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**COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON**

**Jeanette MEARS, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE FOR THE ESTATE OF MERCEDES MEARS,
AND AS LIMITED GUARDIAN FOR JADA MEARS, AND
MICHAEL MEARS,**

Appellants/Plaintiffs,

vs.

**BETHEL SCHOOL DISTRICT, NO. 403, A MUNICIPAL
CORPORATION; RHONDA K. GIBSON, AND HEIDI A.
CHRISTENSEN,**

Respondents/Defendants.

REVISED APPELLANTS' OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

On October 7, 2008, 11-year-old Mercedes Mears perished in the nurse's office at Clover Creek Elementary School. She passed away despite the fact that a few feet from where she died stored in the nurse's office, was an Epi-Pen which she had brought to school earlier that year, just in case she had a "medical emergency" as a result of her well documented and previously diagnosed asthma and allergy conditions.

Mercedes passed away despite the fact that a number of responsible adults, including Clover Creek's designated "health clerk" were present. In fact Bethel School District Superintendent Tom Seigel, the school district in which Clover Creek is a part of, was in a staff meeting only a few feet away from the nurse's office where Mercedes perished.

During the course of trial of this case, which will be discussed in more detail below, the undisputed expert medical testimony presented by the Mears family, (Plaintiffs below, Appellants herein, hereafter Plaintiffs), established that had Mercedes been provided either CPR as her "medical emergency" evolved, or an injection of Epinephrine from the Epi-Pen that was available, she would have survived the health emergency which ultimately took her life.

Mercedes' parents, Jeanette and Michael, were stunned by this preventable death. Mercedes' sister Jada also attended Clover Creek and was with Mercedes on the morning of her death and observed her first becoming ill, gasping for breath and screaming that she was "going to die", and observed part of her futile struggle to live, as she perished on the floor of the nurse's office.

On December 4, 2009 Jada's parents, her Estate with her mother as Personal Representative, and her sister, Jada, after compliance with RCW 4.96 et. seq., filed suit in the Pierce County Superior Court under Cause No. 09-2-16169-6. Suit was filed not only against the Bethel School District, but also Rhonda K. Gibson, who was the "health clerk" at Clover Creek on the day of Mercedes' death, and Heidi A. Christensen, the school nurse. (CP 1-9).

This was a hard fought litigation and in the months that followed prior to the case being called for trial on September 15, 2012, (in front of the Honorable Brian Tollefson), there were a number of evidentiary and substantive motions. Both before and after the case was called, the Trial

Court spent a number of afternoon sessions hearing, and ruling upon a multitude of motions in limine filed by both parties.¹

The jury was empaneled on October 13, 2011, and openings occurred on that date. The trial portion of the case concluded on November 28, 2011 when the jury reached a verdict finding that all of the Defendants were negligent, but that such negligence was not "a proximate cause" of the injuries suffered by these Plaintiffs. (CP 3196-3199). Because the jury had failed to find proximate cause in the Plaintiffs' favor, the issue of damages was not reached.

On January 17, 2012, the Plaintiffs timely filed an extensive Motion for New Trial And/or Alternatively for Judgment as a Matter of Law on the Issue of Proximate Cause. (CP 3305-4083) (CP 4084-4131). On February 17, 2012, the Trial Court denied Plaintiffs' post-trial motions. (CP 4303-4304). A timely notice of appeal was thereafter filed. (CP 3405-3414).

For the reasons discussed below, and which were in part encompassed within Plaintiffs' Motion for a New Trial/Judgment as a Matter of Law on

¹ Significantly, pretrial the Trial Court excluded Defendants' damages expert, Gerald Rosen, Ph.D., due to repeated violations of the Court's discovery orders. (CP 1137-1146). As Dr. Rosen's exclusion was a "discovery sanction" the Trial Court entered into detailed findings of facts and conclusions of law supportive of its determination. (Id). It is believed that the exclusion of Dr. Rosen is one of the issues the Defendants intend to raise by way of their cross appeal.

"Proximate Cause," Plaintiffs are seeking a remand to the Trial Court with direction to find that proximate cause was established as a matter of law, and for a new trial limited to the issue of damages. Alternatively, Plaintiffs request that this matter be remanded for a plenary new trial due to the substantial prejudicial errors which occurred during this hard fought litigation.

II. ASSIGNMENT OF ERRORS

- 1. The Trial Court erred by failing to order a new trial limited to the issue of damages when the undisputed and unimpeached medical evidence presented at the time of trial established that had either CPR or an Epi-Pen been administered while Mercedes was suffering her medical emergency, she would have survived.**
- 2. Alternatively, the Trial Court erred in failing to order a new trial pursuant to CR 59(a)(7) when there was no evidence or reasonable inference from the evidence justifying the jury's verdict with respect to "proximate cause."**
- 3. The Trial Court erred in failing to order a new trial pursuant to CR 59(a)(1), (2), (8) and (9), when, despite repeated objections by the Plaintiffs, both pretrial and during trial, defense counsel was nevertheless allowed to present confusing, misleading and speculative evidence with respect to other potential causes of Mercedes' death, knowing that such "other cause" evidence was unsupportable under appropriate medical/legal standards of proof.**
- 4. The Trial Court erred in failing to grant Plaintiffs a new trial pursuant to CR 59(a)(1) and (2) and/or failing to grant a mistrial (or by admitting highly prejudicial evidence), when defense counsel violated a number of motions in limine and purposely brought before the jury evidence which had been previously excluded which was of such a highly**

inflammatory nature that no curative instructions or instruction to disregard would ameliorate the prejudicial impact created by such actions.

5. The Trial Court erred in failing to grant Plaintiffs' Motion for a New Trial under the terms of CR 59(a)(8) and (9) due to cumulative errors; the cumulative misconduct of defense counsel, which included not only efforts to violate the court's orders in limine, but also interjecting irrelevant and highly prejudicial matters in front of the jury; and discovery abuse and conduct which, *in toto*, created such a rancorous trial that it served to deny Plaintiffs a fair trial and resulted in a failure of "substantial justice."

6. The Trial Court erred by failing to give Plaintiffs' proposed instruction No. 29 and by giving instruction No. 7, which was not a curative instruction, but rather was a limiting instruction which misstated the law and impermissibly allowed the jury to consider irrelevant medical history.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Can the jury verdict in this case, which found an absence of proximate cause be upheld when the only admissible evidence on issues, which required expert medical testimony, established that had Mercedes either been administered CPR or an Epi-pen she would have survived the medical emergency which she faced on October 7, 2008?

2. In a case, such as this, where medical testimony, based on reasonable medical probability and/or certainty is necessary that to establish causation is it permissible for a defendant to submit evidence of other "possible" causes

of injuries not supported by testimony under the applicable medical/legal standard?

3. Is a verdict which finds "no proximate cause" based solely on impermissible speculation when, despite unequivocal evidence to the contrary, only Defendants submitted evidence of other "possible" causes?

4. Should the Trial Court have granted a new trial when the trial in this case was tainted by the presentation of confusing, misleading and speculative evidence with respect to other potential causes of Mercedes Mears' death, given the Trial Court ultimately determined that such "other cause" evidence was unsupported by competent evidence and a directed verdict on such issues at the close of the evidence?

5. Did the Trial Court abuse its discretion by failing to grant a mistrial, and by admitting evidence that was highly inflammatory and prejudicial, including *inter alia* unsubstantiated allegations of child abuse, when pursuant to ER 403 the probative value of such information was far outweighed its prejudicial impact, and there were alternative ways to address relevant issues, and when the evidence was nothing more unsubstantiated allegation of prior "bad acts" precluded under the terms of ER 404(b)?

6. Did the Trial Court commit reversible error by failing to grant Plaintiffs' motion for a new trial due to cumulative errors, inclusive of the cumulative misconduct to counsel, which included not only efforts to violate the court's orders in limine, but also efforts to interject irrelevant and highly prejudicial matters in front of the jury, discovery abuse, and conduct which created such a rancorous trial that it served to deny Plaintiffs a fair trial?

7. Did the Trial Court err by failing to provide Plaintiffs with an appropriate and sufficient curative instruction regarding an unsupportable defense theory which was subject to a directed verdict, when the failure to give a sufficient curative instruction permitted the jury to consider irrelevant medical history that in its entirety never should have been before the jury?

IV. STATEMENT OF THE CASE

A. Historical Factual Background.

Mercedes Mears was born on November 6, 1997. Her younger sister, Jada, was born on December 18, 1998. Both, on October 7, 2008, attended Clover Creek Elementary School. Mercedes, at the time of her death was in the fifth grade. (CP 905). Mercedes had a history of asthma and severe allergies to environmental, as well as, food allergens. (CP 546 - 547). She generally had good control of these conditions. Clover Creek personnel were

well aware and familiar with Mercedes health issues because Mercedes was a frequent visitor to the health room due to her asthma. Clover Creek's part-time health clerk, Rhonda Gibson, was primarily in charge of dispensing medications at school, and she dispensed an Albuterol inhaler to her 40 out of the 57 times she visited the nurses office during the 2007-2008 school year, and 4 out of the 5 times in the 2008 school year prior to her death, including the day before she died. (Ex. Nos. 303, p.1; and 304, p. 1 - 20) (CP 494; 510 - 512). Ms. Gibson, the school's "health clerk," was promoted to that position from the position of a "lunchroom helper" on August 30, 2007. She was placed in this position, despite having no prior health or medical experience, training, or education. She did, however, have previous warehouse experience in the Bethel School District and was a PTA President. (CP 492).

She replaced a Peggy Walker, who was the health clerk for approximately four years at Clover Creek. (CP 481-82) (CP 691-83). Ms. Gibson, and previously Ms. Walker, when operating in a "health clerk" capacity, worked under Nurse Heidi Christensen, R.N., the nurse for Clover and rotated to other elementary schools within the district. Janice Doyle is the lead nurse for the Bethel School District, and held that position for a

number of years prior to Mercedes' death. (CP 727). Donald Garrick was the principal at Clover Creek and Thomas Seigel was Bethel's superintendent during the relevant time frame. (CP 475); (CP 660). Because Mercedes suffered two potentially very serious, and even life-threatening health conditions, the School District, pursuant to statute, OSPI Regulations, and its own internal policies, was mandated to be prepared if Mercedes' medical conditions caused a medical emergency while she was at school.

It is suggested that prior to discussing the factual details surrounding Mercedes death and the Defendants' established negligence, it is appropriate to discuss such statutory and other obligations in order to place the facts into an appropriate context. It is suggested the most reasonable place to start in that regard is RCW 28A.210. et. seq., wherein the legislature placed upon school districts various obligations with respect to children who have serious medical conditions. (Appendix No. 1) (Bates' No. 2-8). For example, under the terms of RCW 28A.210.260, public schools are authorized under certain circumstances to dispense medication to students, so long as there is a current valid prescription from a authorized prescriber, and the board of directors of the district, under Subsection (7) of the statute, has designated a professional person, (registered nurse), who is to "delegate, to train, and supervise

designated school district personnel in proper medication procedures." *Id.*, at p. 1) (Bates No. 2 and 3).

Also, significantly, RCW 28A.210.320, under the heading of "Children with life threatening health conditions – medications or treatment orders – rules," demands that when a child has a "life threatening health condition," before he or she is permitted to attend a particular school, "a medication or treatment order addressing any life-threatening health condition that the child has that may require a medical service to be performed at the school." Once such orders and plans are in place then the child can be admitted into school. Under Subsection (4) of RCW 28A.210.320, the term "life threatening condition" is defined as "a health condition that will put the child in danger of death during the school day if a medication or treatment order and a nursing plan are not in place." *Id.* at p. 3. (Bates' No. 4).

Again, significantly, under this particular statutory scheme the two conditions of which Mercedes suffered are expressly addressed. RCW 28A.210.370 commands that the superintendent of public instruction and the secretary of the department of health develop for schools a uniform policy for the training of school staff in the symptoms, treatment and monitoring of students with asthma while they are attending school. Under this statute "all

school districts shall adopt policies regarding asthma rescue procedures for each school within the district." *Id.*, at page 5. (Bates' No. 5). Also all school districts "must require that each public elementary school and secondary school grant to any student in the school authorization for the self-administration of medication to treat that student's **asthma or anaphylaxis**," so long as the student has been trained by a healthcare provider to administer such medications and aptitude is demonstrated to the professional registered nurse at the school. Under Subsection (c) of Section 370, the healthcare practitioners are obligated to formulate "a written treatment plan for management asthma or anaphylaxis episodes of students and for the medication used by the student during school hours." *Id.*, at page 5. (Bates' No. 5).

Finally, RCW 28A.210.380, under the heading of "Anaphylaxis – Policy Guidelines – Procedure – Reports," obligates the superintendent of public instruction, in consultation with the Department of Health, to develop anaphylactic policy guidelines for schools to prevent anaphylaxis and to deal with medical emergencies that can result from it. (Appendix No. 1, p. 7) (Bates' No. 7). "Anaphylaxis" is described at Subsection (2) of the statute and is defined as "a severe allergic and life threatening reaction that is a

collection of symptoms, which may include breathing difficulties and a drop in blood pressure or shock." Under the commands of this statute, each school is to have training for personnel for preventing and responding to students who experience anaphylaxis and procedures in place to ensure that appropriate school personnel are responsible for responding to a student who is experiencing anaphylaxis, as well as procedures for the development of individualized emergency healthcare plans for children who suffer from such conditions.

From this mandatory statute, OSPI promulgated two pertinent guidelines for school districts such as Bethel. (Appendix No. 2) (Ex. 263) (Bates' Nos. 10 - 59). Under OSPI guidelines, which provide standards for treatment of life threatening conditions, as well as training of personnel responsible for assisting in such situations, it is very clearly stated that in the event of an anaphylactic reaction "an Epinephrine injection, (shot), is the treatment of choice and must be given immediately to avoid death." Under these guidelines, if a child is exhibiting signs of a life threatening allergic reaction, Epinephrine must be given immediately and even prior to calling 911, "there should be no delay in the administration of epinephrine." The guidelines also command that in order to ensure a child's safety while at

school, doctor's orders must be in place and there must be an emergency care plan and trained designated school personnel prior to the child's attendance at school. The guidelines repeatedly remind that the administration of Epinephrine must occur immediately and in a timely manner.

Consistent with such guidance, Bethel, prior to Mercedes' death, had adopted a policy on "self-administrative asthma and anaphylaxis medication which provided that a student would be afforded the opportunity to self-administer prescribed medications, so long as there is a written parental consent, and the student's prescribing healthcare provider provides a written treatment plan." (Appendix No. 3, pages 8- 10) (Ex. 265) (Bates' Nos. 62 - 72).

