

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNFIER AND EUGENE WONG,

Plaintiff,

v.

SEATTLE SCHOOL DISTRICT,

Defendant.

CASE NO. C16-1774-RAJ

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

I. INTRODUCTION

On May 20, 2015, Plaintiffs Jennifer and Eugene Wong filed a Complaint against Defendant, Seattle School District No.1 on behalf of their son, J.W., a minor. Dkt. # 1. The Court heard this matter in a bench trial that began on October 23, 2018 and concluded on October 31, 2018. Dkt. ## 91-97. After stipulations and orders on motions in limine and a motion for partial summary judgment, the only issues remaining for trial was whether the School District discriminated against Plaintiff J.W. in violation of Section 504 of the Rehabilitation Act and the Americans With Disabilities Act (“ADA”), and whether J.W. suffered any emotional damage as a result of the District’s actions. The trial included the testimony of several witnesses and the admission of various exhibits into evidence. The parties also submitted proposed findings of fact and conclusions of law. Dkt. ## 88, 89.

ORDER – 1

1 Pursuant to Federal Rule of Civil Procedure 52, the Court enters the following
2 findings of fact and conclusions of law. For purposes of organization and clarity, the
3 Court has included some subsidiary conclusions of law with its findings of fact, and vice
4 versa. **For the following reasons, the Court finds that Plaintiff failed to prove that**
5 **the District violated Section 504 and the ADA with respect to J.W. by discriminating**
6 **against J.W. either intentionally or with deliberate indifference. Plaintiff also failed**
7 **to provide adequate evidence of J.W.’s emotional distress as caused by the District’s**
8 **alleged discrimination. Finally, Plaintiff has failed to establish a necessary basis for**
9 **declaratory or injunctive relief. The Court finds for Defendant on all claims.**

10 II. FINDINGS OF FACT

- 11 1) Defendant Seattle School District No. 1 (the “District”) is the public school district
12 for the city of Seattle. The District is a local educational agency (“LEA”) within
13 the meaning of the Individual with Disabilities in Education Act, 20 U.S.C. §1400,
14 et seq. (“IDEA”) and Section 504 of the Rehabilitation Act. As such, the District
15 receives federal funds for educating children with disabilities within its
16 boundaries. The District is also a "public entity" as defined by Title II of the
17 ADA, 42 U.S.C. § 12131(1).
- 18 2) Plaintiff J.W. is a student with disabilities, who is diagnosed with autism,
19 dysgraphia, language and communication disabilities (both auditory and recall),
20 and a generalized anxiety disorder. He was found to be eligible for services by the
21 District in the areas of Social/Emotional development, Adaptive Behavior,
22 Communication Skills and Motor Skills. Ex. 259.
- 23 3) Plaintiffs Eugene and Jennifer Wong, J.W.’s parents, brought this suit on J.W.’s
24 behalf. Dkt. # 1.
- 25 4) In 2009, at the age of four, J.W. was qualified as an individual with a disability
26 under the IDEA under the category of autism. Dkt. # 60, Stip. Fact A.

- 1 5) In addition to autism, J.W. also has challenges with auditory processing,
2 communication, word retrieval, and has a diagnosis of Dysgraphia, an impairment
3 in writing. Dkt. # 91 at 77:19-78:16.
- 4 6) In 2009, at the age of four, J.W. enrolled in the District and qualified for special
5 education and related services under the IDEA. J.W. attended West Seattle
6 Elementary School in the Developmental Preschool within the District. Dkt. # 91
7 at 45:9-46:5. J.W. also attended “The Neighborhood Preschool,” a private school,
8 because the District’s developmental preschool wasn’t available full-time. *Id.* at
9 48:10-18.
- 10 7) The District had developed an Individualized Education plan (“IEP”) for J.W.
11 beginning in preschool and continuing to 2014. Dkt. # 91 at 45:20-25. Every IEP
12 adopted for J.W. during the period of time that he attended Schmitz Park, from
13 kindergarten through third grade, had annual goals that addressed his anxiety
14 issues. Dkt. # 92 at 106:22-108:4; Ex. 259 at 6.
- 15 8) In the summer before kindergarten, J.W. received a private psychological
16 evaluation at the CARE Clinic at the University of Washington. Dkt. # 91 at
17 50:16-25, 55:13-22; Ex. 93. The CARE Clinic diagnosed J.W. with Asperger’s
18 Disorder (DSM-IV Code: 299.80), a form of autism. Dkt. # 91 at 54:2-5; Ex. 93.
19 The CARE Clinic evaluation also used the BASC-II assessment for J.W. Based
20 on this assessment completed as part of the CARE Clinic evaluation, J.W. was
21 determined to be in the at-risk range for hyperactivity, depression, and adaptability
22 and as having clinically significant difficulties in the areas of aggression, anxiety,
23 atypical behavior, and withdrawal. Ex. 93 at 6.
- 24 9) The professionals who evaluated J.W. also found that he was a “twice
25 exceptional” child who was extremely bright but faced challenges with social
26 functioning and distractibility. Dkt. # 91 at 61:3-13; Ex. 93.

- 1 10) After attending preschool in the District in 2009, J.W. started kindergarten in 2010
2 at Holy Rosary School, a private sectarian school in the parish where his mother
3 worked. Dkt. # 91 at 65:20-66:4.
- 4 11) J.W. exhibited some behavioral issues at Holy Rosary. Dkt. # 92 at 115:9-21.
5 Based on these issues, the Wongs began taking J.W. to a counselor. *Id.* at 113:16-
6 22; Ex. 267. Within a month or two of his enrollment at Holy Rosary, the school
7 informed the Wongs that J.W. could no longer attend school there. *Id.* at 112:8-
8 113:4.
- 9 12) Upon leaving Holy Rosary, the Wongs enrolled J.W. in the District and he began
10 attending in the fall of 2010 at Schmitz Park Elementary School (“Schmitz Park”).
11 Dkt. # 91 at 69:8-20.
- 12 13) The District developed an annual individualized education program (“IEP”) for
13 J.W. in or about September 2013. Dkt. # 60, Stip. Fact D.
- 14 14) J.W.’s third grade general education teacher was Dorothy Wells. Prior to teaching
15 general education, Ms. Wells was a special education teacher in the District for 12
16 years. She had experience teaching students with autism, and is the mother of two
17 autistic children. Dkt. # 92 at 130:25-131:3; Dkt. # 94 at 7:4-14.
- 18 15) J.W.’s IEP for the 2013–2014 school year, when he was in third grade, was
19 developed on September 23, 2013 by his IEP team, which included Mr. and Ms.
20 Wong. The IEP states that the Parents were concerned about J.W.’s social
21 skills, including self-regulation, cooperation with peers, and empathy. Ex. 259
22 at 2. The IEP contained several social and behavioral goals directed toward
23 improving J.W.’s peer interactions and anxiety management abilities, such as
24 J.W.’s lack of understanding regarding personal space and other non-verbal social
25 behaviors. *Id.* at 6. The IEP further provided J.W. with breaks when his
26 frustration level rose, positive encouragement related to behavior and
27 performance, and communication of clear behavior expectations. *Id.* at 8. It also

1 provided J.W. with 150 weekly minutes of specially designed instruction in the
2 area of Adaptive/Life Skills and 60 minutes per week of specially designed
3 instruction in the area of Social/Behavior. *Id.* at 11.

