could not recall when. She does believe, however, that she expressed at that meeting that she did not want the Student placed in residential treatment. She also remembered that in May or June of 2017 she told Respondent's staff that she wished to invoke stay-put for the Student and she recalled Respondent's staff always giving her the

## **DECISION and ORDER**

**Case#: H-005-18**

**page21**

parent handbook concerning parents' rights and responsibilities. The Prior Written Notice of June 1, 2017, recites that the Student "has been on homebound until a residential was found." The Student's Mother did not recall filing an objection to any of the documentation sent to her by Respondent about meetings, or calling any of Respondent's staff and saying "I just received this document that describes this last meeting, and this isn't correct." The explanation offered by the Student's mother was that she was under the impression that although she had voiced her objection to the Student being placed in residential treatment, she was also under the impression that decisions of the IEP team were by majority vote. On June 4, 2017, Lori Cetak, Special Education Coordinator for Respondent, informed Director Hanson that the Student's Mother had indicated she wanted to go to mediation, and on June 23, 2017, Director Hanson received a copy of the Mother's Mediation Request from the WDE. (Student's Mother, Tr. pp. 92-94, 96-98, 101-102, 201, 206, 210, 212-213, 222-223; Hanson, Tr. pp. 839-840-, 843-849, 851, 854-855, 1025; Brazfield, Tr. pp. 289-301, 314-315; Ex. P-2)

27. While under the assumption that the Student's placement would be changing to a residential setting, Director Hanson assumed that modifications to the Student's Behavior Intervention Plan ("BIP") would occur in concert between Respondent and the residential treatment facility. However, there was no evidence of why, once Respondent was put on notice that the Student's Mother was objecting to residential placement of the Student, the Student's BIP was not revisited. (Hanson, Tr. pp. 1006-1007.)

28. The Mediation Request made by the Student's Mother was made twice, first in June or July, 2017, then again in July or August, 2017. She had not realized the need to sign and return the first set of paperwork related to mediation to the WDE, necessitating a second Request. (Student's Mother, Tr. pp. 109-110.)

29. Mediation occurred September 13, 2017, and the Parties entered a formalized Mediation Agreement ("Mediation Agreement") which was signed the same day. Among other things, the Mediation Agreement provides that when the Student's therapist and psychiatrist feel that Student is ready to safely re-enter a more normal school environment, Respondent will allow the Student to do so within the

## **DECISION and ORDER**

**Case#: H-005-18**

**page22**

parameters of the Student's IEP. The Student's Mother agreed to that provision because the Student was doing well and had a therapist so she didn't think there was going to be any problem. The Mediation Agreement also provided that the Student would enter the Respondent's in the Virtual School and participate from the Student's home with a computer provided by" Respondent, and that the Student would meet the academic benchmarks required to remain in that program. Although not expressed, the Student's Mother understood that the Agreement contemplated the Student would attend tutoring several times a week at Respondent's Special Education Services Building. Should the Student fail to make the academic benchmarks required for participation in the Virtual School, the Agreement provides, the Student would be dropped from that program, and at that point the Student's parent would agree that the Student would either be sent to a residential treatment program in Wyoming or withdraw the Student from Respondent District. (Student's Mother, Tr. pp. 109-111, 116, 224; Ex. P-11.)

30. The Mediation Agreement confirmed the Student's homebound placement, with the Student participating through Respondent's Virtual School. An IEP meeting followed almost immediately following execution of the Mediation Agreement. (Ex.'s P-11, R-17; Hanson, Tr. p. 867.)

31. Petitioner would like to have paragraph 4 of the Mediation Agreement declared unenforceable, contending that on its face item 4 violates the LRE provisions of IDEA and that the Student's Mother did not know or understand the rights she was waiving. (Issue H. [6.a]; Ex. P-11; Request for Due Process Hearing, p.3 [Record tab 2]; Petitioner's Closing Arguments; and Proposed Findings of Facts and Conclusions of Law, p.12 [Record tab 46].)

32. The Mediation Agreement is not ambiguous, with respect to paragraph 4. (Ex. P-11.)

33. No evidence was presented to contradict the impression of the Hearing Officer that the Student's Mother is an articulate adult, without known infirmity (e.g., inability to read or comprehend the special education documentation supplied to her by Respondent concerning the Student), who appears to have been continuously and intensely engaged in the Student's life, both in and out of school, since the

## **DECISION and ORDER**

**Case#: H-005-18**

**page23**

Student's birth. She was not able to recall some details about which she was questioned at the Due Process Hearing. The demands on her have been challenging at times! for example, in contending with the Student's experiences, raising three other children, dealing with alleged abuse of her children and Family Violence Protection Act court proceedings. Given these and perhaps other demands, it has been difficult, at least at times, for her to maintain employment. Nevertheless, Petitioner has not proven that she was unable to comprehend the Parties' Mediation Agreement entered September 13, 2017. (Student's Mother, Tr. pp. 25-134, 173-257, 331-347, 1186-1198, 1266-1298.)