Bethel also had in place Bethel Policy 3419, which was adopted on August 26, 2008, prior to Mercedes' death. Under this policy, the superintendent, (Mr. Seigel), was obligated to establish emergency rescue procedures. In accordance with the policy, Mercedes' parents properly authorized the medication that was in the health clerk's office on the day of her death, (Albuterol inhaler and Epi-pen), as did her doctor, Dr. Larson, for the then current school year. According to Bethel policy, if there is an asthma or anaphylaxis emergency, the district "shall" have easily accessible the

student's "written treatment plan," the parent's written consent, and the parent's signed release from liability form. Under the policy, the school is required to keep Mercedes' Epi-pen at the school so Mercedes can "immediately access it in the event of asthma or anaphylaxis emergency." Bethel's policy requires that "in the event of an asthma or anaphylactic episode, the school nurse shall be immediately contacted, and the school is obligated to follow the procedures outlined in the most recent 2005 edition of the AMES manual, (Asthma Management in Educational Settings), which requires training of school personnel in rescue procedures, and that school must provide the care as designated in the emergency treatment care plan, and then are to call 911.² *Id.* The school district's own documents establish that, before Mercedes' death, its personnel were well aware that a "wait and see" standard had been done away with, and because school personnel were not medically trained, **they are to act** by providing rescue medication and should not attempt to conduct a diagnostic assessment. (Appendix Nos. 15 and 16) (Ex. 352 and 380) (Bates' Nos. 136 - 138, and 140). It was all but an undisputed fact below, that on the date of Mercedes' death, Bethel School

²

At the time of Mercedes' death, the most recent AMES manual was a 2005 manual. Subsequent changes were made to the manual which did away with a "wait and see" standard but standards which required that school personnel act immediately in an emergency life threatening situation administer medication and call 911 immediately.

District and its personnel failed to comply with the rules specifically designed to address exactly what happened here.

Mercedes' parents were proactive, and according to Mercedes' physician, Dr. Larson, they are consistent in their care of their daughter and were active and appropriate care givers. (CP 562). With respect to addressing Mercedes' ailments, her parents made sure Clover Creek was equipped with Mercedes' lifesaving medications, (Albuterol and Epi-Pen), and did what they were required to do. Mercedes was also well aware of her own healthcare needs, and could self-administer her own medications. She was particularly responsible in her care needs relating to her asthma. (CP 481); (CP 534).

As required by the above, the Mears signed a liability waiver for school district personnel for the Year 2008-2009, permitting school personnel to administer the emergency rescue medication that the Mears had brought to the school along with doctor's order to administer the medication in the event of an asthmatic event, or a "allergic emergency." Albuterol and Epi-Pen for the 2008-2009 school year, along with Dr. Larson's orders were received by Clover Creek on September 24, 2008.³

³ As indicated by the above, Mercedes should not have been allowed to attend school until such orders had been received. Mercedes' physician's orders provided the Epi-Pen was to be dispensed by the principal or his/her designee and if the school is not present, that

Unfortunately, despite the efforts of the legislature, OSPI, the policy writers of the Bethel School District, Mercedes' parents and Mercedes' physician, the undisputed evidence presented below established that Bethel School District, and in particular Clover Creek personnel, especially Nurse Christensen failed to take the measures necessary to ensure that, despite her life-threatening condition, Mercedes could safely attend school. Pre-trial discovery revealed that prior to Mercedes' death, Nurse Christensen failed to perform the tasks required of her to ensure child safety under the above-referenced statutory and regulatory scheme. Christensen's lack of organization, fulfillment of her basic job duties, (failure to complete student emergency healthcare plans), was well known and documented for at least a year prior to Mercedes' death. (CP 1452-1522) (Appendix No. 14) (Ex. 336) (Bates' Nos. 133 - 134). With respect to Mercedes, Nurse Christensen failed to have a healthcare plan in place for Mercedes before the 2007-2008 school year, the year preceding Mercedes' death, thus, she failed in this duty for two school years.

Discovery revealed that a month prior to Mercedes' death the incompetent performance of Nurse Christensen was subject to an

Mercedes was authorized to inject herself. (Appendix Nos. 9 and 10) (Ex. 299 and 300) (Bates' Nos. 121 and 123).

extraordinary meeting. (Appendix No. 14) (Ex. 336) (Bates' No. 133 - 134). The topic of the meeting was her failure to complete healthcare plans for students that needed such plans in place prior to the school admission under state law. She was also derelict in her duties in training the health clerks regarding the administration of medications, including Epi-Pen. School administrators were present at the meeting and were aware of Nurse Christensen's dangerous deficiencies. Health clerk Kellie Meyer, who performed the same duties as Rhonda Gibson at a different elementary school, observed that Nurse Christensen's deficiencies were either due to laziness or incompetence. (CP 1454-1466).

In Nurse Christensen's performance evaluations it was noted that she was particularly deficient in training staff and completing emergency healthcare plans.

It was established that Nurse Christensen's failings materially impacted the training of Rhonda Gibson who, in the absence of the nurse, had to effectively provide assistance to students at Clover Creek on medical issues. It was undisputed that Nurse Christensen failed to train Ms. Gibson, or any other employee of Clover Creek, in the lifesaving administration of an Epi-Pen to students presenting with life-threatening conditions. (CP 1454).

Not only did Nurse Christensen fail to properly train Rhonda Gibson, she also failed to complete a proper emergency healthcare plan for Mercedes for 2007-2008 and 2008-2009 school years, thus making it impossible for anyone to reference an emergency healthcare plan for Mercedes on October 7, 2008.

Nurse Christensen was aware that when there is an allergic reaction Epi-Pen is the medication of choice, and that there should be no delay in its administration, even for the purposes of making a 911 call. (CP 424-25). Yet despite such knowledge, Nurse Christensen never imparted such information by way of training to Rhonda Gibson, who was to act in her stead in her absence. Rhonda Gibson testified she did not know all the circumstances that required the administration of an Epi-Pen even though an Epi-Pen is the only injectable medication a health clerk is permitted to administer. (CP 516).

Part of Nurse Christensen's responsibilities was to have a care plan in place covering Mercedes' non-food-related allergies, (her environmental allergies), and there was none. She also should have had a care plan to cover Mercedes' asthma, and there was none.

She was also obligated to write an emergency care plan for Mercedes based on Dr. Larson's current doctor's orders and she did not do so. She merely reprinted the care plan for food allergies from the previous school

year. (Appendix Nos. 12 and 13) (Ex. 310 and 312) (Bates' Nos. 127 - 128; and 130 - 131). (CP 729). This was improper, and it was not a proper care plan, but was consistent with her well-documented poor performance that the district was aware of. (CP 735; 757-58).

Such an "emergency plan" should have been written in simple terms and have steps that you are to follow, it should be kept in an accessible place, (the nurse's office), but with respect to Mercedes one was simply never done.

Such failures in training and proper prophylactic preparation proved to be catastrophic on October 7, 2008.

On that date, Mercedes woke up and prepared for school as she normally would do. On that morning, as Mercedes and her sister, Jada, were walking to a bus stop, (which they did almost every morning), for school at Clover Creek, she ran into Lisa Dodson, a family friend of the Mears, who was driving her son to school in their van. Ms. Dodson picked up both Jada and Mercedes and transported them to school. Ms. Dodson reported that Mercedes was talkative, smiling and was having no asthma-type signs or symptoms while she was in the van. Ms. Dodson dropped the children off in front of the school, leaving her in the care and custody of school personnel. (CP 958-59;(CP 622-624). Unfortunately, after arrival at school Mercedes

started to become sick. According to Mercedes' physician, Dr. Larson, Mercedes was susceptible to severe allergic/anaphylactic reactions, thus requiring a prescription for an emergency rescue Epi-Pen, which was kept at both her home and at school. Mercedes was allergic to many foods and also airborne inhalants such as mold, dust mites and grass. (CP 546-47).

At 8:15 a.m., shortly after being dropped off, as she was walking towards school, Mercedes informed her sister, Jada, that she was having trouble breathing, felt like she was "going to die," and that Jada was to go get the nurse. (CP 624). Jada ran into Clover Creek's main office and informed health clerk Rhonda Gibson that Mercedes was in distress. (CP 890-905). Jada testified that they intended to walk inside the building to wait for school to start, when Mercedes suddenly sat on a bench and expressed that she felt like she was going to die and she started to breathe very hard. (CP 624-25).

Ms. Gibson found Mercedes outside the school sitting on a bench crying. She then proceeded to physically pull Mercedes into the school and into the health room even though Mercedes expressed she was in no condition to walk. As Ms. Gibson was pulling her Mercedes was struggling and took four or five steps, stopped and kind of dropped, but Ms. Gibson still forced her to walk, grabbing and pulling her into the school. Once inside,

Mercedes screamed she was "going to die." (CP 451-455) (CP 624). Mercedes was screaming that she could not breathe as she sat in the health room in distress "gasping and screaming." (CP 693-695).

After Ms. Gibson forced Mercedes into the health room, Mercedes continued to scream that she could not breathe. At this point others, including former health clerk Peggy Walker, began to attend to Mercedes as she continued to scream that she could not breathe and she would breath deeply every once in a while, followed by a scream. (CP 348). Mercedes was panicking and Ms. Walker and the others present had little doubt that this was an emergency. When asked by Peggy Walker what was wrong, Mercedes threw her inhaler on the counter indicating that she had tried to administer Albuterol herself and started to gasp and grab at her throat. Mercedes, who was sat down into a chair, was panicking and thrashing around. (CP 349); (CP 695-96).

Meanwhile, across the hallway, there was a staff meeting with 35 staff members being held in an unenclosed library, less than 10 feet from the health room, and the sounds of Mercedes' emergency were clear.(CP531-540); (CP902-03). The meeting was interrupted by her loud screams but the leader of the district, Superintendent Seigel, and the leader of the school,

Principal Garrick, did not leave the meeting to investigate despite the screams. Alerted by the commotion, several other staff members came to investigate, hearing Mercedes' cries of distress that she was going to die. By this point in time, Mercedes was sitting on a chair in the health room and was struggling to breathe. She had clear mucus coming out of her nose. Eventually, at 8:22 Rhonda Gibson called 911, and then Jeanette Mears. (CP 362) (CP525-27). Health Clerk Gibson testified Mercedes did not look like she normally did and was having breathing, difficulties which were different for Mercedes, whom she had previously had contact with when Mercedes was in need of Albuterol. Despite multiple attempts by staff to administer Albuterol, it had no effect on Mercedes, and she continued to scream that she "could not breathe." Gibson, the health clerk, did not attempt to administer Albuterol and, for a period of time, was nowhere in sight and was providing no care or directives to the staff who was trying to aid Mercedes.⁴

Mercedes lost consciousness. Clover Creek personnel moved her unconscious body onto the floor of the health room and attempted to keep her

⁴ While all these events were transpiring, Jada Mears, who had followed Mercedes into the health room, had left for a short period of time, then returned. (CP 626). She observed her sister's distress. Eventually Mercedes was on the floor of the health room struggling to breathe. Despite the fact that Mercedes was conscious for at least five minutes in the health room, no one provided her Epi-Pen so she could self-administer and neither did staff. No effort was made to review doctor's orders and as previously discussed there is simply no emergency plan for Mercedes which could have been consulted at this time of crisis.

awake, but she was convulsing, twitching and gasping for air. At no time did Health Clerk Gibson, or anyone else, reach to the cabinet only a few feet away for Mercedes' Epi-Pen. While Mercedes was struggling to breathe, instead of retrieving her emergency medication and acting, untrained Health Clerk Gibson knelt down beside her, talked to her and held her but provided no medical treatment. (CP 696-697).

While Mercedes lay on the floor, wet paper towels were put on her forehead and behind her neck. (CP 897). Again, it is emphasized no school personnel attempted to review Mercedes' doctor's order or obtained Mercedes's Epi-Pen, which was only a few feet away, even though Health Clerk Gibson herself had checked the Epi-Pen into the school a couple of weeks prior. (CP 994).

After Mercedes lost consciousness, no school personnel attempted CPR, even though Health Clerk Gibson was required to "provide basic first aid. (CP 960).

While this crisis was occurring, Rhonda Gibson did not have the skills to assess the nature of Mercedes' problems, or to make a determination as to whether or not she was having an asthma attack or anaphylaxis, (allergic reaction). She did not ask any questions of Mercedes while she was still

conscious in order to determine whether or not she was having an allergic reaction. (CP 501).

It was not disputed at time of trial that Health Clerk Gibson had access to the key to unlock the cupboard where Mercedes' medications were kept, but she never attempted to retrieve the key. Although Ms. Gibson was aware that Mercedes has physician orders and parental-authorized emergency medication, which was kept in the health room where she lay dying, she did not relay that information to others who were trying to attend to Mercedes.

Ms. Gibson called 911 twice because she believed that they were not responding fast enough. The first medics arrived at Clover Creek at 8:27; four minutes after they were dispatched at 8:24. Upon arrival, paramedics found Mercedes on the health room floor unresponsive, in severe distress, gasping for air, unconscious with a faint heart rate and/or blood pressure. The paramedics "bagged her" as Mercedes continued to convulse. Mercedes vomited, and the vomit came out of her nose. The EMTs initiated care by ventilating her with a bag valve mask due to her agonal breathing – gasping for air. (CP 361-372).

When the paramedics arrived at Clover Creek, Mercedes was given three dosages of Epinephrine by the EMTs, but it was too late. (CP 372).

She was dead. Paramedics quickly assessed Mercedes as in a dire condition, very minimal respiration, faint carotid pulse, unresponsive, no heart rate, no respiration and no blood pressure. Her heart rate was "flat lined" at 8:35 a.m. (CP 366-67).

At approximately 8:35 a.m., CPR was initiated on Mercedes by EMT personnel because her heart was no longer beating, and the EMTs considered her to be deceased at the point CPR was started. The medics left the school with Mercedes at 8:37 a.m. (CP 945-970).

The paramedics drove Mercedes to Mary Bridge Hospital where emergency room physician, Dr. Jonathan Chalett, received her. Dr. Chalett confirmed Mercedes was already in full arrest while in the ambulance, "meaning the heart rate had stopped, was not having any breathing." Mercedes was dead on arrival despite the paramedics' lifesaving measures. As discussed in more detail below, the undisputed medical evidence presented by Plaintiffs at time of trial was that had either CPR been given during those critical minutes in Clover Creek's health room, or Epinephrine had been earlier administered to Mercedes, she would not have died.

From Plaintiffs' perspective, the reason why Mercedes died on the floor of the health room at Clover Creek Elementary School, at 11 years of

age was because despite statutory, regulatory commands, and the Bethel School District's own policies, the personnel at Clover Creek who were responsible to address Mercedes' medical emergency, were woefully untrained, and did not have the basic tools available to them in order to appropriately address such an emergency, including an emergency healthcare plan and other basic information which was needed in order to appropriately cope with Mercedes' healthcare crisis.

During the course of trial, the defense tried to polarize the case by asserting that Mercedes died from asthma as opposed to anaphylaxis. Plaintiffs viewed this simply as a "red herring" issue, in that whether or not Mercedes was suffering an asthma attack and/or anaphylaxis, the undisputed evidence established that with respect to either condition, had her Epi-Pen been administered she likely would have survived. Further, there is literally next to "no downside" in administering Epinephrine, and under applicable standards, even if there is a doubt, under known standards Epinephrine should be administered immediately. Defendants' personnel, under the applicable standards of care, needed to be trained to act and not think, when it came to the administration of Epinephrine. (Appendices Nos. 15-16) (Ex. 352 and 380) (Bates' Nos. 136 - 138; and 140). This was a preventable

death. Even Defendants' own medical expert, Dr. Montanaro, acknowledged that if he were presented while Mercedes was having her medical emergency, he would have administered Epi-Pen.