4 16) J.W. began receiving counseling from Dr. Erin Milhem, Psy.D., through her
5 private practice in July 2013. Dr. Milhelm was on staff and part of the team that
6 assisted at the CARE Clinic with Jensen's clinical diagnosis in 2010. She was his
7 first assigned clinician after the 2010 clinical diagnosis. J.W. received counseling
8 from Dr. Wilhelm in 2010 and 2011. Dkt. # 60, Stip. Fact I.

9 17) In October 2013, another student in J.W.'s classroom informed Ms. Wells of the
10 existence of a "master plan" to get J.W. in trouble, involving several students in
11 Ms. Wells' class as well as other third-grade students at the school. Ex. 41 at 2;
12 Dkt. # 94 at 13:11-19, 42:8-43:20. The "plan" was to involve provoking J.W. in
13 various ways in an effort to make him react badly so that he would get in trouble.
14 Ex. 41 at 2. Ms. Wells told the student that the plan was not okay and held a
15 meeting with J.W.'s class to help his classmates better understand his needs and to
16 identify ways to address J.W. when he became dysregulated. Dkt. # 94 at 13:11-
17 19; 42:8-22; Ex. 41. After the class meeting, J.W.'s classmates reported to Ms.
18 Wells that they were having more successful interactions with J.W. at recess and
19 they wanted to help J.W. stay regulated and be part of the class. *Id.* at 42:25-
20 43:14. J.W. was not aware of the existence of the "plan." Dkt. # 94 at 13:20-22.

21 18) The District has a policy prohibiting harassment, intimidation, and bullying among
22 students, employees, parents/legal guardians, volunteers, and patrons of District
23 schools. Ex. 287. This policy was known as the "HIB" Policy.

24 19) Between November 7, 2013 and February 6, 2014, the parents of another student
25 ("R.P."), the Pontrellis, filed eight HIB complaints with the District regarding
26 J.W.'s conduct. Dkt. # 60, Stip. Fact O. Mr. Kischner performed the fact-finding
27 investigations in relation to the HIB complaints. Dkt. # 94 at 65:16-66:6. He

1 recorded his investigatory notes in PowerSchool, a new software program the
2 District began using that school year. *Id.* at 66:24-68:8. Due to the manner in
3 which Mr. Kischner saved his investigation notes in PowerSchool, any attempt to
4 print them resulted in the notes printing on a template entitled “Notice of
5 Disciplinary Action.” *Id.* at 68:9-69:20.

6 20) The first alleged incident took place on November 7, 2013. Ex. 276. Mr. Pontrelli
7 filed the incident report on November 14, along with the second, third, and fourth
8 incident reports. In the report, Mr. Pontrelli alleges that two other students held
9 R.P. while J.W. kicked her. *Id.*; Ex. 41 at 2. At trial, Ms. Wells testified that she
10 did not believe that J.W. had kicked R.P., and that she believed R.P. occasionally
11 was “picking and prodding” at J.W. Dkt. # 94 at 16:15, 17:8-15. An investigation
12 by school staff did not substantiate the details of this alleged incident. Ex. 219 at
13 4.

14 21) The second alleged incident took place on November 8, 2013, during a class field
15 trip to the Burke Museum at the University of Washington. Ex. 87 at 25; Ex. 219
16 at 1; Ex. 277. Mr. Pontrelli was present on the trip as a chaperone. Ex.87 at 25.
17 Mr. Pontrelli alleged that J.W. assaulted R.P. twice during the trip, and threatened
18 her life. The first alleged altercation was on the bus at the beginning of the trip.
19 Ex. 4. J.W. allegedly pinched R.P. on the arm when she leaned over him from
20 another seat. Ex. 4; Ex. 277 at 2. Mr. Pontrelli did not observe the pinch himself,
21 but was told about it by R.P. Ex. 87 at 2, 26. Mr. Kischner entered the details of
22 the alleged event into the school’s PowerSchool student information system,
23 which generated a “Notice of Disciplinary Action” that went into J.W.’s academic
24 file. Ex. 5.

25 22) Mr. Pontrelli claimed the third alleged incident took place on November 13, 2013.
26 Ex. 278. In this alleged incident, District Physical Education teacher Carole Sealy
27 stopped J.W. from “looming” over R.P. after she noticed R.P. making eye contact
28

1 with J.W. Ex. 239. Mr. Pontrelli claims that J.W. spoke the word “dead” to her,
2 but Ms. Sealy has stated that she did not hear this. Ex. 87 at 30; Ex. 218 at 3. Ms.
3 Wells, J.W.’s and R.P.’s teacher, talked with R.P. after the incident and reminded
4 her that not everyone has the same social skills and that R.P. can’t be friends with
5 everyone. Ex. 239. Ms. Wells noted that R.P. agreed to leave J.W. alone in the
6 future. *Id.* Mr. Kischner entered the details of the alleged event into
7 PowerSchool, which generated a “Notice of Disciplinary Action” that went into
8 J.W.’s academic file. Ex. 17.

9 23) Mr. Pontrelli claimed the fourth alleged incident took place on November 15,
10 2013. Ex. 279. Another student allegedly lured R.P. behind a portable classroom,
11 saying “J.W. wants you.” Ex. 218 at 3. R.P. went to J.W., who allegedly said
12 “You’re dead.” *Id.* When Principal Kischner interviewed R.P. about the incident
13 on the evening of the 15th, she told him that “she quickly forgot that it had
14 happened.” Ex. 205 at 1. Mr. Kischner entered the details of the alleged event
15 into PowerSchool, which generated a “Notice of Disciplinary Action” that went
16 into J.W.’s academic file. Ex. 10.

17 24) Mr. Pontrelli claimed the fifth alleged incident took place on November 18. Ex.
18 280. J.W. allegedly approached R.P. from behind, turned her around with his
19 hands on her shoulders, pushed her, and said “I will kill you.” Ex. 13. Ms. Wells,
20 J.W.’s and R.P.’s teacher, stated in an email that she couldn’t see “how he
21 managed to sneak that one in,” because very little time had elapsed between when
22 she was working directly with J.W. and when R.P. reported the alleged threat. Ex.
23 42 at 1. The District told the Pontrellis that the incident had been substantiated,
24 but Principal Kischner later noted that the action had not in fact been corroborated
25 by any witnesses. Ex. 13; Ex. 219 at 4. Mr. Kischner entered the details of the
26 alleged event into PowerSchool, which generated a “Notice of Disciplinary
27 Action” that went into J.W.’s academic file. Ex. 15.

1 25) On November 17, 2013, Mr. Kischner contacted the Wongs to discuss the HIB
2 complaints. Ex. 206. He informed them that the Pontrellis were demanding that
3 J.W. be suspended from school, but that he refused to do so. *Id.*; Dkt. # 94 at
4 132:11-15. On the same day, Mr. Kischner also informed the Pontrellis that he
5 would not allow their “presence as classroom or school volunteers because that
6 could interfere with the safety and privacy of [J.W.]” and that he would have them
7 removed from the school premises if they attempted to interfere in J.W.’s
8 education program. *Id.* at 130:12-131:13; Ex. 205.