34. By another provision of the Mediation Agreement m3.), the Parties agreed to "relatively frequent" IEP meetings "to monitor' the Student's "progress." The term "relatively frequent" is not defined. Petitioner contends that Respondent failed to hold sufficient meetings, and Respondent counters that between September 2017, and March 15, 2018, there were eight. The requirement under IDEA is that an IEP team is to meet at least annually. A Prior Written Notice was admitted into evidence, dated September 14, 2017, the day after the Mediation Agreement was signed, reflecting a plan to have the Student attend Respondent's Virtual Academy and receive tutoring in social skills and math 3 times a week for 1 hour at Respondent's Special Ed Service Center. On October 25, 2017 Director Hanson and Respondent's Special Education Coordinator Nancy Johnson met with the Student's Mother to discuss the Student's sporadic attendance at tutoring and the Student not completing assignments at home. A meeting was held on November 27, 2017, between Director Hanson, Special Education Coordinators Johnson and Cetak, and the Student's Mother. Topics discussed were the Student's poor attendance, the Student not making educational progress, and brainstorming potential solutions to be considered at the IEP team meeting in December. On December 7, 2017, the Student's IEP team met, with the Student's Mother present, documentation about which was entered in the record as Exhibit R-23., however the exhibit contains references to an update on "2/7/18." The Student's attendance had continued to fluctuate, with the Student missing an average of 80% of the tutoring sessions, according to Director Hanson. Director Hanson testified that "continued concern over the threatening behavior and the determination by the mediation team that a return to school programing was not appropriate at that time." R-23 states "Concerns were expressed by the school psychologist and other school staff about the validity of an FBA in the Student's "current

## **DECISION and ORDER**

**Case#: H-005-18**

**page24**

placement, however, all agreed to move forward with the FBA to see what information could be obtained." Exhibit R-24 is two page FBA prepared by Respondent School Psychologist Deborah Black following the December 7, 2017, IEP meeting. It was prepared because the Student's Mother and her attorney hoped it would inform the IEP team around decisions supporting the Student's engagement and/or previous behaviors. R-24 was admitted over Petitioner's objection as part of the Student's educational record; Dr. Black was apparently medically unable to testify. Dr. Black's FBA was done on the basis of her review of school records and without interviews of other Respondent staff, the Student's Mother, or the Student. Furthermore, Dr. Black's FBA makes reference to an evaluation in May of 2017, by a "Dr. Mark Holland." Nothing other than Dr. Black's reference to Dr. Holland or his purported report is in evidence. Dr. Black's FBA does not appear to be an in-depth effort and is of little value. It characterizes the Student's behavior as suggestive of "avoidance," meaning, according to Director Hanson, "avoiding unwanted tasks or directions." Dr. Black's FBA contains no mention of the April 2017 incident involving the Student, or how her behavioral analysis might be productively used or how Respondent's staff or the Student's Mother might better engage or support the Student in modifying unwanted behavior or fulfilling the objectives of the Student's IEP. A prior Written Notice dated January 19, 2008, (Ex. R-27) describes the IEP team's meeting of that date. Director Hanson testified that, in light of the Student's lack of educational progress, the team discussed residential placement, but that the Student's Mother wanted to have a psychological evaluation completed prior to making a decision. On February 7, 2018, an IEP team meeting was convened. The substance of the meeting is captured in a Report (Ex. R-31) and, as Director Hanson testified, the discussion included a request from the Student's Mother that the Student be returned to the regular classroom. The Report reflects that the Student had been unsuccessful in the current placement and that pursuant to the Mediation Agreement the school had requested a psychological evaluation of the Mother's choice. Action was deferred until that report could be reviewed, and another meeting was set to occur February 15, 2018. No reference appears in any of the documents described in this Finding to the BIP from St. Joseph's Children's Home, which was apparently still the Student's only behavior intervention plan, about the success or failure of utilizing that BIP, or the effect, if any, of School Psychologist Black's FBA on that BIP. (Ex. P-11; Issue I.; Hanson, Tr. pp. 867, 870-872, 874-877, 888-891, 896, 900, 907-910, 934-936, 938-940; Walters, Tr. pp. 419-422, 428-432, 443-444; Ex.'s R-17, R-19, R-21, R-23, R-24; R-27, R-31.)



## **DECISION and ORDER**

**Case#: H-005-18**

**page25**

35. At the February 7, 2018, IEP meeting, apparently prompted by Dr. Black's FBA and her suspicion that the Student's behavior was "avoidant," Respondent switched the Student's tutor to Lori Cetak. (Hanson, Tr pp. 941-942.)

36. At the February 7, 2018, IEP meeting, Respondent also decided not to pursue a due process hearing until the planned psychological evaluation of the Student which was discussed at the meeting could be reviewed, and the plan was to do that when the Student's IEP team reconvened on February 15, 2018. (Hanson, Tr. pp. 937-938, 940.)

37. The Student's IEP team, including the Student's Mother with her attorney, met February 15, 2018, with Charles Powell, Ph.D. and reviewed his psychological evaluation of the Student. In sum, Dr. Powell's report states that he did not believe residential placement of the Student was needed at the time. (Hanson, Tr. p. 943; Ex.'s P-12, R-32.)