B. Significant Pretrial Rulings.

As previously indicated, this was a hard-fought litigation from the beginning, and the discovery phase of the case was extremely intensive, as reflected by the fact in excess of 20 depositions, which were published during the course of trial and now form part of the Trial Court record.⁵

Not only was the discovery phase of this case intensive, but it was also troubled. Even after discovery cutoff, Plaintiffs' counsel had to compel the production of documents from the Defendants, particularly as it related to the above-referenced performance problems of Defendant Heidi Christensen. Despite Plaintiffs' counsel's best effort, literally hundreds and hundreds of pages of significant documents were dribbling in even after discovery cutoff, thus requiring the taking of a number of depositions on the eve of trial. (A number of the late-disclosed documents could be

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Pretrial discovery and case preparation was also extremely expensive as reflected by the inflated cost bill which was submitted by the defense following entry of the jury's verdict in this case. Initially the defense claimed in excess of \$220,000.00 in litigation-related costs that were ultimately reduced to an Award of approximately \$3,700.00 by the Trial Court.

characterized as "smoking guns," given Plaintiffs' theory of the case.) (CP 1699-1708); (CP 2720-21)(CP 2747).

Additionally, substantial amount of time in the months before trial were spent before the Trial Court in an effort to compel Defendants' damages expert, Gerald Rosen, Ph.D., to comply with the Court's orders regarding limited disclosure of documents relating to his income. (CP 433-4434) After Dr. Rosen's failure to comply to with three court orders, the Court excluded Dr. Rosen and entered detailed Findings of Fact and Conclusions of Law with respect to such order. (CP 1137-1146)⁶

In early August 2011, both parties filed crossing motions for summary judgment. The Defendants contended that summary judgment should be granted due to the absence of any "duty" breached by the school district, and the individual Defendants were entitled to "good Samaritan" pursuant to RCW 4.24.300(1). Contemporaneously, Plaintiffs filed two motions for partial summary judgment, one addressing duty, breach and proximate cause,

⁶ The Plaintiffs in order to have information available to impeach Dr. Rosen relating to any economic biases he may have as a "professional witness", procured an order from the Trial Court requiring him to produce such information under appropriate protective orders. See generally, *Alston v. Blythe*, 88 Wn. App 26, 943 P.2d 692 (1997)(physicians retained by a party may be cross-examined for economic bias in a personal injury case); see also, *Scoog v. Minton*, 145 Wn. 119, 259 P. 15 (1927). For out-of-state cases providing a detailed explanation as to why such information is relevant and should be discoverable see, *Worbski v. deLara*, 53 Md. 509, 727 A.2d 1930 (1999); *Falik v. Hornage*, 413 Md. 163, 991 A.2d 1234 (2010).

and another specifically challenging a number of the affirmative defenses set forth within the Defendants' answers, including, but not limited to, the absence of any comparative/contributory fault on the part of Mercedes, Jada and/or the Mears parents, and the absence of "any empty chair" defense based on RCW 4.22.070.

Motions for Summary Judgment were heard over two extended afternoon sessions on September 2, 2011, and on the morning of September 9, 2011. The Trial Court granted Plaintiffs' Motion for Summary Judgment Regarding the Existence of Duty, and denied Plaintiffs' motion with respect to breach and proximate cause, determining that there were factual issues for the jury to determine with respect to those aspects of Plaintiffs' claims. Correspondingly, Defendants' Motion for Summary Judgment Regarding Duty, Breach and Proximate Cause was denied. (CP 248-249).

Significantly, the Trial Court granted Plaintiffs' Motion for Partial Summary Judgment regarding Defendants' affirmative defense of "comparative/contributory fault as it related to Jada, Mercedes, and Mr. and Mrs. Mears, while reserving on that issue with respect to Plaintiffs' physician

Dr. Larson. Summary judgment was also granted with respect to the existence of any "empty chair defense."

Thereafter, on September 15, 16, 29, and October 5, 6 and 10, the Trial Court heard oral argument on the multitude of motions in limine filed by both sides.

Plaintiffs' Motions in Limine, which initially were filed on September 1, 2011, were detailed. While some of the motions in limine were, for lack of better terms, "run of the mill" relating to insurance, settlement negotiations, and the like, Plaintiffs' motions in limine were otherwise detailed and targeted towards any unsupportable and speculative theories regarding causations, nor medical theories unsupported by the appropriate medical/legal standard.⁷ (CP 1881-1888). Additionally, Plaintiffs' motions in limine were designed to preserve the Court's prior ruling with respect to the absence of any comparative and/or contributory

⁷ In other words, Plaintiffs, by way of motion in limine, were seeking the exclusion of any evidence regarding unrelated medical history regarding any pre-existing conditions that had no causal relationship to the injuries claimed in this case i.e. in particular the death of Mercedes Mears on October 7, 2008. See, *Little v. King*, 161 Wn. 2d 696, 704-05, 161 P.3d 345 (2007); *Harris v. Drake*, 152 Wn. 2d 480, 98 P.2d 872 (2004); *Hoskins v. Reich*, 142 Wn. App. 557, 174 P.3d 1250 (2008). Further Plaintiffs' motion in limine were calculated to preclude the Defendants from asserting, without appropriate medical expert foundation that some other force and/or condition possibly could have been the cause of Mercedes' death, and the like. In other words, as recently reiterated by the Supreme Court in *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn. 2d 593, 605-06, 260 P.3d 857 (2011) in order to be admissible and non-speculative there must be expert medical testimony based on a standard of "reasonable medical certainty or reasonable medical probability" in order to establish a causal link between an event and an ultimate result.

fault on the part of the Mears parents and Jada Mears. Similarly, Plaintiffs took great care to try to bring before the Court and to gain pretrial rulings excluding any evidence which was potentially highly prejudicial in nature, such as there had been unfounded allegations of abuse by Jeanette Mears directed towards her daughter Jada, and that there had been "bonding" issues between the mother, Jeanette Mears, and Jada, the surviving daughter. In that regard, Plaintiffs took great care to try to acquire advanced pretrial rulings in order to preclude or potentially prejudicial evidence which could taint the trial and the ultimate result. In addition to addressing such issues in Plaintiffs' "omnibus" motions in limine, Plaintiffs also filed "Plaintiffs' supplemental motions in limine regarding gambling, etc., which was specifically calculated to exclude potentially inflammatory information that within Mrs. Mears' mental health counseling records that not only related to her relationship with her daughter Jada, but a number of other unrelated collateral matters. (CP 2711-19). Given the inflammatory conduct of such records, the Trial Court ultimately ordered them sealed. (CP 2761-64).

With respect to this specific motion, which was heard on October 6, 2011, Judge Tollefson specifically ruled:

THE COURT: Ok. Well, having listened carefully to all the arguments presented by both sides, excellent

arguments by the way, I do want point out that there was a rather well-reasoned dissent in Little v. King, 160 Wn. App. [sic] 696, 207, and, of course, the other cases that were cited today. So I think everybody has an understanding the mere existence of a pre-existing condition is not a sufficient basis to infer a causal relationship between the injury complained of and the pre-existing condition. And that's been repeated over and over and over again in the case law. And then there's, of course, the proper standard, which is more probable than not. You can't - - I think earlier in all these motions I talked about the instruction I gave in another case wherein I instructed the jury they can't think of things on a basis of might have, could have, possibly did cause and that whole argument was repeated in the Little v. King case. In here, Dr. Hegyvary, after having been given some of this information, didn't change his opinion. So there you go. So that means the gambling is out. The issue with respect to Jada are out. This is pre-death of Mercedes, by the way. Marital discord issues are out. Now post-death Mercedes, we're talking about a totally different set of situations. The jury should be entitled to look at the entire person post-death. Again, though the standard of proof is the same, if you can't connect to post-death behavior with the proper medical causation level, you just don't get to ask about it. So if they don't have any post-death - - the defense doesn't have any post-death competent evidence of causation, then they're not going to be able to explore that either, and I don't know if they have. I don't know if Mr. Harris talked about - - you talk about the fact of treatment and what it is, but they got to be able to link the behavior with some competent evidence of causation. And I haven't heard that yet. So now all of my ruling is of course, is subject to that if somebody owns [opens] the door rule. And if by chance the Plaintiffs open the door, then we will be revisiting all this. - - - Again, I haven't heard any competent evidence of a causal relationship between the post-partum issue regarding

Jada and the mental situation with respect to the loss of Mercedes. (RP, 10/6/11, Trial Excerpts, P. 87-8) (Edited for clarity).

On October 10, 2011, an Order was entered on this motion. The Order "granted" Plaintiffs' motions with "limitations" which stated:

Any evidence re gambling pre-death is excluded. Jada Mears' pre-death is out. Marital discord issues of Mr. and Mrs. Mears is excluded. No questions about this issue without competent causation evidence ... post-partum issues re Jada is out. (CP 2794-2996) (Appendix No. 5, p. 2) (Bates' Nos. 104 - 106).

On the same date, the Trial Court entered an Order with respect to Plaintiffs' "omnibus" motions in limines, and specifically excluded, among other things, any evidence, or argument, and the like, with respect to contributory fault on the part of Jada, Mercedes and Mr. and Mrs. Mears, as well as any suggestion that any of the surviving Mears had any responsibility for Mercedes' death, and the like. (Appendix No. 4, p. 5 - 7) (Bates' Nos. 78 - 80).

With respect to medical testimony, the Court entered a specific Order indicating that any prior or concurrent medical treatment, counseling sessions, medical records, employment records, and/or injuries to Plaintiffs which are unrelated and asymptomatic were inadmissible with the caveat that any "past counseling before death of daughter must have an offer of proof

outside the presence of the party” [sic] [jury] – see Plaintiffs’ motion and the Court Order on gambling and other evidence entered by separate order. (*Id.* P. 15-16) Also, Plaintiffs’ motion required that any medical theories be supported by live expert testimony and/or an appropriate expert was granted along with a prohibition against asking speculative questions that are not based on reasonable medical/psychological probability and/or certainty.

Also significantly, under ER 403, (and ER 404(b)) the Court specifically excluded any arguments, testimony or comment that Mercedes should have been kept home on the date of death as well as any arguments, testimony or comment relating to allegations of abuse relating to Jeanette Mears and Jada Mears. (*Id.* P. 6, 16, 17, 18). Also significantly, Plaintiffs’ motion regarding any argument, testimony or comment that the Mears parents failed to provide any medical care to Mercedes on the day of her death, or prior to her death, was subject to a motion in limine which was granted.

Finally, and also which turned out to be of more significance than one would think, the Court granted Plaintiffs’ motion which required that both sides should show their exhibits to the other side before showing them to the jury. (*Id.* P. 28).

Yet, despite the great care provided by the Trial Court, and substantial amount of time and resources directed towards insuring that only relevant, admissible and non-prejudicial evidence be submitted in front of the jury, because of the actions of the defense, all such efforts were for naught.

C. Events Which Occurred During The Course Of Trial Which Form The Basis For This Appeal.

Unfortunately, defense efforts to delve into irrelevant, misleading and confusing medical history that was not sponsored by appropriate medical expert testimony began on the first real day of trial, and did not stop until the close of all the evidence. On October 13, 2011, the parties gave their opening statements. Despite an Order requiring the parties to share anything shown to the jury with each other prior to its exhibition, during the course of defense counsel's opening, the defense put on a "PowerPoint" presentation which it had not first shared with Plaintiffs' counsel. As part of that presentation, defense counsel represented a graph allegedly depicting details regarding Mercedes prior medical history back to December 2006, cataloging her prescription refills for an asthma controller medication known as Flovent, and suggested that her lack of compliance with her prescription of this medication somehow caused or contributed to her medical emergency on October 7,

2008, even though defense medical experts had not previously disclosed any such opinions based on reasonable medical probability/certainty.⁸

Also, without any medical support, defense counsel asserted that Mercedes died because she had an infection.

With respect to alleged "congestion and/or inflammation," as noted above, the Trial Court had already entered orders excluding any evidence with respect to comparative/contributory fault on the part of Mercedes or her parents, and very specific orders precluding evidence regarding the parents' failure to provide her with healthcare, or that she left for school the morning of her death already ill.

Nevertheless, despite the absence of any medical evidence indicating that she had a "viral infection" or cold prior to arriving at school on October

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The defense called two experts at time of trial both who were deposed pretrial. One of the defense experts was a Dr. Gregory Redding, M.D. a pediatric pulmonologist from the University of Washington. (RP, 11/15/11, Redding, P. 26-29). Dr. Redding during the course of trial testified that it was his opinion that Mercedes died from sudden onset asthma. He never provided an opinion on a more probable than not/medical probability/certainty basis that Mercedes' use or nonuse of Flovent in any ways caused or contributed to that event. Dr. Redding could not rule out an allergic reaction and/or anaphylaxis as being contributing factors to Mercedes death. (*Id.* P. 56). He provided no testimony that anything relating to Mercedes' use or nonuse of her controller medication Flovent had anything to do with her death. Defense also called Anthony Montanaro M.D. from the Oregon Health Science University in Portland, Oregon. (RP,11/16/11, Montanaro, P. 17). Dr. Montanaro sub-specializes in the areas of allergy and asthma. Dr. Montanaro in his deposition testified that he had not been provided information with respect to Mercedes' Flovent usage and as a result could not provide an opinion in that regard. It was his opinion that Mercedes died from chronic uncontrolled asthma. Due to the failure to reveal any opinions relating to Flovent, The Trial Court ultimately excluded Dr. Montanaro from discussing Flovent and how it may have caused or contributed to Mercedes' untimely death.

7, 2008, the defense solicited testimony from Principal Garrick that Mrs. Mears, in a conversation with him on the day following Mercedes death, had stated that she should not have let Mercedes go to school on the date of her death because she had an alleged cold. (RP, Trial Excerpts, P. 136-149). The Plaintiffs' counsel objected to such testimony and the defense counsel asserted that medical providers would testify that "Mercedes had been suffering from a viral infection and a cold" on the date of her death. Previously, during the course of the testimony of Plaintiffs' forensic medical examiner, (who testified regarding cause of death), Dr. Donald Reay M.D. corrected defense counsel and pointed out that on autopsy Mercedes was shown to have had upper respiratory "inflammation," and not an infection. (RP, 10/26/11, Reay, P. 6). After colloquy outside the presence of the jury, the Trial Court struck defense counsel's question regarding his conversation with Ms. Mears following Mercedes death. Nevertheless, despite the fact that any questions in that regard was contrary to the Court's pretrial rulings, after the jury was brought back in, the Trial Court nevertheless permitted testimony that Mercedes was congested on the day she arrived home. (RP, Trial Excerpts, P. 149). The Court did this despite the fact that Plaintiffs' counsel moved for a mistrial because the clear message from that testimony

is that the mother, Jeanette Mears, should not have permitted her child to go to school, and by such actions she had contributed to her child's own death. (*Id.* P. 151). This despite the fact that the Court had already ruled, as a matter of law, that Jeanette Mears did nothing to cause and contribute to her child's death.

On November 3, 2011, Plaintiffs filed a written "Motion and Memorandum to Strike Testimony Regarding Flovent and Congestion and for a Curative Instruction." (CP 2871-2882). The Defendants provided a written response which insisted that, contrary to the Trial Court's prior rulings, that the Defendants "are not precluded from producing evidence of other "possible causes" to rebut Plaintiffs' theory of causation." (CP 3005-3014). Plaintiffs' motion regarding Flovent and congestion was heard on November 7, 2011. Prior to argument, Plaintiffs had already submitted a proposed curative instruction with respect to such issues. (CP 2812-2814) (Appendix No. 6) (Bates' Nos. 108 - 110).