9 26) After these initial HIB reports were filed, Ms. Wells asked Mr. Kischner for an
10 emergency instructional assistant to be assigned to act as an additional adult to
11 ascertain whether the alleged behavior of R.P. was occurring. Dkt. # 94 at 19:5-
12 14. Mr. Kischner and Ms. Wells then informed an instructional assistant who
13 monitored recess, Craig Garretson, of the concerns regarding R.P. and J.W. and
14 asked that he closely monitor their interactions. *Id.* at 21:1-4, 37:25-38:5; Ex. 114.
15 Mr. Garretson had previous experience working in an autism program in another
16 school district and, in addition to monitoring recess, provided J.W. with one-to-
17 one assistance in the academic area of writing. Dkt. # 94 at 38:23-39:11.

18 27) Mr. Kischner also requested additional funding for an emergency instructional
19 assistant from the District’s central office to deal with the developing situation
20 between the Pontrellis and J.W. Dkt. # 94 at 145:17-146:22. On or about January
21 2014, the District assigned J.W. with a one-to-one emergency instructional
22 assistant. Dkt. # 60, Stip. Fact N.

23 28) Mr. Kischner sent the Wongs an email on Monday November 18, 2013 which
24 stated that Sylvia Johnson, one of J.W.’s special education teachers, was working
25 closely with J.W. to identify behaviors that were “against the law,” and that the
26 school team needed to continue working with J.W. “on the way he appears to be
27 using his body to intimidate others.” Ex. 206; Dkt. # 94 at 133:8-25. He

1 explained that Ms. Johnson had named this behavior “looming” and that he had
2 personally witnessed J.W. looming over another student that morning. Ex. 206.
3 He further explained that some students may find the looming behavior scary. In
4 addition, Mr. Kischner informed the Wongs of the HIB complaint R.P.’s parents
5 filed on November 18, 2013. *Id.*

6 29) The District developed a Targeted Student Support Plan for J.W. in November
7 2013. Dkt. # 60, Stip. Fact. M. On November 25, 2013, J.W.’s IEP team met and
8 developed a new functional behavioral assessment (“FBA”) and Behavioral
9 Intervention Plan (“BIP”) to address his behavioral challenges. Exs. 50, 257, 258.
10 This BIP addressed negative self-talk, work refusal and elopement. *Id.*

11 30) The behavior identification method that Ms. Johnson developed for J.W. was a
12 five-point scale to address his behavioral challenges. Ex. 1. The scale identified
13 J.W.’s threatening language and looming behavior as level five behavior that was
14 “against the law.” *Id.* Ms. Wells believed that phrase was appropriate because
15 J.W. was very literal and this was the type of language he used. Dkt. # 94 at 24:2-
16 14; *see also* Dkt. # 92 at 109:20-22; 125:19-126:8. The five-point scale also
17 provided for J.W. to complete a self- reflection sheet once he was calm after a
18 “level five” incident, and provided him with the option of going to the principal’s
19 office because it was a quiet space where he could further calm down. Ex. 1; Dkt.
20 # 94 at 34:23-35:3; 36:6-12.

21 31) Also on November 25, 2013, Ms. Wells spoke with the Wongs regarding ways to
22 help J.W. regulate his behavior without him needing to leave the general education
23 classroom. Ex. 211. The Wongs recommended having him listen to classical
24 music when he experienced stress. Ms. Wells agreed with the strategy and
25 coordinated with Ms. Johnson to provide that accommodation to J.W. *Id.*

26 32) Ms. Wong sent the new FBA and BIP to Dr. Milhem, who reviewed the
27 documents and discussed them with Ms. Johnson. Ex. 212. Dr. Milhem reported
28

1 to Ms. Wong on December 11, 2013 that Ms. Johnson was great and open to her
2 suggestions. *Id.* She further reported that she liked the BIP, that “things look
3 really good,” and that she and Ms. Johnson added the consequence of requiring
4 J.W. to complete a reflection sheet if he engaged in work refusal to discourage him
5 from avoiding work. *Id.*

6 33) On or about November 21, 2013 the District issued a “Targeted Student Support
7 Plan” for R.P. Dkt. # 60, Stip. Fact. G. The plan largely involved informing
8 District staff members when she felt threatened or unsafe.

9 34) Mr. Pontrelli claimed the sixth alleged HIB incident took place on December 10,
10 2013. Ex. 281. J.W. allegedly approached R.P. at recess and made a throat-
11 slashing gesture toward her. Ex. 280 at 3-4. An investigation could not
12 substantiate the details of the alleged incident. Ex. 219 at 4.

13 35) Mr. Pontrelli claimed the seventh alleged incident took place on December 11,
14 2013. Ex. 19. J.W. allegedly approached R.P. again and made another throat-
15 slashing gesture toward her. Ex. 218 at 3-4. An investigation by school staff
16 could not substantiate the details of the alleged incident. Ex. 219 at p. 4.

17 36) On December 12, 2013, R.P.’s parents sent Mr. Kischner an email to request
18 revisions to the November 21, 2013 safety plan that had been developed for R.P.
19 pursuant to the District’s HIB procedure. Ex. 213. The e-mail mentioned that the
20 Pontrellis were considering seeking a restraining order against J.W. but wanted to
21 meet with the Wongs. *Id.* On the same day, Mr. Kischner forwarded this e-mail
22 to Eugene Wong, and included a description of the Pontrelli’s latest allegations.
23 *Id.* Mr. Kischner requested further communication with Mr. Wong to determine
24 “how such a meeting could take place productively.” *Id.*

25 37) In an email dated December 16, 2013, Eugene Wong requested, among other
26 things, that R.P. be moved out of J.W.’s classroom and made a request to the
27 District regarding J.W.’s entire disciplinary record. Dkt. # 60, Stip. Fact K. Mr.

1 Kischner responded to Mr. Wong that he would schedule a safety plan meeting for
2 J.W. Exs. 217, 221. The safety plan meeting was initially scheduled for Friday,
3 December 20, 2013, but it had to be postponed until after winter break due to
4 snow. Ex. 221.

5 38) In January 2014, Dr. Milhem offered recommendations to the school regarding
6 how to strengthen the BIP and change the language that's specific to a child with
7 Autism, based on the information that she had regarding his behaviors in the
8 classroom. J.W. continued to escalate and demonstrate high anxiety levels, in
9 terms of his dysregulation. In response, Dr. Milhem worked more extensively on
10 emotion-regulation strategies by helping J.W. first notice and be aware of his
11 emotions and their intensity, then noticing common situations that provoke those
12 feelings, and then working on making plans to cope for when he felt his stress
13 increasing. Exs. 54, 261; *see also* Dkt. # 93 at 104:4-12.

14 39) On December 19, 2013, the staff at Schmitz Park showed J.W.'s class a
15 documentary, titled "Intricate Minds," that addressed non-neurotypical students,
16 and held a class discussion regarding the different gifts and challenges students
17 have and how the all students could work together to celebrate each other's gifts
18 and to help each other with their challenges. Exs. 218, 231. The documentary
19 film was subsequently shown to the other third grade classes at the school and the
20 students from J.W.'s class lead the other classes in discussions regarding the
21 video. Ex. 231. Prior to showing the film, the school provided the video to the
22 Wongs, and they had no disagreement with showing the film. Dkt. # 92 at 132:3-
23 8.