38. Charles Powell, Ph.D. has a master's degree in educational psychology, has worked as a school psychologist, and has a doctorate degree in clinical psychology. In doing the evaluation, Dr. Powell reviewed the Student's records which were supplied by Respondent. He had also previously evaluated the Student in October of 2015. In both the 2015 and 2017 evaluations Dr. Powell saw a pattern of scores he believed typical in individuals who have well-established antisocial tendencies and a tendency to violate social rules and expectations occasionally causing harm to others. Dr. Powell said that serious concerns persisted about the Student's concentration, impulse control, and aggressive behavior, and that the Student continued to struggle with reactive tendencies and rapid deterioration in response to frustration and/or perceived unfairness. He also noted that the Student's pattern would likely persist over time, and accordingly that the Student would require specialized assistance with management of emotional reactions and metered exposure to potentially threatening environments, "e.g., the regular school environment that requires both peer interaction and rule compliance." For students exhibiting that pattern, Dr. Powell emphasized the need for individualized, structured programs. Dr. Powell concluded that "inpatient

## **DECISION and ORDER**

**Case #: H-005-18**

**page26**

placement" appeared to be "contraindicated at this time." (Powell, Tr. pp. 488-489, 493-494, 509-511, 515, 520-521, 557; Ex.'s P-12, R-44.)

39. On March 15, 2018, an MDR team, including the Student's Mother, was convened in relation to an incident involving the Student which occurred on March 8, 2018. In the incident the Student is alleged to have hit another student at or near a school bus stop. The MDR conclusion is reported in Exhibit R-36, which was admitted into evidence by stipulation. The MDR conclusion was that the Student's conduct was not caused by and did not have a direct and substantial relationship to the child's disability. The report contains the following statement: "After much discussion (see attached) the team was not able to come to consensus on this issue - therefore the outcome of this question rested upon the decision of the SPED administrator." The SPED administrator is identified in Exhibit R-36 as T. Hanson. The report also finds that the incident was not a result of Respondent's failure to properly develop and implement the Student's IEP. Director Hanson testified that he believed the majority of the Student's IEP team members was to place the Student in residential treatment for an evaluation, and that was the LRE. The conclusion is based, at least in part, on Director Hanson's belief that Respondent does not have the capability of keeping the Student and other students safe if the Student is placed in a classroom building environment. (Hanson, Tr. pp. 962-963, 973-975; Ex. R-36.)

40. By stipulation the Parties agreed to the admission of P-18. This was represented to be a compact disk recording of the MDR of March 15, 2018. Those attending the meeting are identified at one point and, in her testimony, Petitioner's Attorney, Katherine Osten, identified those present to have included Kathleen Dixon, Shawna Trujillo, Walt Wilcox, Ted Hanson, Lori Cetak, Deb Black, the Student's Mother, the Student, the Student's Grandmother, and a few teachers and "maybe" a school social worker. In his testimony, Director Hanson said Dr. Black facilitated the initial part of the meeting, but individual speakers on the recording are not identified, other than generally. The Parties were encouraged to somehow identify the speakers, but that did not occur. I listened to the recording, but find it has insufficient probative value to be of assistance in reaching this Decision. (Discussion with Counset Tr. pp. 956-958, 1199-1201, 1207-1208; Osten, Tr. pp. 570-574; Hanson, Tr. pp. 950-951; Ex. P-18.)

## **DECISION and ORDER**

**Case#: H-005-18**

**page27**

41. Katherine Osten, one of Petitioner's attorneys, testified concerning a conversation which she had with Kathleen Dixon, one of Respondent's attorneys, on March 9, 2018. Ms. Dixon told Ms. Osten about an incident involving the Student and that at the IEP meeting for the Student planned to occur on March 15, 2018, the school was "likely" to recommend a residential placement. The meeting later became an MDR concerning the incident. Director Hanson testified that to his knowledge there had been no predetermination of placement. The term "likely" was not suggestive of predetermination and Petitioner did not prove that Respondent impermissibly predetermined a position regarding residential placement for the Student. {Osten, Tr. pp. 567-577, 580-581; Hanson, Tr. pp. 1062-1070.}

42. On April 4, 2018, Dr. Powell received a call from Director Hanson, which he returned. Mr. Hanson described an incident for Dr. Powell involving the Student. Although Dr. Powell could not recall details, he believes he was told that the Student had hit another student. Dr. Powell was supplied with a police report about the incident. Mr. Hanson asked Dr. Powell for a written statement, which was provided. The circumstances, Dr. Powell wrote, raise a question about the Student's diagnosis and whether the behavior was the result of the Student's disability. The incident, Dr. Powell wrote, was consistent with the Student's conduct disorder diagnosis. He also wrote that \_the Student's apparent inability to tolerate perceived injustice without aggression indicates that the Student was not capable of managing the less-structured setting recommended in Dr. Powell's recent evaluation, and instead warranted a more restrictive setting and more intensive treatment. Dr. Powell understood Director Hanson was asking for the Doctor's opinion as to whether the Student's actions had been a manifestation of the Student's disability. In Dr. Powell's opinion, the Student's actions had been a manifestation of disability, as indicated in his written statement. Dr. Powell testified that he had no way of assessing whether the Student's action in the incident had been "premeditated." {Powell, Tr. pp. 523-529, 548-550, 557; Ex.'s P-13, R-46.}