The Court, when ruling, reiterated that all testimony regarding medical issues, including causation, had to be based on "reasonable medical certainty," and recognized that there had not been a disclosure pretrial of any expert opinion that "Flovent or lack of Flovent is a cause of death of

Mercedes Mears on a more probable than not basis." (RP, Trial Excerpts, P. 301). As a result, the Judge ordered that Dr. Montanaro's testimony was limited to that which was set forth in his deposition, (which did not include any testimony regarding Flovent), but left open the door for the defense to make a determination as to whether or not Dr. Montanaro would be asked opinions outside the scope of his deposition, and if so, Plaintiffs' counsel were to be provided a meaningful opportunity to examine Dr. Montanaro outside the presence of the jury on any expanded opinions he may have. (RP, Trial Excerpts, P. 302).

Despite the Court's latitude, defense counsel subsequently announced that Dr. Montanaro was not going to expand upon his opinions.

Ultimately the Trial Court directed the verdict on the question of whether or not Flovent or a cold caused or contributed to Mercedes Mears death. At the close of all the evidence, the Trial Court determined there was no evidence supporting such a proposition. (Supp. RP).

In anticipation of the grant of a directed verdict on this issue at the close of the evidence, Plaintiffs submitted Proposed Instruction No. 29 which in part provided:

You are instructed that testimony and evidence concerning Mercedes Mears' past medical history has

been allowed only for the limited purpose of her prior asthma condition. It has not been allowed to suggest the use or non-use of medication such as Flovent at some in the past, in any way caused or contributed to Mercedes Mears' death on October 7, 2008. You are also instructed that you are not to consider whether Mercedes Mears had a cold, or an upper respiratory tract infection in determining whether the Defendants were negligent and whether such negligence was a proximate cause of Mercedes Mears' death on October 7, 2008. You are not to discuss this evidence when you deliberate in the jury room, except for the limited purpose of discussing Mercedes Mears' past asthma condition... (Appendix No.7) (Bates' No. 114).

Instead of providing Plaintiffs' proposed Instruction No. 29, which was specifically tailored to address the evidentiary issues which arose during the course of trial, and the granted directed verdict, the Trial Court gave its Instruction No. 7 which provided:

You are instructed that testimony and evidence concerning Mercedes Mears' past medical history has been allowed only for the limited purpose of her prior asthma condition. You are not to discuss this evidence when you deliberate in the jury room, except for the limited purpose of discussing Mercedes Mears' past asthma condition. (Appendix No. 8) (Bates No. 119).

Plaintiffs excepted to the Court's failure to give proposed Instruction No. 29, and took exception to Court's Instruction No. 7 as inadequate. (RP, Trial Excerpts, P. 428-434).

Additionally, as mentioned above, a number of motions in limine were granted to exclude ER 403 evidence, (highly prejudicial and inflammatory), and/or which can be characterized as "bad act" evidence otherwise precluded under the terms of ER 404(b), relating in part to difficulties in the relationship between Jeanette Mears and Jada, who tragically witnessed the death of her sister. Such concerns came to fruition during the course of the testimony of Kimberly Barrett, Plaintiffs' psychological damages witness. (RP, 10/25/11, Barrett)

During the course of Ms. Barrett's examination by defense counsel, Plaintiffs' counsel was immediately alerted to the fact that it was likely that the questioning was going to enter into prohibited and excluded territory, and asked that matters be taken up outside of the presence of the jury. (RP, 10/25/11, Barrett, P. 40). During the course of the subsequent colloquy, defense counsel represented to the Court that he intended to explore any "bonding issues" between Jeanette Mears and Jada as it related to her emotional distress damages resulting from her being a bystander at her own sister's death.⁹ (RP, 10/25/11, Barrett, P. 40-49). Dr. Barrett had previously been deposed. She had not been called upon to review Jeanette Mears mental

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It is again noted that Dr. Rosen Ph.D., the Defendants' psychological damages expert had been excluded by the Court.

health records, which had previously been excluded by the Court. After providing the Trial Court assurances that he only intended to explore the "bonding" between Jeanette Mears and her daughter Jada, the jury returned.

At the beginning of the post-colloquy examination, defense counsel essentially "stuck to the script." (*Id.* P. 49-53). Unfortunately, as the examination continued, defense counsel, despite his assurances to the Court's prior motions in limine and exclusion of Mrs. Mears' mental health care records, delved directly into matters that were designed to inflame the jury's passions and prejudices against Jeanette Mears:

*Q. (Mr. Moberg) Did mom, when you talked to her about the issue, tell you that in her treatment one of her treatment goals was dealing with the attachment of Jada was to be able to tolerate the presence of Jada without **feeling like her flesh was crawling or without coming woozy in my stomach content.** Do you recall her saying that that was the level of lack of attachment between Jada and her.*

A. (Barrett) She did not tell me that.

*Q. Okay. Did she tell you her goal was in treatment, was so that she could end up being in the same room with her daughter Jada and not feeling like her **skin was crawling.** Did she tell you that?*

A. She told me that the goal of treatment was to develop a positive, healthy and loving relationship with her daughter.

Q. And did she tell you that – did you read the reports that Jada had in her medical records that she claimed that her mom had told her that she was stupid, she was ugly, and that's that's why couldn't she be more like Mercedes, do you recall reading that?

A. I spoke to Jada about her relationship with her mother, but she did not acknowledge those things and she said um when I asked Jada to tell me about – I said there had been things that had come up about your relationship with your mother and I need to know about those things.

Q. Okay.

A. She was in my office. I have a little dog that she played with. She was laying on the floor.

Q. What did she tell you about.

A. Okay. She was laying playing with the dog, she sat up abruptly, clenched her fist, put her body in an extremely tense position like this, and she said that I am so tired of people saying this about my mother. This is about my sister who died.

*Q. Now, you know, don't you, that Jada **reported to her counselors and before this event an instance of what was described by the counselor as severe emotional abuse that she suffered from her mom.** You read those records and you know about that. That was reported by Jada to those counsels, don't you? (RP, 10/25/11, Barrett, P. 54-56) (Emphasis added).*

At that point, counsel for Plaintiffs objected and asked for a conference outside the presence of the jury. Due to the inflammatory nature of such questioning, Plaintiffs' counsel moved for a mistrial. (RP, 10/25/11,

Barrett, P. 58). The motion for the mistrial was denied, the objections were not sustained, and cross-examination of Dr. Barrett continued and only served to confirm that she had not reviewed the records referenced by defense counsel, and the focus of her evaluation did not involve a detailed study of the relationship between Jada and her mother "other than to talk with Ms. Mears about what she had attempted to do about it." (*Id.*, P. 65).

There were also additional incidents where, clearly, defense counsel was trying to paint Mrs. Mears with a negative brush based on irrelevant considerations. For example, on November 1, 2011, during the testimony of Defendant Rhonda Gibson, defense counsel attempted to elicit from her, in the presence of the jury, that Mrs. Mears had made a negative comment towards her. (RP, Trial Excerpts, P. 173-176). Fortunately, in that instance, the matter was taken up outside the presence of the jury before she could answer the question with the sustaining of Plaintiffs' objection. Further, despite the fact that the Court, without reservation and/or limitation, had previously excluded Mrs. Mears' counseling records, nevertheless defense counsel, Mr. Moberg, in the presence of the jury, tried to introduce part of such counseling records into evidence. Naturally, he did so without seeking

prior guidance and permission of the Court. As a result, once again Plaintiffs' counsel moved for a mistrial. (RP, Trial Excerpts, P. 419-420).

In total, there were three motions for mistrial, which were denied. Substantial irrelevant medical history was submitted before the jury to not only bias the jury against Mrs. Mears, but also in order to confuse and mislead the jury on the issue which the defense ultimately prevailed upon, i.e., proximate cause. This occurred despite the fact that the Defendants knew, or had to have known, that there was no supporting medical and/or other expert testimony which would provide any form of a causal link between the method and manner in which Mercedes utilized "Flovent" prior to her death. Also, despite numerous motions in limine **which were granted**, all designed to prevent highly inflammable and prejudicial evidence from being placed in front of the jury, the defense counsel repeatedly ignored the Court's orders and at every available opportunity pushed the boundaries in order to get inflammatory and prejudicial evidence in front of the jury.

As explored in detail below, it was error for the Trial Court not to grant Plaintiffs' Motion for a New Trial or, at a minimum, Plaintiffs' Motion for a New Trial on the Issues of Proximate Cause and Damages, and/or for the Court to determine as a matter of law that the jury's verdict with respect

to proximate cause was not supported by any admissible nonspeculative evidence.

V. ARGUMENT

A. Standard of Review.

Generally, issues of law are reviewed de novo. Thus, if a motion for a new trial relates to a disputed issue of law, the standard review is de novo. See, *Columbia Park Golf Course, Inc. v. City of Kennewick* 160 Wn. App. 66, 79-80, 248 P. 3d. 1067 (2011). If what is at issue is whether or not the Trial Court should have granted a new trial due to misconduct of counsel, an abuse of discretion standard is applicable. See, *Teter v. Deck* 174 Wn. 2d. 207 222, 274 P. 3d. 336 (2012). As stated in *Teter*, "We review a trial court's order granting a new trial solely for abuse of discretion when it is not based on an error of law." *Id.*

Additionally, a trial court's determination to exclude and/or admit evidence is also reviewed under an abuse of discretion standard. See, *Salas v. Hi-Tech Erectors* 168 Wn. 2d. 644, 668-69, 230 P. 3d. 583 (2010). As explored in the *Salas* case, a trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds or reasons." *Id.*, citing to *State v. Stenson* 132 Wn. 2d. 668, 701, 940 P. 2d. 1239 (1997). A

decision is based on untenable grounds or untenable reasons if the Trial Court applies the wrong legal standard or relies on unsupported facts. *Id.* Submission of prejudicial evidence will be deemed a harmless error unless there is a risk of prejudice and "no way of knowing what value the jury placed upon improperly admitted evidence." *Id.*, citing to *Thomas v. French*, 99 Wn. 2d. 95, 105, 659 P. 2d. 1097 (1983).

The adequacy of jury instructions are subject to de novo review as to questions of law. See, *Hall v. Sacred Heart Med Ctr.*, 100 Wn. App. 53, 61, 995 P. 2d. 621 (2000). A Trial Court's decision whether to give a particular instruction to the jury is a matter that is reviewed for an abuse of discretion. See, *Anifinson v. FedEx Ground Packaging Systems Inc.* 159 Wn. App. 35, 44, 244 P. 3d. 32 (2010).

Challenges to the sufficiency of evidence to support a verdict is subject to de novo review applying the same standards as the Trial Court. See, *Schmidt v. Coogan* – Wn. App. – 287 P. 3d. 681 (10/30/12).

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B. The Jury's Verdict Is Inconsistent And Contrary To The Undisputed Evidence In This Case With Respect To Proximate Cause (CR59(a)(7)).

Under the specific facts of this case, the jury's verdict is contrary to the unrebutted and undisputed evidence which was presented at time of trial by the Plaintiffs.

Under the terms of CR 59(a)(7), a new trial may be granted on the basis that "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is "contrary to law." Challenges to the sufficiency of the evidence may be made by either the plaintiff or the defendant under either CR 50 or CR 59(a)(7). See, *14A WAPRAC § 24:7*, Tegland, (2011). See also, *15 WAPRAC §38:17*, Tegland, (2011). When a verdict is in favor of the defense, and the Court ultimately determines that such a verdict is contrary to the evidence, the appropriate remedy is a grant a new trial limited to the issue of damages. See, *Sommer v. DSHS*, 104 Wn. App. 160, 175, 15 P.3d 664 (2001).

In this case, the jurors' finding of negligence constitutes a "general verdict" in that specific interrogatories were not provided for a determination of each specific allegation of negligence set forth within the pleadings, and testimony presented at time of trial. Thus, the jurors' determination that the

defendants in this case were "negligent" constitutes a general verdict. Under the terms of CR 49 a general verdict by definition is as follows: "**A general verdict is that which the jury pronounces generally upon all or any of the issues in favor of either the plaintiff or the defendant.**" (Emphasis added).

As the jurors in this case found on **all issues** in favor of the Plaintiff regarding negligence, it must be presumed that the jury found in Plaintiffs' favor with respect to all allegations of negligence set forth within the pleadings and proof presented at time of trial. As noted in *Hawley v. Mellem*, 66 Wn.2d 765, 405 P.2d 243 (1965), "When the verdict of a jury is consistent with the pleadings, the evidence, and the instruction of the court, all issues are resolved and inhere the verdict." (Emphasis added). Thus, all issues encompassed by the "pleadings, the evidence and the instructions of the court," were resolved in the Plaintiffs' favor with regard to the issue of negligence. (See, CR 49).

Thus, it must be presumed as a matter of law that the jury found in favor of Plaintiffs with respect to all claims that the Bethel School District was negligent, not only in the retention, training and supervision of its employees, including Rhonda Gibson and Heidi Christensen, but also the School District and its employees were negligent in their failure to rescue

Mercedes Mears when she suffered a medical emergency at school, which ultimately resulted in her death. Specifically, the jury by its verdict found that the School District and its employees, were negligent by failing to provide Mercedes Mears CPR, and an injection of epinephrine, when she suffered her medical emergency. This is significant in that it was simply un rebutted, that had such rescue measures been provided, Mercedes Mears would have survived. **Therefore, there is simply no factual basis within the evidence for the jury to determine that the School District and its employees were negligent in such a fashion, but that such negligence was not the proximate cause of the Plaintiffs' injures and/or damages resulting from the death of Mercedes Mears.** There was no contradictory evidence on that issue presented by the defense which in any way rebutted the affirmative testimony provided by Plaintiffs' experts, specifically Dr. Larson and Dr. Hopp, that had either CPR or epinephrine been provided, Mercedes would have survived. A verdict cannot be based on mere theory or speculation. *Hojem v. Kelly*, 93 Wn. 2d 143, 145, 606 P.2d 275 (1980).

Dr. Larson, in his trial testimony provided:

Question (by Mr. Barcus): Do you have an opinion as to whether or not it would have been appropriate under Mercedes'

presentation for CPR to have been undertaken or attempted?

Mr. Moberg: Same objection.

The Court: Objection overruled.

Answer: I believe that CPR should have been initiated probably when she was still in the chair before she fell. She already fulfilled the A-B-Cs, and somebody should have placed her flat on the ground, and which would have also preserved blood flow to her vital organs, you want to get -- the problem with serious reaction like that is you're going to get peripheral vasodilations, so all your blood goes to your extremities, goes away from your brain, and that's why you're becoming so agitated. So at that point, when she was so agitated and crying, they should have put her flat on the floor and then started CPR.

Question (by Mr. Barcus): Do you have an opinion on a more probable than not basis that had she been provided CPR, if Mercedes Mears would have survived?

Mr. Moberg: Same objection.

The Court: Objection overruled.

Answer: CPR would have given her an advantage to survive this, no doubt.

Question (by Mr. Barcus): So, that advantage, do you believe that would translate into survival on a more probable than not basis?

Answer: I think it would have.

(RP, 10/20/11, Larson, P.48-49)

In addition, Plaintiffs' forensic expert, Dr. Russell Hopp, M.D., provided the following testimony at time of trial: ¹⁰

Question (by Mr. Barcus): Do you have an opinion on a more probable than not basis as to whether or not Mercedes Mears' presentation had she been provided CPR in a timely manner, whether or not with Mercedes Mears' presentation had she been provided CPR in a timely manner, if she would have survived?