24 40) On January 2, 2014, Mr. Kischner informed Mr. Wong that he had considered his
25 request to move R.P. to another classroom, but determined that moving her by
26 means of involuntary transfer would not serve the interests of either student. Ex.
27 221.

1 41) In January 2014, Ms. Wells took steps to limit R.P. and J.W.’s interactions while
2 they were in her class. Specifically, she moved R.P.’s desk so that it was far away
3 from J.W.’s desk, which she did not move. Ex. 114 at 49-50; Dkt. # 94 at 59:6-23.
4 Ms. Wells also arranged the desks so that J.W. did not face R.P., made sure they
5 were separate from each other when lined up to enter the classroom, and permitted
6 J.W. to enter the classroom prior to his classmates to reduce any transitional
7 interactions. Ex. 114 at 49-50; Dkt. # 94 at 59:17-23.

8 42) On January 6, 2014, Beryl Miller, the District’s HIB Compliance Officer, issued a
9 letter to R.P.’s parents in response to their HIB complaints. Ex. 220. The letter
10 summarized the District’s findings and its determination of whether the alleged
11 conduct qualified as HIB under the District’s policies and procedures. Based on
12 the investigation of the allegations in the complaints, the District concluded that
13 R.P. was subjected to HIB based on J.W.’s conduct on November 8, 13, 15, and
14 18, 2013. Ex. 220. It determined that the allegations by R.P.’s parents related to
15 J.W.’s conduct on November 7, 2018 and December 10 and 11, 2018 were
16 unsubstantiated. *Id.* The District concluded that several remedial measures had
17 already occurred at the school, including the screening and discussion of the
18 “Intricate Minds” documentary, and provided for additional remedial measures.
19 *Id.* The Pontrellis appealed these determinations. Ex. 223; Dkt. # 95 at 88:5-12.

20 43) A student safety meeting was held for J.W. on January 10, 2014. The meeting
21 attendees developed a “Targeted Student Support Plan” for J.W. that provided an
22 instructional assistant and called for his FBA and BIP to be reviewed and updated.
23 Dkt. # 60, Stip. Fact M; Ex. 22. The Wongs expressed that the meeting was
24 productive and that the safety plan was appropriate at the time. Ex. 54; Dkt. # 2 at
25 142:13-20. At this meeting, Mr. Kischner provided the Wongs with copies of his
26 investigatory notes, which printed out as “Notice of Disciplinary Action.” Exs.
27 54, 221; Dkt. # 4 at 81:3-15; Dkt. # 95 at 122:21-25. This was the first time the

1 Wongs received copies of these “Notices of Disciplinary Action.” Dkt. # 60, Stip.
2 Fact Z.

3 44) In accordance with his safety plan, Schmitz Park provided J.W. with an
4 instructional assistant, Mr. Frank Robertson, on January 13, 2014. Ex. 222. Mr.
5 Robertson’s duties were to support J.W. in the classroom and on the playground
6 and to assist in the development of a new FBA and BIP. Dkt. # 94 at 123:13-
7 124:4. District staff worked with Ms. Wong over the following weeks to
8 determine what data Mr. Robertson would collect regarding J.W. Exs. 225, 226,
9 227.

10 45) At this point, the Wongs and Dr. Milhem both reported noticing higher levels of
11 stress and anxiety in J.W. By February, Dr. Milhem testified that J.W. was
12 increasing his use of “stimming” at school as a way to self-regulate. Dkt. # 93 at
13 110:14-111:10, 117:24-118:16. According to Dr. Milhem, when stimming, J.W.
14 would say things such as "I'm going to kill you with my lightsaber," which was
15 J.W.’s way of communicating that things were not going well and he did not like
16 what was going on. Dkt. # 93 at 116:21-117:4.

17 46) In February, Mrs. Wong testified that J.W. also stated in a car ride after coming
18 back from a group play therapy session, J.W. stated that he wanted to throw
19 himself off of a bridge. Dkt. # 92 at 64:20-66:8. After this, Dr. Milhem saw J.W.
20 again, and testified that he was extremely dysregulated, that she was worried for
21 his safety, and that it was very difficult to get through to him in therapy. Dkt. # 93
22 at 110:7-9, 111:1-5.

23 47) R.P.’s parents filed another HIB complaint against J.W. on February 6, 2014. Dkt.
24 # 60, Stip. Fact O. This complaint alleged J.W. directed another student to
25 “execute” R.P. during school on February 6, 2014. Exs. 20, 232. J.W. was with
26 another student at recess and allegedly told her to “go execute” R.P. Exs. 20, 232,
27 240 at 1. According to the other student, this was related to J.W. sometimes liking

1 to play “evil third grader” and “rebel.” *Id.* The District investigated the February
2 6, 2014 HIB complaint and substantiated this incident, which it found to constitute
3 HIB. Ex. 33. Mr. Kischner entered the details of the alleged event into
4 PowerSchool, which generated a “Notice of Disciplinary Action” that went into
5 J.W.’s academic file. Ex. 21.

6 48) R.P.’s parents applied for and received a temporary restraining order (“TRO”)
7 against J.W. on February 7, 2014 under King County Superior Court Cause No.
8 14-2-04376-7. The TRO restrained J.W. from attending Schmitz Park Elementary
9 School and ordered that J.W. be transferred to a different school. Despite the TRO
10 not being served on J.W.’s parents, the District issued an emergency exclusion
11 against J.W. and informed the parents J.W. could not attend school. Dkt. # 60,
12 Stip. Fact P.

13 49) Upon receiving a copy of the TRO, Mr. Kischner sent Ms. Wong a copy of the
14 TRO the same day and informed her that the school was required to issue an
15 emergency exclusion and hold a manifestation meeting with J.W.’s IEP team. Ex.
16 234. When J.W.’s IEP team gathered for the scheduled manifestation
17 determination meeting on February 10, 2014, Mr. Kischner informed the Wongs
18 that a manifestation determination meeting was not necessary because the school
19 was not excluding J.W. Dkt. # 92 at 76:15-77:2; Dkt. # 94 at 127:14-128:2; Dkt. #
20 95 at 149:13-150:11. At the meeting, the District offered to provide J.W. with
21 daily tutoring while the restraining order was in place and agreed to develop a BIP
22 to address J.W.’s aggressive language. Ex. 111; Ex. 262 at 5; Dkt. # 92 at 77:8-
23 15. The IEP team developed a BIP that identified J.W.’s target behavior as
24 “negative or aggressive talk and intimidating gestures that make others feel
25 unsafe.” Ex. 111. The BIP provided for teaching replacement behaviors, whole
26 class social skills instruction to address other students’ behavior that may
27

1 contribute to J.W.'s target behavior and provided for reinforcement for J.W. when
2 he engaged in socially appropriate coping strategies. *Id.*

3 50) On February 14, 2014, the District issued a letter to R.P.'s parents that denied their
4 appeal of its prior HIB investigation and determinations. Ex. 33. The letter also
5 informed R.P.'s parents that their February 6, 2014 allegation related to J.W.'s
6 conduct was substantiated. *Id.*

7 51) On February 15, 2014, Mr. Kischner responded to feedback on J.W.'s FBA and
8 BIP that he received from the District's safety and security department. Ex. 69.
9 Mr. Kischner testified that he was receptive to the input, but he knew that the
10 issues needed to be mediated at the school level and it was his role to ensure the
11 safety of both R.P. and J.W., balancing both safety concerns and concerns with
12 J.W.'s special educational needs. Dkt. # 94 at 117:23-118:4; 138:14-21; Ex. 69.
13 Mr. Kischner responded and emphasized that he needed to serve the needs of both
14 children, and that he planned to move forward with an approach that he judged to
15 be appropriate for both students. *Id.*

16 52) On February 18, 2014, the TRO was reissued through February 25, 2014. Dkt. #
17 60, Stip. Fact Q.