43. Petitioner has proven that the MDR conclusion reached on March 15, 2018 and Reported in the Manifestation Determination report of the same date is erroneous. I find, even assuming the truth of the allegations concerning the Student's conduct on March 8, 2018, as outlined by Respondent and noted above, that the conduct was caused by or had a direct and substantial relationship to the Student's

## **DECISION and ORDER**

**Case #: H-005-18**

**page28**

disability. Significant in the context of this Finding is the opinion expressed by Charles Powell, Ph.D., based upon the Student's file and Dr. Powell's evaluations, all of which was known to Respondent and Director Hanson at the time of the decision of no manifestation. Dr. Powell's expertise relative to formulating an opinion on the question has not been challenged, and Respondent has not offered opposing evidence of comparable weight. {Powell, Tr. pp. 527-529; Ex.'s P-12.)

44. Stephen Walters, MA, has been contracted by Respondent to perform an independent FBA for the Student. Mr. Walters has served over the last decade as a school psychologist and behavior specialist systems designer in Albany County, Wyoming. Previously, for four years, he was a school psychologist for Respondent. He has also been a classroom teacher. Mr. Walters was qualified at the Due Process Hearing as a behavioral-intervention-for-education expert. Mr. Walters' FSA is in process and, as of the time of his testimony, his work on it has primarily consisted of compiling and reviewing records supplied by Respondent and Petitioner, and briefly interviewing the Student. Mr. Walters described an FBA simply as "looking for things that are either in or not in the environment that encourage prosocial and/or maladaptive behaviors." Following further record review, whereby he hopes to discern patterns and formulate preliminary questions, he planned to interview pertinent parties - including anybody involved who could help answer the questions that have been generated about the Student's behavior - and, if possible, directly observe the Student, he anticipates composing a report which describes specific behaviors of the Student and the circumstances under which those behaviors provide specific functions. At the time of his testimony, he had reviewed the Student's IEP back to at least first grade, reports from several of the Student's residential placement facilities, information about the Student's placement in Respondent's BASE classroom at CYMS and information about that classroom's behavior support, tiered program, and reports from several clinical psychologists concerning the Student. Mr. Walters was aware of the Student's threat to bring a gun to school, the Student's alleged assault which occurred after Mr. Walters was engaged by Respondent, and police reports which make reference to the Student's social media posts relating to harming people in the school district. From his review up to the time of his testimony, he anticipates his review will target threatening behaviors that are physically aggressive, refusals, and arguments. After determining the function of a behavior, the next step, according to Mr. Walters, is to develop a behavior

## **DECISION and ORDER**

**Case#: H-005-18**

**page29**

plan, figure out what training needs to occur for staff and parents, train and monitor - not only the student's progress but fidelity to the program, collect data, and make alterations as the need becomes apparent. Mr. Walters noted, persuasively, that kids do not act-out in isolation, that in his opinion there is something in the Student's school environment or home environment in need of repair, and that it is possible that an ill advised behavior intervention could exacerbate unwanted behavior. For example, applying an intervention for avoidance when instead something else is prompting unwanted behavior, may make the situation worse. (Walters, Tr. pp. 402-418, 422-425, 448; Ex. P-16.)

45. As of the time of his testimony, Mr. Walters had not completed the FBA for the Student. Other than the Student, he had not interviewed the pertinent parties as he anticipates doing. He had not learned very much about the Student's home environment, and so lacked substantial knowledge of the structure and stability of the home, something he agreed was important. He was not fully aware of the details of the Student's attendance at tutoring since September 2017, or the details of the social and emotional instruction and support offered by Respondent. Those deficits would have altered the concerns he expressed about the Student. However, Mr. Walters did not express the opinion that Respondent's failure to implement those portions of the Student's IEP intended to address behavior amounted to a substantial failure to provide services under the IEP, or that the special education and related services had not been provided by Respondent other than in conformity with the Student's IEP. (Walters Tr. pp. 404, 409-410, 469-470, 472, 474.)