Mr. Harris: Objection. Foundation.

The Court: Hold on just a minute, doctor.

The witness: Okay.

The Court: Objection overruled. Go ahead.

Answer: My opinion would be that it would have been more probable than not she would have survived if CPR would have been initiated in a timely fashion.

Question (by Mr. Barcus): And based on applying your understanding of her presentation, when should CPR have been initiated?

¹⁰ All of Dr. Hopp's opinions were based on "a more probable than not medical basis". See, transcript of testimony of Dr. Hopp, page 64, lines 11 through 14.

Answer: I believe -- I believe when she was no longer coherent, when she was not talking in a coherent fashion. I guess there was, I don't know what time frame was, 30 seconds, a minute, two minutes, it was obviously a point when she was no longer communicating with them and she was not going to respond to the therapies that was -- what was being done to her. (RP, 10/18/11, Hopp, Page 74, Line 8 through 75, Line 2).

As shown below, the Defendants presented no competent evidence and/or testimony that in any way served to rebut, or any way contradict the unequivocal testimony provided by both Dr. Larson and Dr. Hopp, that had CPR been administered, Mercedes Mears would have survived. As the Court indicated, not only by way of its rulings on multiple Motions In Limine, but also by way of the Court's Instruction No. 6, only competent evidence can support causation determinations in cases involving personal injury and/or death. (Appendix No. 8). In other words, in order for causation testimony to be "competent," and not speculative, it must meet a "more probable than not," or "reasonable medical certainty standard." See, *Anderson v. Azko Nobel Casting, Inc.*, 172 Wn.2d 593, 280 P.3d 857 (2011). Such standards are also discussed within *Little v. King*, 160 Wn.2d 696, 161, P.3d, 345 (2007), which was discussed a number of times during pretrial motions, and during the

course of trial, and which was substantially relied on by the Court in making its evidentiary rulings. As discussed in *Little v. King*, at page 705, in order for medical causation evidence to be "competent," testimony must be provided by an appropriately qualified expert, usually a licensed physician, that "on a more probable than not" or "more likely than not" basis, the subsequent condition was caused by the accident, injury or event:

*We have long held that the mere existence of a pre-existing condition is an insufficient basis to infer a causal relationship between the injury complaint of a pre-existing condition. Vaughan v. Bartel Drug Co., 56 Wn.2d 160, 164, 351 P.2d 925 (1960) (reversible error to invite jury to speculate about contribution of pre-existing condition when no evidence about it has been submitted); Greenwood v. Olympic, Inc., 51 Wn.2d 18, 23, 315 P.2d 295 (1957) (same). Without competent evidence of causation, evidence of other injury is thus inadmissible. Such evidence would only invite the trier of fact to speculate without an appropriate factual basis. Washington Irrigation and Development Company v. Sherman, 106, Wn.2d 685, 691-692, 724 P.2d 997 (1986) (reversible error to allow trier of fact to speculate about pre-existing conditions when only inadmissible hearsay evidence support any causal connection to current injury). **The moving party must present substantial evidence that the condition "probably" or "more likely than not" caused the subsequent condition, rather than that the accident or injury "might have," or "could***

have," or "possibly did" cause the subsequent condition. Ugolini v. State Marine Lines, 71 Wn.2d 404, 407, 429 P.2d 213 (1967) (quoting Orcutt v. Spokane County, 58 Wn.2d 846, 853, 364 P.2d 1102 (1961) and citing Bland v. King County, 55 Wn.2d 902, 342 P.2d 599, 351 P.2d 153 (1960)). They have not met this burden ... (Emphasis added).

The testimony of Drs. Larson and Hopp clearly met such a standard. What little testimony was presented with respect to these issues by the defense experts Drs. Montanaro and Redding clearly did not. In fact, neither of these doctors presented testimony on this issue based on the appropriate medical-legal standard, that clearly did not contradict the testimony provided by Plaintiffs' experts. In fact, Dr. Redding provided that CPR was indicated, but was unwilling to provide at what point within the events it should have been administered:

Question (By Mr. Barcus): And the other thing that even if you're not going to provide epinephrine, if a person is compromised such as their breathing is compromised as you indicated, CPR is indicated?

Answer: CPR is indicated at some point. It's difficult to know when someone makes respiratory efforts whether they're effective or not. So, to put it another way, if you have doubts you might think about doing that.

Question: Again there is no reason not to if you want do everything you can for that child and preserve the life of that child?

Answer: There's a lot of reasons why that's not quite true. Um, I think if you think someone can't breathe, doing mouth to mouth can be very counterproductive if they aren't breathing sufficiently. I don't know if you have been ventilated, but it's extraordinarily uncomfortable. So I think the essence of your question is if someone's not breathing and unresponsive then you would start CPR, including some form of ventilation. I totally agree with that.

(RP, 11/15/11, Redding, page 71, line 6 to line 25.)

Dr. Redding went on to provide at page 72, line 15 through 19 the following testimony:

Question (by Mr. Barcus): And there's no reason that you can think of that CPR could not have been administered to Mercedes Mears in an attempt to preserve her life, correct?

Answer: It could have been.

Question: Okay ...

Additionally, while Dr. Montanaro's testimony was far more equivocal, he never affirmatively testified on a more probable than not basis

that even had Mercedes been provided CPR, that she would not have survived:

Question (by Mr. Barcus): You're aware that CPR was not attempted?

Mr. Moberg: Objection. Beyond the scope.

The Court: Objection overruled.

Answer: At the site, yes I am aware.

Question (by Mr. Barcus): That could have been helpful also, correct?

Answer: Um, I think as I testified before, that my understanding was that the original I'm assuming you're asking me about the EMTs arriving because ...

Question: Let me ask a better question.

Answer: Okay.

Question: Based upon your --

Mr. Moberg: I'd like to hear the answer, Your Honor.

Mr. Barcus: You asked me a question.

The Court: Go ahead and finish your answer.

Answer: So you'd asked me if CPR would have been helpful. CPR would not

have been indicated at the -- for the first few minutes of the encounter because, you know, she was still mentating, she was still breathing on her own, even up to the time of agonal respiration, so CPR would not have been indicated at the time of the arrival of the EMTs when she still had a palpable pulse, CPR would not have been indicated. When she had lost pulse and lost spontaneous breathing and quit mentating, I believe CPR would have helpful [sic].

Question (by Mr. Barcus): So when she loses consciousness --

Answer: Yes.

Question: The breathing is compromised, CPR is indicated?

Answer: When she lost pulse.

(RP, 11/16/11, Montanaro, Page 75, Line 1 through Page 76, Line 7). (It is noted that such testimony was not provided on the required "more probable than not" basis).

The exact same is true with respect to the factual issue as to whether or not the defendants were negligent in failing to provide Mercedes Mears with epinephrine, (Epi-Pen), during the course of her October 7, 2008 medical emergency. Once again, Plaintiffs' experts provided clear and unequivocal testimony that had epinephrine been utilized, Mercedes would

have survived. Again, in contrast the defendants provided no competent testimony under the appropriate medical/legal standard on that issue.

RP, 10/10/11, Larson, at P. 47, Dr. Larson unequivocally testified under the appropriate medical-legal standard that had Mercedes been administered her Epi-Pen on October 7, 2008, during her medical emergency, she would have survived:

Question (by Mr. Barcus): Doctor, with your order, an allergic emergency for an EpiPen to be administered, under the presentation as you've described in your analysis of the event, do you have an opinion on a more probable than not basis as to whether or epinephrine or EpiPen should have been administered in that school setting to Mercedes Mears?

Mr. Moberg: Objection, Your Honor. This is also new opinion, subject to Court orders.

The Court: Objection overruled.

Answer: The Epi-Pen would have been an appropriate thing to use. It should have been used. And I believe it would have changed the outcome.

Question (by Mr. Barcus): And what do you do mean by it would have changed the outcome?

Answer: More likely than not she would have survived.

Question: Had she been given timely EpiPen?

Answer: Yes.

Question: Consistent with the order?

Answer: Yes (emphasis added).

Plaintiffs' expert, Russell Hopp, M.D., also provided unequivocal opinion testimony on that issue:

Question (by Mr. Barcus): Doctor, if epinephrine, if Epi-Pen would have been timely provided, per your opinion, to Mercedes, do you have an opinion on a more probable than not basis as to her likely survival?

Mr. Harris: Same objection.

The Court: Objection overruled.

Answer: My opinion is that the epinephrine would have had the best opportunity to have changed the course of events. And more probably than not, would have had an appropriate outcome.

Question (by Mr. Barcus): Which is survival?

Answer: Correct.
(Emphasis added).

In marked contrast, the defense experts provided no testimony based on the appropriate standard which refuted such opinions: On cross-examination, Dr. Redding (RP, 11/15/11, Redding) provided at page 67, line 2 through page 18 the following testimony:

Question (by Mr. Barcus): All right. And with her state as she presented, with her being conscious, breathing, indicating a sense of doom, crying out "I can't breathe," "I'm going to die," reaching out for people, asking for help, even after Albuterol was provided, there is no contraindication to giving her that EpiPen from a medical standpoint, was there?

Answer: There's no contradiction medically.

Question: It would not have hurt her in any way, would it?

Answer: No.

Question: You're not in a position to render an opinion on a more probable than not basis as to whether or not Mercedes would have survived with the injection of EpiPen, correct?

Answer: It's difficult to speculate about that.

Question: You don't have an opinion one way or the other?

Answer: I don't feel strongly one way or the other about that. (emphasis added)

Dr. Montanaro provided a similar non-opinion with respect to such an issue, and even conceded, that had he been present during the course of Mercedes' medical emergency, he personally would have provided her with epinephrine. Dr. Montanaro (RP, 11/16/11, Montanaro) provided at page 73, line 12 through page 74, line 25 of his trial testimony the following:

Question (by Mr. Barcus): There is no reason not to give the epinephrine to Mercedes in her state as she presented, which was when she was still conscious and breathing, even though she was indicating a sense of doom, crying out, reaching for people, asking for help, and even after Albuterol was administered?

Answer: There is no reason not to give it, no.

Question: There's no contraindication or downside to giving Mercedes the Epi-Pen. It would hurt her anyway?

Answer: Correct. There's no contraindication.

Question: It could potentially given her a chance to live?

Answer: It's possible.

Question: Yeah. Epinephrine as you are aware and I'm sure you will agree, could have been helpful to Mercedes in an allergic emergency that is not just limited to a food allergy correct?

Answer: Correct.

Question: There's no indication that Mercedes would not have responded to epinephrine?

Answer: No.

Question: And if you were there in that presentation yourself, you would have given her the epinephrine, correct?

Mr. Moberg: Objection, Your Honor. That's irrelevant. Whether the doctor was present at the time has no relevance.

The Court: Objection overruled.

Answer: You know without being there, I don't think I could sit here and testify as to whether I would have given her epinephrine. I think I testified to you at the time of deposition that it is reasonable to use epinephrine in the setting of status asthmaticus in a healthcare facility.

Question (by Mr. Barcus): If you were present there, Mercedes' circumstances, and you were assisting the resuscitation of someone that was in status asthmaticus, you would have used the EpiPen, correct?

Answer: **In that setting, I would have, yes.**

Question: **In attempt to save her live?**
[sic]

Answer: **Yes.** (*Emphasis added*).

The standards applicable to granting a motion for new trial based on CR 59(a)(7), that "there is no evidence or reasonable inference to the evidence to justify the verdict . . .," are the same as the standard applicable to granting a CR 50 motion for judgment as a matter of law. See, *15 WAPRAC § 38:17 (2011)*, Tegland (2011). Such standards are discussed in detail in the Appellate Court's opinion in *Sommer v. DSHS*, supra. The *Sommer* opinion provides at page 172 the following under the heading of "New Trial – Verdict Contrary to the Evidence;"

CR 59(a)(7) permits a new trial when 'there is no evidence or reasonable interference from the evidence to justify the verdict'. It is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence. Palmer v. Jensen, 132 Wn.2d 193, 198, 937 P.2d 597 (1997). When the proponent of a new trial argues that the verdict was not based on the evidence, the appellate court reviews the record to determine whether there was sufficient evidence to support the verdict. Palmer, 132 Wn.2d at 197-98, 937 P.2d 597. All evidence

must be viewed in the light most favorable to the party against whom the motion is made. Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). There must be 'substantial evidence' as distinguished from a 'mere scintilla' of evidence, to support the verdict—i.e., evidence of a character 'which would convince an unprejudiced, thinking mind of the truth of the fact at which the evidence is directed'. Id. A verdict cannot be founded on mere theory or speculation. Id. Accord Campbell v. ITE Imperial Corp., 107 Wn.2d 807, 817-18, 73 P.2d 969 (1987). (emphasis added)

In *Sommer*, despite a defense verdict, the Appellate Court reversed and found as a matter of law in favor of the plaintiff. In *15 WAPRAC* § 38:17, Professor Tegland cites to the *Sommer* opinion for the proposition, **"[w]hen there is simply no conflict of the evidence, and all relevant evidence favors the moving party, the court will not hesitate to authorize a new trial."** Further, although the plaintiff has the burden of proof, **when the defendants' evidence is only speculative, a directed verdict in favor of the plaintiff on the issue of liability may very well be proper.** See, *Curtiss v. YMCA, of Lower Columbia Basin*, 82 Wn.2d 455, 465, 511 P.2d 991 (1973). Where a defendant introduces no evidence, a directed verdict for the plaintiff has previously been upheld. *Clancy v. Reis*, 5 Wn. 371, 31 P. 971 (1982); *Pacific National Band of Tacoma v. Aetna Indemnity*

Company Tacoma, 33 Wn. 428, 74 P. 590 (1903), (same). The plaintiffs' motion should be granted "only if we can say there is no evidence at all to support the defendants' claims." *Martin v. Huston*, 11 Wn. App. 294, 522 P.2d 192 (1974), citing, *In Re Thornton's Estate*, 81 Wn.2d 72, 499 P.2d 864 (1972); *Messina v. Rhodes Company*, 67 Wn.2d 19406 P.2d 312 (1965).

In this case, even viewing the evidence in the light most favorable to the defense, the Defendant simply provided no countervailing evidence on the issue of whether or not either CPR, or the administration of epinephrine would have saved Mercedes' life. Given that the jury, by its verdict, found that the Defendants were negligent in failing to provide CPR and epinephrine to Mercedes on October 7, 2008, there is no factual basis from which the jury could have found that such negligence was not the proximate of injury or damages to the Plaintiffs in this case. There was simply no countervailing evidence with respect to those issues as it relates to the question of proximate cause of injury, and in particular Mercedes' death. Essentially, nothing was presented by the defense which contradicted Dr. Larson's and Dr. Hopp's clear and unequivocal opinions, and, at best, any opinions presented by Dr. Montanaro and Dr. Redding were not based on the appropriate medical/legal standard, thus, were nothing more than mere speculation and

conjecture, which by definition is insufficient to support the jury's verdict in this case and contrary to the Court's clear rulings in limine. In other words, there was simply no competent evidence to support the Defendants' defenses as it related to proximate cause, thus the jury's findings in the Defendants' favor, was simply contrary to all competent evidence, and are grounds for a new trial.

As indicated by the *Sommer* opinion, as now the issue of negligence and proximate cause effectively have been resolved in the Plaintiffs' favor upon the granting of a CR 59(a)(7) Motion, all that remains for trial are issues regarding damages. Thus, the Court should so order.