18 53) On February 24, 2014, before the TRO was quashed, the District transferred R.P.
19 out of J.W.'s classroom in anticipation of his return to school. Dkt. # 60, Stip.
20 Fact S.

21 54) A further hearing on the temporary order for protection against J.W. was held on
22 February 25, 2014. Ex. 87; Dkt. # 94 at 139:14-142:21. Mr. Kischner and Ms.
23 Wells voluntarily testified in support of J.W. and against the extension of the
24 temporary protection order. Ex. 87; Dkt. # 92 at 79-80. J.W.'s second grade and
25 kindergarten teachers, along with his third-grade instructional assistant, provided
26 declarations in support of him. *Id.* The District also provided 2 hours of tutoring
27

1 per day for two weeks prior to the quashing of the TRO on February 24, 2014.
2 Dkt. # 60, Stip. Fact U.

3 55) The TRO was dismissed by King County Superior Court Judge Monica Benton,
4 and the Pontrellis' request for a permanent restraining order was denied. Dkt. #
5 60, Stip. Fact R. The court concluded that, due to J.W.'s age and disability, he did
6 not possess sufficient awareness of his conduct for it to satisfy the applicable
7 criminal statute, and that the school was the appropriate entity to address his
8 conduct. Ex. 87 at 185-86.

9 56) Following the hearing, Mr. Wong emailed Mr. Kischner and expressed his
10 appreciation for Mr. Kischner's and Ms. Wells' testimony at the hearing, to
11 acknowledge that J.W. potentially could return to Schmitz Park as result of the
12 court's ruling, and he affirmed his understanding that R.P. had been transferred
13 out of J.W.'s classroom. Ex. 243. He also stated that J.W. missed Schmitz Park.
14 *Id.* Mr. Wong also sent an e-mail to Ms. Wells stating, "Please know that [J.W.]
15 misses being in your class, which means a lot coming from him!" Ex. 244; Dkt. #
16 93 at 7:2-9.

17 57) The District sent Mr. Wong an e-mail on February 28, 2014 with a plan regarding
18 J.W.'s return to Schmitz Park Elementary for March 3, 2014. Dkt. # 60, Stip Fact
19 V. The plan sought to minimize the potential contact between R.P. and J.W.,
20 ensure classroom and instructional assistant support for J.W. through March 28,
21 2014, and include specific plans for J.W. on reentry and upcoming field trips. Ex.
22 246.

23 58) J.W. did not return to Schmitz Park on March 3, 2014. J.W. has not attended
24 Schmitz Park since February 6, 2014. Dkt. # 60, Stip. Fact T.

25 59) On March 5, 2014, Ms. Wong sent an email to J.W.'s private providers in which
26 she stated that she and Mr. Wong had decided to place J.W. at the APL, a private
27 school, and were exploring the option of litigating to make the District pay for the
28

1 placement. Ex. 248. She further explained that, in order to have the District pay
2 for APL, they either had to provide the District with 10 days' notice of their intent
3 to privately place him or prove that returning him to Schmitz Park would be
4 emotionally harmful. *Id.* Ms. Wong stated that they needed the providers to
5 provide expedited documentation that concluded that returning J.W. to Schmitz
6 Park would result in emotional injury. *Id.*

7 60) On March 6, 2014, Mr. Wong informed Mr. Kischner that the Wongs were
8 gathering input and guidance on the reintegration plan from J.W.'s providers, but
9 did not mention the plan to move J.W. to APL. Ex. 247.

10 61) On March 9, 2014, Dr. Milhem drafted a letter stating that it would not be
11 appropriate for J.W. to return to Schmitz Park. Ex. 249. Ms. Wong reviewed the
12 letter and directed Dr. Milhem to make a number of changes, including adding a
13 statement to the letter that J.W. "would be emotionally harmed if he returned to
14 Schmitz Park"; adding a statement that her work with J.W. indicated that his stress
15 and anxiety was caused by poor support in school most likely due to weak
16 programing and untrained implementation; and eliminating sections of the letter
17 that addressed the stress J.W. would experience if he was placed in a temporary
18 placement. *Id.*

19 62) Also on March 9, 2014, the Wongs emailed Mr. Kischner and told him that the
20 proposed reintegration plan failed to provide the necessary supports for J.W. Dkt.
21 # 60, Stip. Fact W. One reason given that the transition plan was inappropriate
22 was because it attempted to alter J.W.'s stimming behavior. Ex. 250. Mr. Wong's
23 justifications also included the physical structure of the school building, the fact
24 that some of J.W.'s classes were in portable classrooms, an apparent problem with
25 the gender of J.W.'s assigned instructional assistant, and that staff were not
26 appropriately trained. *Id.* He then cited to the letter Dr. Milhem wrote and revised
27

1 at the Wongs' direction for the proposition that J.W. would suffer emotional harm
2 if he returned to school. *Id.*

3 63) Mr. Kischner responded to Mr. Wong's e-mail and stated that he would work to
4 schedule an IEP meeting immediately to address the stated concerns, and
5 expressed his wish that the Wongs attend the meeting. Ex. 250. Mr. Kischner
6 stated that the District did not intend to prohibit J.W. from referencing Star Wars,
7 but wanted to designate times in the day to focus on other matters. *Id.*

8 64) J.W.'s IEP team met on March 17, 2014 and discussed the need to revise the BIP
9 to help J.W. learn safe language. The Wongs opposed this proposal. Ex. 251;
10 Dkt. # 92 at 83:19-84:7.

11 65) The Wongs withdrew J.W. from the District, placed him at Yellow Wood
12 Academy for the remainder of the 2013–2014 school year, and then enrolled him
13 in APL at the start of the 2014–2015 school year. Dkt. # 60, Stip. Fact X, Y, CC.

14 66) The Wongs made a request for an independent education evaluation (“IEE”) at
15 District expense, in the Spring of 2014. The District filed Due Process against the
16 Wongs pursuant to IDEA with the Washington State Office of Administrative
17 Hearings) on or about June of 2014. The District alleged, inter alia, that the
18 District's 2012 Tri-Annual-Re-Evaluation was appropriate and would defend the
19 Re-Evaluation provided J.W. a free and appropriate education (“FAPE”) under the
20 IDEA during the 2012-2013, 2013-2014 school years. The District subsequently
21 dismissed the due process action and paid for the IEE conducted by Dr. Alison
22 Brooks. Dkt. # 60, Stip. Fact AA, BB.

23 67) The Wongs filed an IDEA action in March 2015 (OSPI Cause No. 2015-SE-0018),
24 and alleged, inter alia, that the District violated the IDEA based on its provision of
25 special education and related services to J.W. for the 2013–2014, 2014–2015, and
26 2015–2016 school years. Dkt. # 60, Stip. Fact DD.