46. In light of several factors the IEP team should be ordered to revisit and revise, as necessary, the Student's IEP. Those factors include: (a) the finding that the Student's BIP, as set forth in the St. Joseph's Children's Home IEP of November 9, 2016, was implemented with, at best, incomplete fidelity; (b) the finding that Respondent misread the requirements of IDEA with respect to revisiting the Student's FBA and adjusting the Student's BIP following the conclusion of manifestation at the MDR of April 21, 2017; (c) the finding that the MDR conclusion of no manifestation on March 15, 2018, was erroneous, and that such finding has implications for the referenced IDEA requirements concerning revisiting and perhaps adjusting the Student's BIP ; (d) the finding that the FBA of Stephen Walters will be completed in the near future; and,

## DECISION and ORDER

Case#: H-005-18

page30

(e) the finding, based on Mr. Walters' testimony, that the Student's educational and/or behavioral difficulties in settings overseen by Respondent may relate to the Student's difficulty generalizing what was learned during residential placements at St. Joseph's Children's Home. (Hanson, Tr. pp. 1004-1005, 1070-1072; Walters, Tr. pp. 402-481; Ex. R-4; 34 CFR 300.530(n and its WOE counterpart; 20 U.S.C. 1414[d][4][A].)

### CONCLUSIONS OF LAW

The following conclusions of law were relied upon in reaching this Decision and are adopted:

#### BURDEN OF PROOF

1. In the present case, the burden of proof is Petitioner's. Absent a statutory allocation - and there is no such allocation in the IDEA, or in its implementing regulations, or in the Wyoming companion provisions

- the default rule for determining which party in a dispute has the burden of proof, also sometimes referred to as the burden of persuasion, is that the burden is assigned to the party seeking to change the present state of affairs. (*Schaffer v. Weast*, 546 U.S. 49, 56 and 61, 126 S.Ct. 528, 163 L.Ed 387 [U.S. 2005].)

2. The IDEA is a Spending Act statute that seeks to ensure that all children with disabilities have available to them a "free appropriate public education," FAPE (20 U.S.C. § 1400 *et seq.*). The IDEA was first approved by Congress to address the fact that the majority of children with disabilities in America were "either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out,'" (H. R. Rep. No. 94-332, p. 2 (1975)). *Schaffer, supra*, 546 U.S. 49, 51-52; *Endrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 at 993 and 999, 197 L.Ed.2d. 335, \_U.S.\_[2017].)

## DECISION and ORDER

Case#: H-005-18

page31

3. A FAPE includes both special education and related services. 20 U.S.C. §1401(9). "Special education" is defined as specifically designed instruction to meet the unique needs of an eligible student, and "related services" are the support services required to assist the student to benefit from that instruction. 20 U.S.C. §1401 [26) and [29).]

4. The United States Supreme Court first examined the question of a FAPE standard in the context of IDEA in *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Although a majority of the *Rowley* Court held that the IDEA establishes a substantive right to FAPE for certain children with disabilities, it did not establish a requirement that schools provide eligible students with disabilities with equal educational opportunity in comparison to students without disabilities (*Andrew F.*, 137 S.Ct. at 1001 ), and it did not endorse any one standard for determining when such students are receiving sufficient educational benefits. That "more difficult problem" was most recently addressed by the Court in 2017 in *Andrew F.*, *supra*.

5. The IDEA requires that children with disabilities receive education in a regular classroom whenever possible. When that preference is met, the system self-monitors educational progress. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for students who attain an adequate knowledge of course material. Progress through that system is what our society generally means by an "education." "Access to an education" is what the IDEA promises. (*Andrew F.*, 137 S.Ct. at 999.)

6. In *Andrew F.* the Supreme Court recognized that while *Rowley* did not articulate an overarching standard to evaluate the adequacy of the education provided, the decision pointed to a general approach: 'To meet its substantive obligations under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (emphasis added). And it is now clear that the educational program of a student entitled to specialized education and related services must be appropriately ambitious in light of the Student's circumstances, and that standard means the program must aim for markedly more than de minimus progress. (*Andrew F.*, 137 S.Ct. at 999-1000.)

## DECISION and ORDER

Case#: H-005-18

page32

7. While not elaborating further as to what "appropriate" progress will look like in a particular case or establishing a bright-line rule, the *Andrew F.* Court did make clear that a hearing officer is not to substitute his or her notions of sound educational policy for those of the school authorities. Those authorities, the Court instructed, have the responsibility for decisions of critical importance to the life of a student with disabilities, and the nature of the IEP process is expected to ensure that parents and school representatives will fully express their respective opinions about the degree of progress a child's IEP should pursue. A reviewing tribunal's deference to those authorities is based on the expectation that they will offer cogent and responsive explanations for their decisions demonstrating that an IEP is reasonably calculated to enable the student whose education is under review to make progress appropriate to the student's circumstances. (*Andrew F.*, 137 S.Ct. at 1001-1002.)

8. Lack of implementation of a student's IEP denies the student FAP E if it amounts to a substantial failure to provide the IEP services. (*HISD v. Bobby R.*, 200 F.3d 341, 348-349 [5th Cir. 2000].) A material failure is one that is more than a minor discrepancy between the services provided and the services required by the IEP. (*Van Duyn ex rel Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811 [9th Cir. 2007].) Failure to implement those parts of a student's IEP designed to assist the student with behavioral issues can be a material failure. (*Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 [8th Cir 2003].)