C. A New Trial Should Have Been Granted Pursuant To CR 59(a)(2) Due To The Misconduct Of Defense Counsel (i.e., The Prevailing Party).

1. Defense Counsel Purposely Interjected Into This Case Speculative and Confusing Evidence Regarding "Flovent," Knowing That Such Evidence Could Never Be "Connected" To Any Material Issue In This Case. (CR 59(a)(2) and CR 59 (a)(8)).

In order to understand Plaintiffs' position with respect to the admission of evidence regarding "Flovent" in this case, requires a review of the procedural history. As the Court may recall, the Plaintiffs in this case moved for Partial Summary Judgment relating to issues of contributory fault and the existence of any potential "empty chairs." The Court entered an

Order on that motion on September 9, 2011, and specifically granted Plaintiffs' Motion for Partial Summary Judgment regarding the affirmative defense and comparative/contributory fault as it related to **Jada Mears and Mr. and Mrs. Mears**. In addition, Plaintiffs' Motion for Partial Summary Judgment Regarding any "Empty Chair Defense" was granted in total.

Naturally, upon the granting of such motion, the Plaintiffs included amongst their Motions in Limine No. 4.24, seeking to exclude "any argument, testimony, or comment, that any Plaintiff was contributorily negligent should be excluded." That Motion in Limine was **granted**. (Appendix No. 4, p. 6). (See, Order on Plaintiffs' Motions in Limine, page 6, line 24) (Bates' No. 79). As an extension of the Court's grant of summary judgment regarding the absence of comparative and/or contributory fault, Plaintiffs also brought Motion in Limine No. 4.15.8, to preclude "argument, testimony, or comment that the Mears parents failed to provide any medical care to Mercedes on the day of her death, or prior to her death." That Motion in Limine was also **granted**. *Id.*, (Bates' No. 93). (See, Order on Plaintiffs' Motion in Limine, page 20, line 4).

Also significant to this issue, is the Court's granting of Plaintiffs' Motion in Limine No. 14.13.1, which related to the Supreme Court's opinion

in *Harris v. Drake*. The Court granted a motion indicating “the Court will follow the law” that “any prior or concurrent medical treatment, counseling sessions, medical records, employment records, and/or injuries to Plaintiff which are unrelated, and asymptomatic are inadmissible.” The Court also provided specific “limitations” of “past counseling before death of daughter must have an offer of proof outside presence of the party [jury]. See, Plaintiffs’ Motion, and Court’s Order on Gambling, and Other Evidence, entered by separate Order.” (Court’s Order on Plaintiffs’ Motion in Limine, page 15, line 19 through page 16, line 5).

Significantly, the Court also granted Plaintiffs’ Motion in Limine, which precluded, under the heading of “Unsupported Testimony and Inadmissible,” any “medical text, theories, and/or testimony not supported by live expert and/or appropriate expert is not admissible.”

As shown below, all of these particular Motions in Limine go directly to the issues regarding Defendants’ efforts to introduce evidence regarding Mercedes Mears’ use or non-use of “Flovent,” an asthma controller medication prescribed by Dr. Larson. As discussed below, the only reason that the Defendants attempted to introduce evidence regarding such use or non-use of “Flovent,” was a clearly transparent effort to try to prejudice the

jury against Jeanette Mears, the mother of Mercedes, by trying to create an impression that she permitted Mercedes to be non-compliant with Dr. Larson's orders, and that such non-compliance ultimately caused or contributed to Mercedes' death.

In order to punctuate that point, during opening statement, defense counsel presented a PowerPoint presentation grafting out the defense's interpretation of Mercedes' pharmacy records, presumptively in an effort to establish that she was non-compliant with Dr. Larson's "Flovent" orders. ¹¹

Knowing that there was simply no medical testimony or opinions disclosed during the course of discovery that Mercedes' use or non-use of "Flovent" somehow caused or contributed to her death, Plaintiffs' filed a separate Motion to Strike Testimony Regarding "Flovent" and Congestion during trial, and for a curative instruction. A transcription of the argument regarding that motion is set forth on November 7, 2011, page 270, line 18, through page 304, line 4. Significantly, the Court clearly understood the

¹¹ Ultimately, through the testimony of Jeanette Mears, it was established that the defense was misreading the pharmacy records, and operating under the assumption that every time a prescription was filled, only one canister of "Flovent" was being acquired. In addition, the "Flovent" graphic used in the defense opening statement, was not provided to the Plaintiff before it was shown to the jury, again in violation of the Court's Orders In Limine. (Appendix No. 4, p. 28) (Bates' No. 101). (Order In Limine No. 4.34, page 28, lines 11 to 16, stipulated by both parties.)

issue being presented by the Plaintiffs, and provided at page 301, line 21, through page 302, line 23, the following:

*All opinions have to be based on reasonable medical certainty. That's the standard in this state. Nobody is saying any different than that. In other areas of expert opinion law now days, that rigorous standard is not required. But, in this state, where you've got medical issues involved, that standard is still reasonable medical certainty within a reasonable medical probability. You don't get to water that one down. I know that there is some trend of watering down in other areas of expert opinion law, not on the medical stuff. So everybody has to testify in that regard. So the trial is, in theory, a search for the truth; discovery is a tool to check on the facts and the opinions and the legal theories of the opposite side. Discovery is only as precise as the discovery inquiries that are made at the time that the discovery is in play. - - you have to remember that the legal process is not an exact science. **So, I'm going to let Dr. Montanaro testify in accordance with his deposition. If he is going to expand on what he said in his deposition, I expect defense counsel to give notice in advance right now to the Plaintiffs, and then I expect the defense counsel to make Dr. Montanaro available to expand upon his opinions outside of the presence of the jury in advance of them getting to the stand.** (Emphasis added).*

Subsequently, defense counsel communicated to Plaintiffs' counsel that they were not going to have Dr. Montanaro expand on his opinions as set forth within his deposition regarding the use or non-use of "Flovent," which he had not reviewed at the time of his deposition, and which he indicated he

was not prepared at the time of his deposition to state an opinion, because the defense had not told him to have such an opinion.

Thus, when Dr. Montanaro testified at time of trial, he was very clear that any opinions he may have had that Mercedes Mears suffered from “uncontrolled asthma” was based upon findings at time of autopsy, **and not a review of her medical records.** (See, transcript of Montanaro trial testimony, RP, 11/16/17, Montanaro, page 16, lines 6 through 9). At no time did Dr. Montanaro ever testify that Miss Mears’ use or non-use of a controller medication, including “Flovent,” in any way caused or contributed to Mercedes Mears’ death, based upon reasonable medical probability and/or certainty. Such testimony was entirely absent. The same is true with respect to Dr. Redding, who simply testified that the use of “Flovent” was reflective that the asthma was “bothersome or active,” but in and of itself said nothing about “its severity.” (See, RP, 11/15/11, Redding, page 80, line 7, through page 81, line 5). Again, Dr. Redding never opined that Miss Mears failure to use “Flovent” in any way caused or contributed to her death.

Further, from Plaintiffs’ perspective, clearly, such evidence was rendered completely irrelevant by the Court’s grant of Plaintiffs’ Motion for

Summary Judgment Regarding the Affirmative Defense of Comparative and/or Contributory Fault.

In addition, even if we assume *arguendo* that Mercedes' medical emergency of October 7, 2008, was caused or contributed by the absence of "Flovent," a fact upon which no competent proof was ever presented, that still would not absolve the Defendants from any form of liability, because at its essence, this case was a failure to rescue case. The fact that she had a medical condition which caused her medical emergency on October 7, 2008, is undisputed fact.

The Court ultimately granted the Plaintiffs' Motion for Directed Verdict Regarding "Flovent," but failed to provide Plaintiffs' proposed curative instruction, which is attached as Appendix No. 6. (Bates' Nos. 108 - 110); and Appendix No.7, (Bates' No. 114). Instead, the Court provided an instruction, Court's Instruction No. 7, which was subject to exception by the Plaintiff as being incomplete and not sufficiently explanatory. (See, Appendix 8, Court's Instructions to the Jury) (Bates' No. 119). Such evidence, beyond an effort to try to place Jeanette Mears in a bad light before the jury, has no other legitimate purpose. ER 103(c) provides:

*In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent **inadmissible***

evidence from being suggested to the jury by any means, such as making statements or offers of proof, or asking questions within hearing of the jury.

In addition, RPC 3.4, under the heading of Fairness to Opposing Party and Counsel provides that:

A lawyer shall not:

*(e) in trial allude to any matter that the lawyer does not reasonably believe is relevant **or that will not be supported by admissible evidence**, assert personal knowledge of facts and issue, except when testifying as a witness, or state personal opinion as to the justice of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of the accused.*

Unfortunately, that is exactly what happened here. Evidence, for which no foundation could ever be properly laid based upon the information known pre-trial, was submitted in front of the jury in a clear effort to mislead and confuse the jury with respect to causation issues. Such efforts were highly improper and intentionally prejudicial.

In that regard, in many respects, it is hard to distinguish what occurred in this case to that which occurred in the case of *Hoskins v. Reich*, 142 Wn.App 557, 174 P.3d 1250 (2008). In *Hoskins*, the Appellate Court found that without expert testimony regarding a causal relationship between any prior treatment and/or conditions to the injury at issue in the case, the

submission of such evidence constituted error, and the Appellate Court rejected the notion that the jury was entitled to evidence that the plaintiff “was not a perfect clean slate when he got into the accident...” In other words, when the questions involve injury and/or illness, a party defending in an action involving such issues, cannot put on trial the person’s entire healthcare history, without appropriately “connecting” such history to any matter at issue within the case. Simply because this case involves a pre-existing asthma condition as well as anaphylaxis, versus a physical injury such as a back injury, makes no difference. Such principles have equal application.

Here, as in *Hoskins*, suggestions were made by the defense that the pre-existing health history would be “connected” to matters at issue in the case. Such false promises remained unfulfilled, and as it was ultimately determined by the Court, it was correct to strike such evidence because under the terms of ER 104 (b), once it was determined that the conditional admission of evidence was erroneous due to lack of an appropriate foundation, it must be ruled inadmissible and disregarded. Instead, under ER 105 a limiting instruction was erroneously used. It was erroneous and prejudicial because, as shown by *Hoskins*, Mercedes overall medical history

had no relevancy to any issue in this case and it was both an error of law, and an abuse of discretion to fail to instruct the jury to disregard such evidence, the failure of which otherwise permitted the jury to speculate regarding irrelevant matters. (See, Appendices Nos. 6, 7, and 8).

Further, given the absence of such foundational requirements, which were clearly known pre-trial, the Defendants cannot justify their actions on the proposition that they might have been able to make an appropriate connection by way of cross-examination. The case of *Washington Irrigation and Development Co. v. Sherman*, 106 Wn.2d 685, 691, 724 P.2d 997 (1986) is directly on point, and cross-examination cannot be used inappropriately, in a manner which invites the trier of fact to speculate about the pre-existing conditions or historical events, without proper testimony that a causal connection exists.

As with respect to the above-referenced testimony regarding CPR and the administration of epinephrine, it is insufficient for the defense to contend that the utilization of “Flovent,” or the absence thereof, “might have” or “could have” or “possibly did” contribute to Mercedes’ untimely death. There is simply no expert testimony under the appropriate legal medical

standard supportive of such a position, and the admission of such evidence was clearly erroneous and highly prejudicial.

This issue, clearly not only involves an erroneous admission of evidence, but also clearly involves misconduct of counsel. The erroneous admission of irrelevant evidence can constitute sufficient prejudicial error to warrant the grant of a new trial. See, *Liljeblom v. Dept. of Labor & Industries*, 57 Wn.2d 136, 356 P.2d 307 (1960) (admission of medical report). (CR 59 (a)(8)). Patently if it is highly prejudicial as discussed below.

As discussed within *Hoskins*, citing to *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983), **when “there is no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.”**

Not only was the evidence here improperly admitted, but it was done so under circumstances which the Court could reasonably find to be misconduct of counsel. Further, obviously the reason such misconduct occurred is because the defense knew that the admission of such evidence would have the potential impact of either confusing the jury, or prejudicing the jury against the decedent’s mother, Jeanette, **or both**. Thus, the Court

should look at the way this inadmissible, speculative evidence was utilized by the defense in this case in making the determination of whether or not its admission was prejudicial, or harmless error. See, *Hoskins v. Reich*, 142 Wn.App at 571.

This was simply not “cumulative” evidence, but was rather evidence calculated to create unnecessary confusion in the jury, particularly as it relates to the issue of “proximate cause,” a matter upon which (though improperly, as discussed above), the defense ultimately prevailed. The Court also should consider the existence of such prejudice, with the entirety of the efforts on the part of the defense to interject irrelevant matters into this case, in a completely inappropriate, inflammatory and prejudicial fashion, and how such efforts ultimately contributed to the result in this case.

Another example is the defense’s violation of the Court’s Order granting Plaintiffs’ Motion in Limine, regarding “speculation” and specifically precluded “argument, testimony or comment that Mercedes should have been kept home on October 7, 2008.” That motion was **granted**. (See, Order on Plaintiffs’ Motion in Limine, page 16, lines 16 through 20). Yet, despite such a clear Motion in Limine, previously during the course of trial defense counsel elicited from Principal Garrick previously

undisclosed testimony, that the day following Mercedes' death, Jeanette Mears supposedly stated that she should not have let Mercedes attend school on the previous day. (See, transcript of October 7, 2011, page 136, lines 6, through page 172, line 17).

During the course of that argument, Mr. Moberg misleadingly represented that testimony would be presented indicating that there was proof on autopsy that Miss Mears had an upper respiratory "**infection.**" Thus, making relevant Principal Garrick's testimony regarding an alleged admission that Mercedes went to school with a cold that day.

Ultimately, no such evidence was ever presented by the defense, and the evidence was as stated by the Plaintiffs counsel, i.e., that the Plaintiff, who was asthmatic, had "**inflammation**" noted on her autopsy, (which is something entirely different than an "infection").

Further, at that time, a Motion for Mistrial was brought because such questioning suggested comparative fault on the part of Mrs. Mears, as well as being an unsupported medical contention that a pre-existing cold somehow caused or contributed to Mercedes' death. None of Mr. Moberg's representations ever came to fruition, and at the end of the day, the only thing

such testimony accomplished was the violation of a multitude of the Motions in Limine that this Court had granted, as noted above.

As discussed below, the admission of such irrelevant evidence, combined with other obvious misconduct of defense counsel, individually and/or cumulatively, warrants the grant of a new trial in this case, pursuant to CR 59 (a)(2), (7), (8), and (9).

2. Misconduct Of Counsel, Which Was Objected To At The Time Of Its Occurrence And Subject To Contemporaneous Motions For A Mistrial, Constitute Grounds For The Granting Of A New Trial In This Case Pursuant To CR 59(a)(2).