1 68) On May 14, 2016, the administrative law judge (“ALJ”) in the first special
2 education case issued findings of fact, conclusions of law, and an order (“FFCL”).
3 The ALJ determined that Plaintiffs prevailed and awarded remedies that included
4 an order that the District reimburse Plaintiffs for J.W.’s private school programs
5 (Yellow Wood and APL) and related services, such as counseling, for the 2013–
6 2014, 2014–15, and 2015–2016 school years. Plaintiffs admit that they received
7 these remedies. Dkt. # 60, Stip. Fact EE. The District has continued to fund
8 J.W.’s education at APL since the ALJ’s decision.

9 69) Dr. Alison Brooks is the cofounder of Brooks Powers Group, which provides
10 psychological and educational services to children, their families, school districts,
11 and other providers who serve those children. Ex. 312. Dr. Brooks conducted an
12 evaluation of J.W. in July 2014, which was performed at the request of and paid
13 for by the Wongs. Dkt. # 96 at 112:11-15; *see also* Ex. 96. In 2016, Dr. Brooks
14 conducted a second psychoeducational evaluation of JW, which was paid for by
15 the District. *Id.*; Ex. 274.

16 70) In the course of her evaluation of JW in 2014, Dr. Brooks diagnosed JW with
17 generalized anxiety disorder (“GAD”), which is a diagnosis that is listed in the
18 *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-5).
19 Ex. 274; Dkt. # 96 at 122:6-127:12. The diagnostic criteria for GAD are,
20 generally, worry or apprehension that occurs on more days than not; a pattern of
21 which have been present for more than six months prior to the evaluation; and the
22 worry or fear must interfere with the person’s social or daily life functioning to a
23 significant degree and in multiple settings.

24 71) Plaintiffs Jennifer and Eugene Wong filed this action on November 14, 2016 on
25 behalf of themselves and as parents of J.W. Dkt. # 1.

26 72) Plaintiffs filed an Amended Complaint on March 23, 2017, alleging disability
27 discrimination under of the Americans with Disabilities Act, disability
28

1 discrimination under Section 504 of the Rehabilitation Act, disability
2 discrimination under the Washington state Law Against Discrimination
3 (“WLAD”), common law negligence, and outrage. Dkt. # 9.

4 73) Plaintiffs Jennifer and Eugene Wongs’ causes of action and claims for damages
5 resulting from or related to their physical or mental health or any medical or
6 mental health treatment, including but not limited to their claims for emotional
7 distress, physical injuries, and treatment costs, were dismissed with prejudice
8 based on Plaintiffs’ voluntary stipulation of dismissal. Dkt. ## 23, 23.

9 74) Plaintiffs’ claims under Washington state law under the WLAD and based on the
10 common law theories of negligence and outrage were dismissed on partial
11 summary judgment for Plaintiffs’ failure to comply with the RCW 4.96.020. Dkt.
12 # 29. Plaintiffs Jennifer and Eugene Wong’s claims for associational
13 discrimination under the ADA and Section 504 of the Rehabilitation Act were also
14 dismissed. *Id.*

15 75) Pursuant to the Court’s Order on motions in limine (Dkt. # 63), Plaintiffs were
16 prohibited from offering evidence of or seeking actual damages (i.e. medical costs
17 and compensatory education costs) or consequential damages (i.e. lost wages and
18 additional insurance costs), and were allowed to offer evidence of general
19 damages only in the form of emotional distress damages. Absent written consent
20 from Defendant, Plaintiffs were also only allowed to offer as evidence of
21 emotional distress damages documents that were properly produced to Defendant
22 prior to the discovery cutoff date of November 13, 2017. Accordingly, the only
23 issues that remained for trial were J.W.’s claim for emotional distress damages
24 under Section 504 and the ADA and Plaintiffs’ claims for injunctive relieve under
25 the same statutes.

III. CONCLUSIONS OF LAW

A. The District is Not Liable Under Section 504 or the ADA

- 1) Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act provides: “No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794.
- 2) The Court analyzes claims under the ADA and § 504 of the Rehabilitation Act together, because there is no significant difference in the analysis of rights and obligations created by the two Acts. *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 n. 11 (9th Cir. 1999). Generally, the plaintiff must show that: “(1) he is a “qualified individual with a disability”; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.” *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir.2001) (citing *Weinreich v. Los Angeles County Metropolitan Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997)).
- 3) A “public entity can be liable for damages under § 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons.” *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008). To prevail on a Section 504 claim, “plaintiffs must prove a mens rea of ‘intentional discrimination’ . . . [and] that standard may be met by showing ‘deliberate indifference,’ . . . not only by showing ‘discriminatory animus.’”

1 *Lemahieu*, 513 F.3d at 938 (quoting *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1136
2 (9th Cir. 2001)). Deliberate indifference requires both (1) knowledge that a harm
3 to a federally protected right is substantially likely, and (2) a failure to act upon
4 that likelihood. *See Duvall*, 260 F.3d at 1139 (citing *City of Canton v. Harris*,
5 489 U.S. 378, 379 (1988)). The Ninth Circuit further articulated the deliberate
6 indifference standard in *Lovell*: “The first element is satisfied when the public
7 entity has notice that an accommodation is required. The second element is
8 satisfied if the entity's failure to act [is] a result of conduct that is more than
9 negligent and involves an element of deliberateness.” *Lovell*, 303 F.3d at 1056
10 (internal quotations and citations omitted). Under the second element of the
11 deliberate indifference standard, “a public entity does not act by proffering just
12 any accommodation: it must consider the particular individual's need when
13 conducting its investigation into what accommodations are reasonable.” *Id.*
14 “Thus, a public entity can be liable for damages ... if it intentionally or with
15 deliberate indifference fails to provide meaningful access or reasonable
16 accommodation to disabled persons.” *Lemahieu*, 513 F.3d at 938.

- 17 4) There is no dispute that J.W. was, and is, a qualified individual with a disability.
18 Additionally, it is undisputed that the District has received federal education
19 funding with respect to J.W.’s Rehabilitation Act claim.
- 20 5) Plaintiff asserts the District acted with intentional discrimination or deliberate
21 indifference in the following ways: (1) issuing the six “Notices of Disciplinary
22 Action” against J.W. without notifying the Wongs; (2) issuing HIB findings
23 substantiating some of the complaints made by the Pontrellis, including
24 classifying J.W. as the “aggressor” student and R.P. as the “target” student; (3)
25 retaining an emergency aide to “shadow” J.W. that was ostensibly for his benefit;
26 (4) excluding J.W. from school under an “emergency exclusion” in response to
27 the TRO; (5) calling a Manifestation Determination Hearing and then changing it

1 to an IEP meeting; (6) allegedly meeting with the Pontrellis to discuss J.W.'s
2 educational placement; (7) allegedly attempting to change J.W.'s educational
3 placement; (8) providing safety plans that protected R.P. but not J.W.; (9) not
4 protecting J.W. from bullying and harassment by R.P. and her family; (10)
5 developing and implementing a five-point scale for J.W.; (11) developing an
6 inappropriate FBA and BIP; and (12) not having an adequate reentry plan for
7 J.W. following the TRO period.