### INDIVIDUALIZED EDUCATION PROGRAM (IEP)

9. The IDEA has been described as a model of "cooperative federalism" (e.g., *Little Rock School Dist.*

*v. Mauney*, 183 F.3d 816, 830 (C.A.8 1999)). It leaves to the States the primary responsibility for developing and executing educational programs for children with disabilities, but imposes significant requirements to be followed in the discharge of that responsibility. (*Rowley*, supra, 458 U.S. at 183). For example, in exchange for funding assistance, the IDEA mandates cooperation and reporting between state and federal educational authorities, with State educational agencies ensuring that local schools and teachers are meeting State educational standards (20 U.S.C.A. § 1412(a)(11)) and a local school board can only receive IDEA funds if it certifies to the State that it is acting in accordance with pertinent State policies and



## DECISION and ORDER

Case#: H-005-18

page33

procedures (20 U.S.C. § 1413(a)(1)). *Schaffer*, supra, 546 U.S. at 52-53. That includes, in effect, the representation that the local school will provide qualifying students with adequate special education and related services in conformity with such students' individualized education programs, in other words with their IEP s. (20 U.S.C. § 1401 [9][D]; *Andrew F.*, 137 S.Ct. at 994.)

10. The IEP is the centerpiece of the IDEA's educational delivery system. An IEP is a comprehensive plan prepared by a student's IEP team, which includes teachers, school officials, and the student's parent(s). The IEP is to be drafted in compliance with a detailed set of procedures, and special education and related services for an eligible student must be provided in conformity with the student's IEP. (20 U.S.C. §§ 1401[9], 1414[d][1][8]; *Andrew F.*, 137 S.Ct. at 994.)

11. "The core" of the IDEA is this cooperative process, *Rowley*, supra, 458 U.S. at 205-206, and the central vehicle for their collaboration is the IEP process. *Schaffer*, 546 U.S. at 53. The prescribed detailed procedures for developing an IEP emphasize collaboration among IEP team members and careful consideration of the student's individual circumstances, 20 U.S.C. § 1414, to help ensure that the IEP is tailored to the unique needs of the particular student. (*Andrew F.*, 137 S.Ct. at 994.)

12. "IEP" means a written statement for a student with a disability that is developed, reviewed, and revised in accordance with 20 U.S.C § 1414 and which includes the ingredients specified in that section.(20 U.S.C. § 1414[d][1][A][i].)

13. Every IEP is to aim to enable the student to make progress by setting out a plan for pursuing academic and functional advancement (20 U.S.C. § 1414[d][1][A]). To that end, it is to include "a statement of the child's present levels of academic achievement and functional performance," describe "how the child's disability affects the child's involvement and progress in the general education curriculum," and set out "measurable annual goals, including academic and functional goals," along with a "description of how the child's progress toward meeting" those goals will be gauged.§ § 1414(d)(1)(A)(i)(I)-(III). The IEP must

## DECISION and ORDER

Case#: H-005-18

page34

also describe the "special education and related services ... that will be provided<sup>11</sup> so that the child may "advance appropriately toward attaining the annual goals<sup>11</sup> and, when possible, "be involved in and make progress in the general education curriculum.<sup>11</sup> § 1414(d)(1)(A)(i)(IV). (*Endrew F.*, 137 S.Ct. at 994, 999-1000.)

14. The "reasonably calculated" qualification to which attention was given in *Endrew F.*, supra, and described above, reflects a recognition that crafting an appropriate education requires a prospective judgment by school officials and that the fact-intensive exercise contemplated will be informed not only by the expertise of those officials, but also by the input of the student's parents. Accordingly, any review of the adequacy of an IEP must appreciate that the question is whether the IEP is reasonable, not whether it is ideal. (*Endrew F.*, 137 S.Ct. at 999.) Parents and school staff often agree about what a student's IEP should contain, but not always. When disagreement occurs, a parent may resort to the dispute resolution procedures established by the IDEA. Among the dispute resolution options are mediation (20 U.S.C. § 1415; 34 CFR 300.506) and a due process complaint (20 U.S.C. § 1415; 34 CFR 300.507 and 508). At the conclusion of a due process hearing, the losing party may seek redress in court (20 U.S.C. § 1415). (*Endrew F.*, 137 S.Ct. at 994.)

15. A school, in fulfilling its obligations under IDEA, is required to ensure that a student's IEP is reviewed not less frequently than annually, and to revisit an IEP, as appropriate, in response to several factors, including new information about the student's performance, behavior, disabilities, and needs. (20 U.S.C. § [d][4][A].)

### FUNCTIONAL BEHAVIORAL ASSESSMENT (FBA) and BEHAVIOR INTERVENTION PLAN (BIP)

16. The IDEA expressly mandates the development of a FBA and BIP in one circumstance: when the conduct of a student who is receiving special education is subjected to a disciplinary change of placement and the conduct is determined to be a manifestation of the student's disability. (34 CFR 300.530[ij].)

## **DECISION and ORDER**

**Case #: H-005-18**

**page35**

17. However, in developing an IEP, a student's IEP team must consider, among other things, the concerns of the Student's parent for enhancing the education of the student, and the results of the student's evaluations. In the instance of students for which behavior impedes learning (of the student or of others), the IEP team must consider the use of positive behavior interventions and supports, and other strategies to address the behavior. (34 CFR 300.324[a][1] and [2][i].)