As discussed by Professor Tegland, at 15 WAPRAC § 38:10 (2011) under the heading of “grounds for new trial – misconduct” the misconduct of counsel is considered to be the misconduct of a party even though it is not expressly mentioned generally within the terms of CR 59, nor specifically within the terms of CR 59(a)(2). Professor Tegland in another one of his scholarly works, which is set forth at 14A WAPRAC § 30:33 (2011), discusses in detail when misconduct of counsel can occur, and how it can unfairly impact an opposing party at the time of trial. Under the heading of “Examination of Witnesses,” Professor Tegland provides:

Counsel have a general duty to keep inadmissible evidence from the jury. Thus, it is improper for

counsel to continue to question a witness on matters that have been held by the court to be inadmissible. Likewise, the persistent asking of questions which counsel knows are objectionable is misconduct. Prejudice results even though the objections are sustained; the defense [opposing party] should not be put in the unfavorable position of having to make constant objections. Asking questions only remotely related to the issues for the purpose of injecting prejudice may be improper. But if the question asked on examination are relevant to the issues in the case, their asking will rarely be found to be misconduct. Counsel has a general duty to avoid the harassment and embarrassment of witnesses, and the court has a duty to control abuses in this regard. Thus, framing questions in an inflammatory and argumentative form is misconduct...

Within the same article under the heading of “injecting prejudice”

Professor Tegland goes on to provide:

Perhaps the most common of the unfair tactics employed by counsel in trials is the injection of prejudice into the case. The case should be decided by the jury on the facts proven in court. This the counsel knows, and the injection of prejudice is a deliberate violation of the principles of fair play as they are expressed in the rules and in the standards of justice. It is improper for counsel to make prejudicial statements in the course of trial not supported by the record. And the error cannot be cured by instruction when counsel conveys to the jury the opinion that the court relative to facts in the case expressed in the absence of the jury when the judge was ruling on a point of law. Prejudice takes many forms...

In order for a party to preserve issues regarding misconduct of counsel, a party should object to the statement, seek a curative instruction and move for a mistrial, or a new trial. See, *City of Bellevue v. Kravik*, 69 Wn.App. 735, 743, 850 P.2d 559 (1993). If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculate upon a favorable verdict, and then, when it is adverse, use the claim misconduct as a life preserver on a motion for a new trial or on appeal. See, *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960); See also, *Estate of Lapping v. Group Health*, 77 Wn.App. 612, 892 P.2d 1116 (1995) (although misconduct occurred, a failure to accept the trial court's offer of a mistrial, and "gambling on the verdict" waived the issue). In this case, there is simply no question that the Plaintiffs preserved as grounds for a new trial, the misconduct of counsel by objecting to defense counsel's improper questions, seeking a curative instructions and by moving for a mistrial, on a number of occasions. Nevertheless, even if we assume for sake of discussion that no such efforts occurred, the above quoted question by Mr. Moberg, to Ms. Barrett, was so toxic, incendiary, and inappropriate, even had Plaintiff not made such efforts, such actions nevertheless would be valid grounds for a new trial.

As the Court is well aware there is a long-standing exception for the need to object to such conduct when the misconduct is “flagrant.” As discussed in *Carabba v. Anacortes School District*, 72 Wn.2d 939, 954, 435 P.2d 936 (1968), this exception has been described as follows:

The necessary inquiry, therefore, is whether the incidence of misconduct referred to were so flagrant that no instruction of the court, or admonition to disregard, could suffice to remove the harm caused thereby. If such is the case, appellants failure to bolster his objections by moving for a mistrial did not waive, and the instruction and admonitions by the trial court did no cure, the harm produced. The only effective remedy is a new trial, free from prejudicial misconduct of this magnitude.

Here, particularly, considering the defense’s actions violated a multitude of the Court’s Orders In Limine, the above-quoted question by Mr. Moberg, which accused Jeanette Mears of abusing her child, Jada, is misconduct of such a magnitude that no instruction to disregard could cure it, and it was an error for the Court not to grant a mistrial at the time of its occurrence. This is particularly true given that this was not the first time that there had been efforts to portray Jeanette Mears in a exceptionally negative and prejudicial light in front of the jury. The Court no doubt remembers that Mr. Moberg also asked Dr. Barrett if she knew Mrs. Mears had stated

“thoughts of Jada made her skin crawl.” (See, TR October 27, 2011, page 171, lines 14-21).

Plaintiff also moved for a mistrial because the defense, through Principal Garrick, tried to blame Jeanette Mears for allowing her child to go to school with a cold on the date of her death, in violation of **an agreed Motion In Limine**. See, transcript of October 27, 2011, page 168 line 8.

Defense counsel, Mr. Moberg, also stooped so low that he specifically tried to introduce part of Mrs. Mears’ counseling records, that this Court has specifically excluded within its ruling regarding the Motion In Limine regarding Gambling, etc. (See, transcript of November 18, 2011, page 419, line 5 through page 420, line 21). Naturally, without seeking prior guidance and permission of the Court, Mr. Moberg attempted to introduce such previously excluded record in front of the jury. Of course once again a motion for mistrial was brought. Also, clearly knowing that such evidence would have no impact on any issue in the case, Mr. Moberg tried to illicit through Rhonda Gibson, in the presence of the jury, that Jeanette Mears, had called Ms. Gibson a name. (Transcript of November 1, 2011, pages 173 to 176).

Clearly, to use trial counsel's terms, this was another "dirty trick" to bias the jury against Jeanette Mears.

These were not isolated events, but were part of a persistent pattern during the course of trial. It is respectfully suggested that the above-quoted "child abuse" comment, and comments regarding "skin crawling," are so prejudicial that there is no way that the curative instructions and sustaining of objections served to cure the prejudice engendered. Again, it is noted one would have to look long and hard to find comments, or misconduct as severe as that perpetrated by Mr. Moberg.

There are certain types of evidence that its exclusion pursuant to ER 403 and ER 404(b) should be a forgone exclusion. And when it is admitted erroneously a new trial should follow.

As discussed in *Salas*, supra, where the Supreme Court ordered a new trial due to the erroneous admission in a personal injury case of the Plaintiff's immigration status, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." (Citations omitted). The exclusion of such evidence is particularly proper when its

connection to any claimed injury is tenuous at best, and there are other alternative methods and available means of proof to address whatever point that may need to be made. See, *Kirk v. WSU* 109 Wn. 2d. 448, 460, 746 P. 2d. 285 (1987). (Upholding trial court's decision to exclude abortion evidence when defense had no testimony based on reasonable probability that the abortion in any way caused or contributed to emotional injury, and there was other evidence available to establish that Plaintiff suffered pre-injury depression).

On this point, the case of *Garcia v. Providence Medical Center* 60 Wn. App. 635, 806 P. 2d. 766 (1991), is extremely instructive. The *Garcia* case was a medical malpractice action where a mother sought emotional distress damages caused by the death of her infant son. Pretrial, the mother filed a motion in limine seeking to exclude evidence regarding her previous abortions, and the fact that she had been in the past visited by CPS caseworkers following a report of alleged child abuse. In *Garcia*, the Appellate Court found that it was error for the Trial Court to deny Plaintiff's motions in limine because such information was irrelevant to any claimed injury and was so prejudicial that it required reversal and a grant of a new trial. As in *Hoskins*, and the other cases cited above, in *Garcia*, the Court

was unimpressed with the notion that such facts could be a "possible" contributor to the post child death emotional distress, thus relevant. See also, *Himango v. Prime Time Broadcasting, Inc.* 37 Wn. App. 259, 680 P. 2d. 432 (1984) (Upholding the exclusion of evidence of an extra marital affair under both ER 403 and ER 404(b)); see also, *Osborn v. Lake Washington School District* 1 Wn. App. 534, 462 P. 2d. 966 (1969) (Upholding Trial Court's grant of a new trial where a school district's counsel, contrary to pretrial orders deliberately elicited testimony to the effect that Plaintiff had previously been committed to a boys home, as being appropriate because the misconduct was so flagrant and prejudicial that no instruction to disregard would have cured it).

The *Lapping* case, where misconduct was found, but was deemed to be waived, is instructive. In that case, without any sort of a factual basis, defense counsel asked the treating physician about the status of his disciplinary investigation, when in fact no such investigation was occurring. The Court found such question to be highly inappropriate, because there was no factual basis for such a question, and "it is axiomatic that counsel cannot ask questions of a witness that have no basis in fact and are merely intended to insinuate the existence of facts to a jury." See, *Estate of Lapping* at

Page 619 citing to *Del Monte Banana Company v. Chacon*, 466 So.2d 1167, 1172 (1985). Further, as in the *Lapping* case, there was no answer to Mr. Moberg's question which could possibly have been admissible under the rules of evidence, or under the express terms of this Court's prior rulings relating to Motions in Limine.

There is no question that such questions were ill intended, and flagrantly calculated not to lead to admissible evidence, but to manufacture inappropriate prejudice in the minds of the jury.

This, combined with Defendants' misconduct as it related to "Flovent," as well as other matters, would more than justify the granting of a new trial in this matter due to misconduct of counsel. With respect to the "Flovent" issue, the case of *Kuhn v. Schnal*, 155 Wn.App. 560 228 P.3d 828 (2010) is instructive. In that case, the Court found that a new trial was justified when defense counsel used a demonstrative aid in front of the jury which served to punctuate an improper argument. Here, Mr. Harris, during the course of his opening and thereafter, punctuated his improper, unsupported, and foundationless argument regarding "Flovent" by using a PowerPoint chart in front of the jury. Such efforts are almost identical to

those which occurred in the *Kuhn* case wherein the grant of a new trial due to misconduct was upheld.

A. Cumulative Errors and Misconduct Warranted a New Trial

Cumulative errors, misconduct, and events which occurred at the time of trial prevented the Plaintiffs from having a fair trial and justify the grant of a new trial pursuant to CR 59(a)(9) because, the Court should be left with an abiding belief that in this case “substantial justice has not been done.”

CR 59(a)(9) permits the Trial Court to grant a new trial when it determines “that substantial justice has not been done.” As discussed above, there are multiple grounds pursuant to CR 59(a) from which this Court could grant a new trial. Dispositively, a new trial should be granted in this case pursuant to CR 59(7) because there is simply no evidence justifying the jury’s verdict with respect to proximate cause. Additionally, this is a case that was permeated, and toxically so, by the misconduct of defense counsel who prevailed on that issue. Thus, grounds exist pursuant to CR 59(a)(2) for the grant of a full new trial. Also because due to the “Flovent” issue and the Jada Mears “bonding issue,” which was abusively used and abused by defense counsel, grounds for a new trial exist due to evidentiary error pursuant to ER 59(a)(8).

Further, there were clearly other matters that either constitute cumulative evidentiary error warranting a new trial pursuant to CR 59(a)(8), or pursuant to CR 59(a)(9), i.e. that substantial justice has not been done. See, *Storey v. Storey*, 29 Wn.App. 370, 585 P.2d 183 (1978) (Even if one error, alone, would not justify a new trial, the accumulative affect of multiple errors may justify a new trial pursuant to CR 59(a)(9).

Here, in addition to the above-outlined errors, it is noted that in this case the misconduct of counsel, did not only occur at time of trial but prior. The Court, upon review of the record, will no doubt recall, that two days prior to discovery cutoff, over approximately 500 pages of new discovery was produced by the defense which included a number of “smoking guns.” Such discovery abuse, clearly should not be tolerated because it undercuts the fairness of the process, and has a potential of reducing a trial to “a game of blinds man’s bluff.” See, *Gammon v. Clark Equipment Company*, 38 Wn.App. 274, 280, 686 P.2d 1102 (1984). The timing of the receipt of such “smoking gun” discovery was clearly abusive and obviously done tactically for the purposes of maximizing disruption to Plaintiffs’ counsel’s trial preparation. Such game playing at discovery is subject to disdain by the appellate courts within the State of Washington. See, *Smith*

v. Behr Process Corp., 113 Wn.App. 306, 54 P.3d 665 (2002); *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584, 220 P.3d 191209; See also, *WSPIEA v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993).

The mere fact that Plaintiffs were able to take a few additional depositions as a byproduct of such misconduct does not fully ameliorate the disruption caused by Plaintiffs' counsel's actions. See, *Berry v. Coleman Systems Company*, 23 Wn.App. 622, 596 P.2d 1165 (1979) (Bad faith actions perpetrated by Defendants in discovery injured the Plaintiffs to such a degree that the Plaintiff was entitled to a new trial "on the grounds that substantial justice had not been done.").

Further, there is no question that the defense witnesses in this case were, for lack of better terms, "coached" to be non-cooperative with Plaintiffs' counsel in responding to Plaintiffs' counsel's questions. This is particularly so with respect to those witnesses who were called as adverse witnesses toward the beginning of the trial. For example, one only needs to examine the excerpts of the testimony of witness Peggy Walker, RP, Trial Excerpts, pages 77 to 89, to walk away with a firm impression that Ms. Walker was coached not to be cooperative and forthrightly answer the questions being asked by Plaintiffs' counsel. It has long been recognized that

when witnesses fail to properly respond to questions, and operate on their own agenda by providing non-responsive answers which interject irrelevant matters into the proceedings, a new trial can be granted. See, *Storey v. Storey*, 21 Wn.App. 370, 373, 585 P.2d 183 (1976).

In addition, the Court, based on its own observation that due to the misconduct Defendants' counsel, as outlined above, the rapport between counsel deteriorated to such a point as being rancorous and the aura of such rancor must have been transmitted to the jury. In the case of *Snyder v. Sotta*, 3 Wn.App. 190, 473 P.2d 213 (1970), the Appellate Court found that the Trial Court was justified in granting a new trial due to a failure of "substantial justice," because due to the misconduct of defense counsel, among other things, deterioration of relationships between counsel, and counsel and the Trial Court, which had to be conveyed to the jury, in and of itself granting a new trial due to "a failure of substantial justice:"

We have also considered portions of the record, made outside of the presence of the jury, wherein the trial judge may comment on one occasion accusatory of defense counsel supposed petty frogging and on another occasion advising him to have some responsible member of his firm associate with him for the balance of the trial. Furthermore, counsel of both parties agree that 'the record itself indicates the length and, to some extent, the bitterness of the ordeal. Only those present at the trial however can attest to its heat.' The verve and piquancy of trial counsel radiates from the cold record. From the

record, it is evidence the rapport between the trial counsel and counsel, while involving matters outside the presence of the jury, deteriorated to the point of being rancorous; the aura of which must have transmitted to the jury. This is supported, not by a mere feeling from the case, but by the trial court's observation [strike that last sentence]... (Emphasis added).

In this case, the jurors were being sent from the courtroom repeatedly, and the rancor provoked by the misconduct of defense counsel became palpable. (RP, Trial Excerpts, pages 199-208). It would be hard to imagine that the jurors were not somehow adversely impacted by the “rancorous aura,” which was provoked by defense counsel’s repeated efforts to either push the limits or intentionally violate this Court’s Orders on Plaintiffs’ Motions in Limine. While clearly the Trial Court did not enter the fray, the “aura” of this trial was another unfortunate victim of the exceptionally “flagrant and prejudicial misconduct” of defense counsel.

Finally, the above-referenced grounds for a new trial clearly are not exhaustive. For example, additional evidentiary error occurred when the Trial Court permitted Heidi Christensen to render her opinions with respect to Rhonda Gibson’s performance during Mercedes Mears’ medical emergency and the performance of the other Bethel School District’s

personnel who were present at the scene. (RP, Trial Excerpts, page 305, line 5, to page 307).

Ms. Christensen was never listed as an expert witness in this case, and as such could not provide opinions pursuant to ER 702. Thus, presumptuously the Court was allowing her to express her opinions, pursuant to ER 701. However, under the terms of ER 701, the absolute predicate for such opinions, is the presence of “personal knowledge.” See, ER 701(a)(“rationally based on perception of the witness”). Clearly, Ms. Christensen, who was not present at the time of Mercedes Mears’ death, simply had no personal knowledge of the circumstances of which she was ultimately allowed to base her opinions.