8 6) The Court finds that Plaintiff has failed to prove, via a preponderance of the
9 evidence, that the District acted with intentional discrimination or deliberate
10 indifference for these alleged acts. While the District did not achieve perfection
11 in its treatment of J.W., Plaintiff has failed to prove that the District's conduct
12 was more than negligent and involved an element of deliberateness. The record
13 reflects a District that made multiple good faith efforts to make appropriate
14 accommodations for J.W., efforts that were unfortunately hampered by the
15 actions of third parties; namely, the Pontrellis.

16 7) First, Despite the issuance of multiple "Notices of Disciplinary Action" to J.W.,
17 the Court finds that the record fails to indicate that the District actually
18 disciplined J.W. These "Notices" appeared to be form notices that were
19 automatically generated by the recording of incidents in PowerSchool. Dkt. # 94
20 at 52:5-8, 125:14-18; 128:12-129:1. There was no evidence presented that these
21 "Notices" were ever effectuated, or that J.W. was aware of them. There is little
22 evidence in the record to indicate that the District ever took any additional
23 disciplinary action as a result of these "Notices," and indeed never sent them to
24 the Wongs or any other individuals to indicate that J.W. had been disciplined.
25 These records were apparently kept by the District for administrative purposes.
26 Any damage arising from these records would thus be inherently speculative and
27

1 not supported by any evidence presented at trial.¹ The Court finds that the
2 existence of these “Notices of Disciplinary Action” was thus not undertaken with
3 deliberate indifference, and Plaintiff has failed to show how they denied J.W. a
4 FAPE.

- 5 8) Second, the Court finds little evidence to indicate that the District discriminated
6 intentionally or acted with deliberate indifference in substantiating some of the
7 HIB complaints. Plaintiff’s main argument is that even if some of the events
8 happened as described in the complaints, J.W. lacked the intent to harass,
9 intimidate, or bully. Even if this was true in a legal sense, it does not follow that
10 the District was precluded from conducting HIB investigations into J.W.’s
11 conduct. Rather, as explained by District witnesses, the role of J.W.’s disability
12 came into play in deciding what actions the District was to take in light of the
13 investigation’s result. The District explains that this is because the HIB policy is
14 designed to protect, not to punish. The record indicates that the District did not
15 discipline J.W. in light of the substantiated or unsubstantiated HIB complaints.
16 Plaintiff has failed to provide evidence showing that these actions, i.e.
17 “substantiating” some of the conduct described in the HIB complaints through
18 investigations, were improper.
- 19 9) Third, Plaintiff has failed to show evidence as to how the District intentionally
20 discriminated or acted with deliberate indifference by hiring an instructional aide
21 for J.W. following the HIB complaints. Even if the request for an aide was driven
22 in part by the HIB complaints, Plaintiff fails to show how hiring an aide
23 constitutes discrimination or a denial of a FAPE.

24 ¹The Court is, however, concerned about District’s record keeping system. Although the Court
25 finds that the District did not discipline J.W., it also finds that J.W.’s school records contained
26 misleading indications that he was disciplined. The PowerSchool records were each categorized
27 as “discipline” and any attempt to print these records would result in a “Notice of Disciplinary
28 Action” templated being generated. While this practice did not indicate discrimination or
deliberate indifference in this case, the Court is concerned about the District’s maintenance of
records in students’ files that convey the incorrect impression the student was disciplined.

1 10) Fourth, the Court finds that the District’s “emergency exclusion” of J.W. from
2 Schmitz Park for the period that the TRO was in effect was not undertaken with
3 intentional discrimination or deliberate indifference. Given the court order
4 directing that J.W. be excluded, the District did not act in bad faith or with
5 deliberate indifference in following that order. Moreover, the record contains
6 numerous indications that the District attempted to challenge the exclusion or
7 lessen the impact on J.W.’s education. The District provided tutoring for J.W.
8 during this time, and provided multiple District witnesses to testify on J.W.’s
9 behalf in further TRO hearings. There is also little indication in the record that
10 the District intended to discipline J.W. in any way as a result of the TRO once
11 J.W. returned to school.

12 11) Fifth, Plaintiff has similarly failed to show intentional discrimination or deliberate
13 indifference in Mr. Kischner initially calling for a Manifestation Determination
14 Hearing, and then changing it to an IEP meeting. Although the Wongs spent time
15 and energy preparing for this IEP meeting as if it were a Manifestation
16 Determination Hearing, it is not clear how this implicates J.W. or the District’s
17 mental state in calling this meeting.

18 12) Sixth, there is little indication in the record that the District consulted with the
19 Pontrellis as to J.W.’s placement, as Plaintiff indicates. It also does not appear
20 from the record that the District ever attempted to change J.W.’s placement,
21 despite investigating whether a change in placement of either R.P. or J.W. would
22 be feasible. Ultimately, the District changed the placement of R.P., not J.W.

23 13) Seventh, while the District produced a safety plan for R.P. in response to the HIB
24 complaints, this action was done pursuant to the HIB policy requiring such plans
25 following complaints. R.P.’s safety plan did not involve punishing or disciplining
26 J.W. and was solely focused on R.P.’s safety. Moreover, upon request from the
27 Wongs, the District developed a safety plan for J.W. that provided an

1 instructional assistant, among other actions. The record indicates that the Wongs
2 participated in the creation of this plan and at the time approved of its directives.
3 Plaintiff fails to show how these actions indicate intentional discrimination or
4 deliberate indifference by the District.

5 14) Eighth, the Court finds that Plaintiff has failed to prove beyond a preponderance
6 of the evidence that J.W. suffered from disability-based peer-on-peer harassment
7 under Section 504. Although the Ninth Circuit has not yet ruled on this issue,
8 courts in this District that have recognized a cognizable claim for peer-to-peer
9 disability-based harassment under Section 504 and the ADA have applied the
10 analysis for claims of peer-to-peer sexual harassment under Title IX of the Civil
11 Rights Act set forth by the Supreme Court in *Davis v. Monroe County Board of*
12 *Education*, 526 U.S. 629 (1999). *See, e.g., Held v. Northshore Sch. Dist.*, C13-
13 1548 MJP, 2014 WL 6451297, at *8 (W.D. Wash. Nov. 17, 2014) (citing cases).
14 Under *Davis* (as applied to peer-on-peer disability based harassment), a plaintiff
15 must then show that the school district had actual knowledge of the harassment
16 and was deliberately indifferent, the harasser was under the district's control, the
17 harassment was based on the victim's disabilities, and the harassment was "so
18 severe, pervasive, and objectively offensive that it effectively bar[red] the victim's
19 access to an educational opportunity or benefit[.]" *Davis*, 526 U.S. at 650.

20 15) Here, while Plaintiff argues that R.P. "taunted" J.W. on several occasions,
21 Plaintiff has failed to provide evidence that R.P. targeted J.W. because of his
22 disability.² Moreover, while the parties dispute the severity of the alleged
23 harassment by R.P., the record does show that the District was not deliberately
24 indifferent to the conflict. District employees separated the students, held class

25 ² While Plaintiff cites to the "Master Plan" incident as evidence of other students' targeting of
26 J.W. based on his disability, the connection between this incident and R.P.'s alleged behavior is
27 not apparent from the current record. There is also little evidence in the record that this "Master
28 Plan" ever resulted in actual documented instances of bullying after Ms. Wells engaged with the
students who drew up the document.