18. The IDEA does not define the term "functional behavioral assessment." However, "IEP teams need to be able to address the various situational, environmental, and behavioral circumstances raised in individual cases." (20 U.S.C. § 1414 et seq.; 64 Fed. Reg. 12,620 [1999].)

19. The IDEA also does not define the term "behavioral intervention plan." [20 U.S.C. § 1414 et seq.]

### **MANIFESTATION DETERMINATION REVIEW (MDR)**

20. An MDR is an evaluation of a student's misconduct that will result in a change of placement, to determine whether the conduct was a manifestation of the student's disability or whether the conduct was a direct result of the failure of the student's school to implement the student's IEP. (34 CFR 300.530[e], Wyoming Department of Education, General Agency, Board or Commission Rules, Chapter 7: Services for Children with Disabilities, p. 7-21, Wyoming Department of Education IDEA P procedural Safeguards, January 2015, Procedures for Disciplining Children with Disabilities, pp.11-12.)

21. IDEA recognizes that a student with a disability may display disruptive behaviors characteristic of the child's disabilities and the student should not be punished for behaviors that are a result of disability. (71 Fed. Reg. 46,720.)

22. An MDR must involve a review of all relevant information in the student's file, including the student's IEP, any teacher observations, evaluations and diagnostic results, and relevant information provided by the parents. (34 CFR 300.530[e]; Wyoming Department of Education, General Agency, Board

## **DECISION and ORDER**

**Case#: H-005-18**

**page36**

or Commission Rules, Chapter 7: Services for Children with Disabilities, p. 7-21; Wyoming Department of Education IDEA Procedural Safeguards, January 2015, Procedures for Disciplining Children with Disabilities, pp.11-12; OSEP, Letter toYudien, August 1, 2003; 64 Fed. Reg. 12625.)

23. 34 CFR 300.530(ij) reads as follows: (ij) Determination that behavior was a manifestation. If the LEA (local educational agency, i.e., the school), the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must -

(1) Either -

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child;

or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

24. The provisions of the Wyoming Department of Education Notice of Procedural Safeguards, issued January 2015, at page 12, are consistent with 34 CFR 300.530(ij).

25. 34 CFR 300.530(9), and its Wyoming counterpart, provide that a school may remove a student to an interim alternative educational setting for not more than 45 school days, without regard to whether the behavior is determined to be a manifestation of disability, if the student: ( 1) carries a weapon to or possesses a weapon at school, on school premises or to or at a school function under the jurisdiction of the school or the state educational agency; (2) knowingly possesses or uses illegal drugs, or sells or solicits

## **DECISION and ORDER**

**Case #: H-005-18**

**page37**

the sale of a controlled substance while at school on school premises or at a school function under the jurisdiction of the school or the state educational agency; OR, (3) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the school or the state educational agency. (20 U.S.C. § 1415; 34 CFR 300.530[g]; Wyoming Department of Education IDEA Procedural Safeguards, January 2015, Procedures for Disciplining Children with Disabilities, p.12.)

26. A manifestation determination review (MDR) is to be employed to determine the relationship between a student's disability and the student's misconduct and the relationship, if any, between the school's failure to implement the student's IEP and the student's misconduct. IDEA mandates that within 10 school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the school, student's parent, and relevant members of the student's IEP team (as determined by the parent and the school) must review all relevant information in the student's file, including the student's IEP, teacher observations, and any relevant information provided by the parents, in order to determine: (i) the conduct in question was caused by, or had a direct and substantial relationship to the student's disability; or, (ii) if the conduct in question was the direct result of the school's failure to implement the student's IEP. (20 U.S.C. § 1415; 34 CFR 300.530[e]; Wyoming Department of Education IDEA Procedural Safeguards, January 2015, Procedures for Disciplining Children with Disabilities, pp. 11-12.)

27. Except as provided in 34 CFR 300.530(9), when an MDR team determines that the violation of the code of student conduct giving rise to an MDR was a manifestation of the student's disability, the school MUST return the student to the placement from which the student was removed, UNLESS the student's parent and the school agree to a change of placement as part of the modification of the behavioral intervention plan (BIP). (20 U.S.C. § 1415; 34 CFR 300.530[ij][2]; Wyoming Department of Education IDEA Procedural Safeguards, January 2015, Procedures for Disciplining Children with Disabilities, p.12.)

## **DECISION and ORDER**

**Case#: H-005-18**

**page38**

28. The parent of a student with a disability who disagrees with any decision regarding placement under 34 CFR 300.530 and 300.531, or a manifestation determination made under 34 CFR 300.530(e), or a school that believes that maintaining a student's current placement is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is initiated by filing a due process complaint pursuant to 34 CFR 300.507 and 300.508(a) and (b). A hearing officer's authority in the context of such an appeal or school initiated due process complaint is described in 34 CFR 300.532.

### PARENTAL CONSENT

29. The process of "parental consent" and "revocation of parental consent" in the context of special education is to be understood and implemented by Wyoming school districts consistent with 34 CFR 300.9 and 300.300. {Wyoming Department of Education, General Agency, Board or Commission Rules, Chapter 7: Services for Children with Disabilities [effective 03/22/2010 to current], Section 6.[b], p.7-20; WOE Notice of Procedural Safeguards Individuals with Disabilities Education Act, January 2015, pp. 4-6; 20 U.S.C. § 1415.}

30. Consent, among other things, means that: (a) a parent has been fully informed of all information relevant to the activity for which consent is sought; (b) the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and, (c){1} the parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time; (c){2} if a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked; and, (c){3} if the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any reference to the child's receipt of special education and related services because of the revocation of consent. {34 CFR 300.9; WOE Notice of Procedural Safeguards Individuals with Disabilities Education Act, January 2015, pp. 4-6, 10.}

## **DECISION and ORDER**

**Case#: H-005-18**

**page39**

### LEAST RESTRICTIVE ENVIRONMENT {LRE}

31. The LRE requirement is that students be educated, to the maximum extent appropriate for the particular student, in regular classroom settings with students who do not have disabilities. (20 U.S.C § 14 12[a]; 34 CFR 300.114[a].)

32. An IEP must explain the extent (if any) to which a student will not participate with students who do not have disabilities in a regular class and in other school activities. The LRE for a particular student with a disability must be determined on an individual basis based on the student's IEP. {U.S. Department of Education, A Guide to the Individualized Education Program, p.4.)

### MEDIATION AGREEMENT

33. When parties to a dispute under IDEA resolve their differences through mediation, they are required to execute a legally binding agreement that sets forth that resolution. A written, signed mediation agreement is enforceable in any state court of competent jurisdiction or in a district court of the United States. (34 CFR 300.506[b][6] and [7].)

34. Settlement agreements are contracts and subject to Wyoming laws of contract interpretation. (*Western Municipal Construction of Wyoming Inc. v. Better Living, LLC*, 234 P.3d 1223, ,r 11 [Wyo. 2010].)

35. Discussions that occur during the mediation process are confidential and may not be used as evidence in any subsequent due process hearing. Furthermore, under Wyoming law, the initial question with interpretation of a contract is whether it is clear and unambiguous. If it is, the determination turns to discerning the parties' intent from the contract alone. Extrinsic evidence is not to be considered although the context in which the contract was made, including the subject matter, the purpose, and the circumstances surrounding its making, all may be considered to help ascertain what was intended. (34 CFR

## DECISION and ORDER

Case#: H-005-18

page40

300.506[b](7); [*Hurst v. Metropolitan Property and Casualty Insurance Company*, 2017 WY 104, ffJ 11 and 12 [Wyo. 2017])

36. Even an imprudently entered contract is not to be rewritten so long as it is not ambiguous and parties are bound to their contract as written. (*Collins v. Finnel*, 2001 WY 74, 29 P.3d 93 [2001], citing earlier authority.)

### ORDER

IT IS HEREBY ORDERED, pursuant to 34 CFR § 300.532(b)(2)(i) and the WDE counterpart, that the Student is returned to the Student's placement as it existed on March 15, 2018 (that is to say, HomeBound and tutoring services), for the reason that the Student's behavior was a manifestation of the Student's disabilities.

IT IS FURTHER ORDERED that the Student's IEP team revisit and revise, as necessary, the Student's IEP in light of: (a) the finding that the Student's BIP, as set forth in the St. Joseph's Children's Home IEP of November 9, 2016, has apparently not been implemented with fidelity; (b) the finding that Respondent misread the requirements of IDEA with respect to revisiting the Student's FBA and adjusting the Student's BIP following the conclusion of manifestation at the MDR of April 21, 2017; (c) the finding that the MDR conclusion of no manifestation on March 15, 2018, was erroneous, and that such finding has implications for the referenced IDEA requirements concerning revisiting and perhaps adjusting the Student's BIP ; (d) the FBA of Stephen Walters which is expected to be completed in the near future; and, (e) the finding, based on Mr. Walters' testimony, that the Student's educational and/or behavioral difficulties in settings overseen by Respondent may relate to the Student's difficulty generalizing what was learned during residential placements at St. Joseph's Children's Home.



**DECISION and ORDER**

**Case#: H-005-18**

**page41**

Petitioner is the prevailing party with respect to Respondent's failure, following the April 21, 2017, MDR manifestation, to revisit the Student's FBA and adjust, as necessary, the Student's BIP. Petitioner is also the prevailing party with respect to the challenged MDR of March 2018. Otherwise, Respondent is the prevailing party.

**ENTERED** this 11th day of May, 2018.



Robert "Bob" Mullen, Hearing Officer

Copies of this Decision and Order were provided to the Parties this 11th day of May, 2018, via U.S.P.S. and

email, addressed as follows:

**ENTERED** this 11th day of May, 2018.

Copies of this Decision and Order were provided to the Parties this 11th day of May, 2018, via U.S.P.S. and

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