1 discussions and provided parent-approved autism education sessions for students
2 in the class, and kept the parents of both R.P. and J.W. informed as to the status
3 and pendency of HIB complaints.

4 16) As for the Pontrellis themselves, Plaintiff fails to cite authority imposing liability
5 on school districts for the actions of other students' parents. The actions of the
6 Pontrellis in seeking a restraining order outside of school is not conduct that is
7 "subject to the school district's control." *Davis*, 526 U.S. at 645. There is also
8 little indication the Pontrellis' actions, while shockingly insensitive to J.W.'s
9 disability, were directed at J.W. because of his disability. There is little evidence
10 that the District encouraged in any way the Pontrellis unfortunate and misguided
11 attempt to obtain a restraining order against J.W. excluding him from school.
12 Rather, the record indicates that the District attempted to dissuade the Pontrellis
13 from taking further action against J.W. District employees such as Mr. Kischner
14 and Ms. Wells voluntarily attended the ultimate TRO hearing and testified on
15 J.W.'s behalf and against the Pontrellis, and other employees submitted
16 declarations supporting J.W. The District also took numerous steps to address the
17 HIB issue, including developing and implementing a safety plan for J.W.,
18 providing instructional aide support to monitor any interactions between J.W. and
19 R.P., keeping J.W. and R.P. separate in their classroom and eventually
20 transferring R.P. out of the classroom, and informing the Wongs about the HIB
21 complaints.

22 17) Next, Plaintiff has failed to show that the District acted with deliberate
23 indifference or intentional discrimination by utilizing a "five-point scale" with
24 J.W. that specifically categorized certain behaviors as "above the law." While the
25 Court agrees that it is possible that the language in this scale could have been
26 better formulated, the use of the scale does not evidence deliberate indifference
27 by the District, and was implemented seemingly in good faith after consultation

1 with Ms. Wells and J.W.’s educational support group. Based on the record before
2 the Court, it is not apparent that the use of the five-point scale evidences any
3 intentional discrimination or deliberate indifference by the District.

4 18) Plaintiff has also failed to show how the District’s proposed “reentry plan” denied
5 J.W. access to a FAPE, or was undertaken with intentional discrimination or
6 deliberate indifference. The District’s proposed transitional plan was rejected for
7 inconsistent reasons, and it is not apparent that the Wongs made a good faith
8 attempt to negotiate with the District to fix the plan’s alleged weaknesses.
9 Communications between the Wongs, Dr. Milhem, and others following the TRO
10 indicate that at that point the Wongs had already decided to move J.W. to private
11 school and to attempt to get the District to pay for these educational costs. Exs.
12 248, 249. The District has already paid for J.W.’s schooling at APL starting with
13 the 2014-2015 school year. The record also shows that the District’s efforts to
14 secure J.W.’s return to school following the TRO, while not perfect, were
15 apparently done in good faith.

16 19) Accordingly, Plaintiff has failed to establish the District’s liability under the ADA
17 or Section 504.³

18 **C. Plaintiff Has Not Proven J.W. Suffered Emotional Distress Damages as a**
19 **Result of the District’s Actions.**

20 20) Even if this Court found liability for the District under Section 504 or the ADA,
21 Plaintiff has still failed to uphold his burden of proof on his only remaining
22 damage claim: whether J.W. suffered emotional distress damages because of the
23 District’s alleged conduct.

24 21) During trial, Plaintiff offered the testimony of Dr. Milhem, who argued that the
25 District caused J.W. emotional distress through their allegedly exclusionary

26 ³ The Court need not, and will not, address the District’s arguments regarding statutes of
27 limitations, as these arguments were not adequately raised at trial. Even if they were, because
28 the Court is finding for the District, they are now unnecessary.

1 actions. While Dr. Milhem credibly testified about her experience in treating
2 J.W., her expert opinion as to the sufficiency of District policies, the District's
3 actions, or causes of diagnoses she did not make is not deserving of equal weight.
4 For instance, instead of producing her treatment notes with respect to J.W. to the
5 District in discovery, she instead produced a six-page summary at her deposition
6 that excised discussion about alternative causes for J.W.'s anxiety. Dkt. # 93 at
7 66:2-67:5; 68:21-69:7, 178:5-183:10. Dr. Milhem also permitted the Wongs to
8 edit the letter to the District that stated it would be emotionally harmful for J.W.
9 to return to school at the District after the temporary order for protection was
10 lifted. Dkt. # 96 at 78:23-82:19; Exs. 248, 249. Finally, Dr. Milhem expressed
11 her opinions about the District despite never observing J.W. in Schmitz Park and
12 having limited interaction with the relevant District staff. Dkt. # 93 at 130:20-
13 131:15, 169:10-170:4; Ex. 212. This gives the Court great pause that the opinions
14 expressed by Dr. Milhem as to the cause of J.W.'s emotional distress reflect her
15 unblemished and unbiased professional opinion.

16 22) Although Dr. Milhem and Plaintiff assert that J.W. has GAD as a result of the
17 District's actions, the Court finds inadequate evidence in the record to support
18 this claim. The Court is more persuaded by the testimony of Dr. Brooks, the
19 professional who diagnosed J.W. with GAD, who testified that GAD is not
20 caused by environmental factors. Dkt. # 96 at 129:6-130:21. This indicates that
21 the District's actions as reflected in the record before the Court were not a
22 significant causing factor of J.W.'s GAD, and Plaintiff has failed to counter this
23 testimony with evidence of such.

24 23) Plaintiffs remaining arguments that the District's actions in this case caused J.W.
25 emotional distress are not well supported by causal evidence. The record also
26 indicates that J.W. was not aware of the "Notices of Disciplinary Action" or of
27 the TRO itself.

1 24) Based on the evidence presented at trial, the Court concludes that Plaintiff has
2 failed to prove that the District's alleged actions were the cause of J.W.'s
3 emotional distress.

4 **D. No Injunctive Relief Warranted**

5 25) Plaintiffs have also requested declaratory and injunctive relief from this Court
6 directing the District to change its HIB policy, and to expunge J.W.'s record.

7 26) Plaintiff provides little in the way of legal authority for these requested actions.

8 27) The Court finds that Plaintiff's request for declaratory or injunctive relief is not
9 adequately supported by facts in the record or justified by any provided legal
10 authority.

11 28) Plaintiff has failed to present evidence that the District engages in widespread
12 discrimination or deliberate indifference toward students with disabilities.

13 Instead, the evidence indicates that the District's IEP/BIP process is available to
14 all kids with special needs. There is little evidence in the record about how the
15 District's policies apply to other students with special needs.

16 29) Moreover, Plaintiff provides no articulation of what language needs to be changed
17 in the HIB policy, why it allegedly violates the Constitution, and what to change
18 it to.

19 30) Plaintiff has also failed to show evidence on ongoing violations by the District.

20 31) Finally, Plaintiff fails to present evidence of irreparable harm with respect to
21 J.W.'s school record.

22 32) Accordingly, the Court finds that Plaintiff is not entitled to declaratory or
23 injunctive relief in this case.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

For the reasons previously stated, the Court finds in favor of Defendant on all claims. The Clerk shall enter judgment for Defendant.

DATED this 7th day of June, 2019.



The Honorable Richard A. Jones
United States District Judge