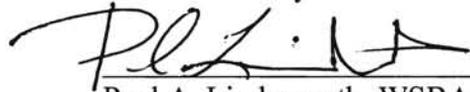
On the grounds of a new trial, it is respectfully suggested that such lay opinions not be allowed. In addition, naturally the existence of such lay opinions, constitute a cumulative evidentiary error which pursuant to CR. 59(a)(8) in the above-referenced *Storey* opinion, justify the grant of a new trial.

VI. CONCLUSION

The jury’s verdict regarding “proximate cause” is contrary to the evidence. A new trial limited to damages should have been ordered.

Primarily, but not exclusively, due to the clearly flagrant and toxic misconduct of defense counsel, the Plaintiffs did not receive justice, nor a fair trial. Even if the Court concludes that the verdict is supported by the evidence, (it is not), there are ample grounds for the grant of a new trial. Defense counsel's "dirty tricks" should not be rewarded with an unjustified verdict. The Appellate Court should reverse the Trial Court in this matter and remand for a new trial limited to damages or alternatively a full new trial.

RESPECTFULLY SUBMITTED this 10th day of December, 2012.

A handwritten signature in black ink, appearing to read "P. A. Lindenmuth", written over a horizontal line.

Paul A. Lindenmuth, WSBA# 15817
Of Attorneys for Appellants/Plaintiffs

FILED
COURT OF APPEALS
DIVISION II

2012 DEC 10 PM 2:24

STATE OF WASHINGTON

DEPUTY

DECLARATION OF SERVICE

I, Marilyn DeLucia, hereby declare under penalty of perjury that the following statements are true and correct:

I am over the age of 18 years and am not a party to this case.

On December 10, 2012, I caused to be served delivered to the attorney for the Defendants/Respondents, a copy of **REVISED APPELLANTS' OPENING BRIEF**, and this **DECLARATION OF SERVICE**, and caused those same documents to be filed with the Clerk of the above-captioned Court.

Filed with the Court of Appeals, Division II, In and For The State of Washington, via legal messenger and email to:

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DATED this 10TH day of December, 2012, at Tacoma, Pierce
County, Washington.

A handwritten signature in cursive script, appearing to read "M. DeLucia", written above a horizontal line.

Marilyn DeLucia, Paralegal
The Law Offices of Ben F. Barcus & Associates, PLLC

No. 43121-1-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

JEANETTE MEARS, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE FOR THE ESTATE OF MERCEDES MEARS,
AND AS LIMITED GUARDIAN FOR JADA MEARS, AND MICHAEL
MEARS,

Appellant,

vs.

BETHEL SCHOOL DISTRICT, NO. 403, A MUNICIPAL
CORPORATION; RHONDA K. GIBSON, AND HEIDI A.
CHRISTENSEN,

Respondent.

REVISED APPENDICES

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APPENDIX 1

RCW 28A.210.260

Public and private schools – Administration of medication – Conditions.

Public school districts and private schools which conduct any of grades kindergarten through the twelfth grade may provide for the administration of oral medication, topical medication, eye drops, or ear drops of any nature to students who are in the custody of the school district or school at the time of administration, but are not required to do so by this section, subject to the following conditions:

(1) The board of directors of the public school district or the governing board of the private school or, if none, the chief administrator of the private school shall adopt policies which address the designation of employees who may administer oral medications, topical medications, eye drops, or ear drops to students, the acquisition of parent requests and instructions, and the acquisition of requests from licensed health professionals prescribing within the scope of their prescriptive authority and instructions regarding students who require medication for more than fifteen consecutive school days, the identification of the medication to be administered, the means of safekeeping medications with special attention given to the safeguarding of legend drugs as defined in chapter 69.41 RCW, and the means of maintaining a record of the administration of such medication;

(2) The board of directors shall seek advice from one or more licensed physicians or nurses in the course of developing the foregoing policies;

(3) The public school district or private school is in receipt of a written, current and unexpired request from a parent, or a legal guardian, or other person having legal control over the student to administer the medication to the student;

(4) The public school district or the private school is in receipt of (a) a written, current and unexpired request from a licensed health professional prescribing within the scope of his or her prescriptive authority for administration of the medication, as there exists a valid health reason which makes administration of such medication advisable during the hours when school is in session or the hours in which the student is under the supervision of school officials, and (b) written, current and unexpired instructions from such licensed health professional prescribing within the scope of his or her prescriptive authority regarding the administration of prescribed medication to students who require medication for more than fifteen consecutive workdays;

(5) The medication is administered by an employee designated by or pursuant to the policies adopted pursuant to subsection (1) of this section and in substantial compliance with the prescription of a licensed health professional prescribing within the scope of his or her prescriptive authority or the written instructions provided pursuant to subsection (4) of this section;

(6) The medication is first examined by the employee administering the same to determine in his or her judgment that it appears to be in the original container and to be properly labeled; and

(7) The board of directors shall designate a professional person licensed pursuant to chapter 18.71 RCW or chapter 18.79 RCW as it applies to registered nurses and advanced registered nurse practitioners, to delegate to, train, and supervise the designated school district personnel in proper medication procedures.

NOTES:

Severability -- Headings and captions not law -- Effective date -- 1994 sp.s. c 9: See RCW 18.79.900 through 18.79.902.

Severability -- 1982 c 195: "If any provision of this amendatory act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1982 c 195 § 4.]

RCW 28A.210.320

Children with life-threatening health conditions -- Medication or treatment orders -- Rules.

(1) The attendance of every child at every public school in the state shall be conditioned upon the presentation before or on each child's first day of attendance at a particular school of a medication or treatment order addressing any life-threatening health condition that the child has that may require medical services to be performed at the school. Once such an order has been presented, the child shall be allowed to attend school.

(2) The chief administrator of every public school shall prohibit the further presence at the school for any and all purposes of each child for whom a medication or treatment order has not been provided in accordance with this section if the child has a life-threatening health condition that may require medical services to be performed at the school and shall continue to prohibit the child's presence until such order has been provided. The exclusion of a child from a school shall be accomplished in accordance with rules of the state board of education. Before excluding a child, each school shall provide written notice to the parents or legal guardians of each child or to the adults in loco parentis to each child, who is not in compliance with the requirements of this section. The notice shall include, but not be limited to, the following: (a) The requirements established by this section; (b) the fact that the child will be prohibited from further attendance at the school unless this section is complied with; and (c) such procedural due process rights as are established pursuant to this section.

(3) The superintendent of public instruction in consultation with the state board of health shall adopt rules under chapter 34.05 RCW that establish the procedural and substantive due process requirements governing the exclusion of children from public schools under this section. The rules shall include any requirements under applicable federal laws.

(4) As used in this section, "life-threatening condition" means a health condition that will put the child in danger of death during the school day if a medication or treatment order and a nursing plan are not in place.

(5) As used in this section, "medication or treatment order" means the authority a registered nurse obtains under RCW 18.79.260(2).

[2006 c 263 § 911; 2002 c 101 § 1.]

NOTES:

Findings -- Purpose -- Part headings not law -- 2006 c 263: See notes following RCW 28A.150.230.

RCW 28A.210.370

Students with asthma.

(1) The superintendent of public instruction and the secretary of the department of health shall develop a uniform policy for all school districts providing for the in-service training for school staff on symptoms, treatment, and monitoring of students with asthma and on the additional observations that may be needed in different situations that may arise during the school day and during school-sponsored events. The policy shall include the standards and skills that must be in place for in-service training of school staff.

(2) All school districts shall adopt policies regarding asthma rescue procedures for each school within the district.

(3) All school districts must require that each public elementary school and secondary school grant to any student in the school authorization for the self-administration of medication to treat that student's asthma or anaphylaxis, if:

(a) A health care practitioner prescribed the medication for use by the student during school hours and instructed the student in the correct and responsible use of the medication;

(b) The student has demonstrated to the health care practitioner, or the practitioner's designee, and a professional registered nurse at the school, the skill level necessary to use the medication and any device that is necessary to administer the medication as prescribed;

(c) The health care practitioner formulates a written treatment plan for managing asthma or anaphylaxis episodes of the student and for medication use by the student during school hours; and

(d) The student's parent or guardian has completed and submitted to the school any written documentation required by the school, including the treatment plan formulated under (c) of this subsection and other documents related to liability.

(4) An authorization granted under subsection (3) of this section must allow the student involved to possess and use his or her medication:

(a) While in school;

(b) While at a school-sponsored activity, such as a sporting event; and

(c) In transit to or from school or school-sponsored activities.

(5) An authorization granted under subsection (3) of this section:

(a) Must be effective only for the same school and school year for which it is granted; and

(b) Must be renewed by the parent or guardian each subsequent school year in accordance with this subsection.

(6) School districts must require that backup medication, if provided by a student's parent or guardian, be kept at a student's school in a location to which the student has immediate access in the event of an asthma or anaphylaxis emergency.

(7) School districts must require that information described in subsection (3)(c) and (d) of this section be kept on file at the student's school in a location easily accessible in the event of an asthma or anaphylaxis emergency.

(8) Nothing in this section creates a cause of action or in any other way increases or diminishes the liability of any person under any other law.

[2005 c 462 § 2.]

NOTES:

Findings – 2005 c 462: "The legislature finds that:

(1) Asthma is a dangerous disease that is growing in prevalence in Washington state. An estimated five hundred thousand residents of the state suffer from asthma. Since 1995, asthma has claimed more than five hundred lives, caused more than twenty-five thousand hospitalizations with costs of more than one hundred twelve million dollars, and resulted in seven million five hundred thousand missed school days. School nurses have identified over four thousand children with life-threatening asthma in the state's schools.

(2) While asthma is found among all populations, its prevalence disproportionately affects low-income and minority populations. Untreated asthma affects worker productivity and results in unnecessary absences from work. In many cases, asthma triggers present in substandard housing and poorly ventilated workplaces contribute directly to asthma.

(3) Although research continues into the causes and cures for asthma, national consensus has been reached on treatment guidelines. People with asthma who are being treated in accordance with these guidelines are far more likely to control the disease than those who are not being treated and therefore are less likely to experience debilitating or life-threatening asthma episodes, less likely to be hospitalized, and less likely to need to curtail normal school or work activities. With treatment, most people with asthma are able to live normal, active lives.

(4) Up to one-third of the people with asthma have not had their disease diagnosed. Among those with diagnosed asthma, thirty to fifty percent are not receiving medicines that are needed to control the disease, and approximately eighty percent of diagnosed asthmatics are not getting yearly spirometry measurements that are a key element in monitoring the disease." [2005 c 462 § 1.]

RCW 28A.210.380

Anaphylaxis -- Policy guidelines -- Procedures -- Reports.

(1) The office of the superintendent of public instruction, in consultation with the department of health, shall develop anaphylactic policy guidelines for schools to prevent anaphylaxis and deal with medical emergencies resulting from it. The policy guidelines shall be developed with input from pediatricians, school nurses, other health care providers, parents of children with life-threatening allergies, school administrators, teachers, and food service directors.

The policy guidelines shall include, but need not be limited to:

(a) A procedure for each school to follow to develop a treatment plan including the responsibilities for [of] school nurses and other appropriate school personnel responsible for responding to a student who may be experiencing anaphylaxis;

(b) The content of a training course for appropriate school personnel for preventing and responding to a student who may be experiencing anaphylaxis;

(c) A procedure for the development of an individualized emergency health care plan for children with food or other allergies that could result in anaphylaxis;

(d) A communication plan for the school to follow to gather and disseminate information on students with food or other allergies who may experience anaphylaxis;

(e) Strategies for reduction of the risk of exposure to anaphylactic causative agents including food and other allergens.

(2) For the purpose of this section "anaphylaxis" means a severe allergic and life-threatening reaction that is a collection of symptoms, which may include breathing difficulties and a drop in blood pressure or shock.

(3)(a) By October 15, 2008, the superintendent of public instruction shall report to the select interim legislative task force on comprehensive school health reform created in section 6, chapter 5, Laws of 2007, on the following:

(i) The implementation within school districts of the 2008 guidelines for care of students with life-threatening food allergies developed by the superintendent pursuant to section 501, chapter 522, Laws of 2007, including a review of policies developed by the school districts, the training provided to school personnel, and plans for follow-up monitoring of policy implementation; and

(ii) Recommendations on requirements for effectively implementing the school anaphylactic policy guidelines developed under this section.

(b) By March 31, 2009, the superintendent of public instruction shall report policy guidelines to the appropriate committees of the legislature and to school districts for the districts to use to develop and adopt their policies.

(4) By September 1, 2009, each school district shall use the guidelines developed under subsection (1) of this section to develop and adopt a school district policy for each school in the district to follow to assist schools to prevent anaphylaxis.

[2008 c 173 § 1.]

APPENDIX 2

Guidelines for Care of Students with Life-Threatening Food Allergies



Dr. Terry Bergeson
State Superintendent of
Public Instruction

March 2008

Client - 2960 - 001267

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Guidelines for Care of Students with Life-Threatening Food Allergies

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Guidelines for Care of Students with Life-Threatening Food Allergies

INTRODUCTION AND ACKNOWLEDGMENTS

On January 15, 2002, a Food Allergy Advisory Committee met to provide recommendations to the Office of Superintendent of Public Instruction (OSPI) on essential components of guidelines for schools to ensure the provision of a safe learning environment for students with life-threatening food allergies. Committee members and consultants represented parents, school nutrition services, school nurses, school administration, pupil transportation, and others. A list of these committee members, consultants, and their affiliations is in Appendix A. Draft guidelines were prepared by Judy Maire, Health Services Supervisor, OSPI, based upon the work of this committee. Judy retired shortly after this work was completed and as a result, the drafted guidelines were not finalized at that time.

The 2007 Washington State Legislature appropriated \$45,000 for OSPI to convene a workgroup to develop school food allergy guidelines and policies for school district implementation in 2008–09 (see Appendix B for the budget proviso language). A new workgroup met to review and revise the previously drafted guidelines. They incorporated state and federal laws that impact the management of food allergies in the school setting. See Appendix C for the list of 2007 workgroup members.

OSPI wishes to acknowledge and thank the members of the committees for their time, sharing their expertise, and their ongoing interest and support. Their contributions and suggestions ensure that this document will provide useful, comprehensive guidelines for schools, parents, students, and their Licensed Health Care Providers* (LHCPs).

PURPOSE

The purpose of this educational guide is to provide families of students with life-threatening food allergies, school personnel, and LHCPs with the information, recommendations, forms, and procedures necessary to provide such students with a safe learning environment at school and during all other nonacademic school-sponsored activities. A comprehensive plan must be cooperatively developed with families, school personnel, the LHCP, and lead by the school nurse. Through this cooperative effort, plans that are reasonable and appropriate for implementation in the public school setting can be developed to meet the individual needs of these students and their families.

The guidelines address only students with acute life-threatening food allergies that could precipitate a reaction during the school day or any time the student is in the custody of the school, such as a field trip or after school sport.

*According to RCW 18.79.260(2), Washington State defines the licensed health care provider as a licensed physician and surgeon, dentist, osteopathic physician and surgeon, naturopathic physician, podiatric physician and surgeon, physician assistant, osteopathic physician assistant, or advanced registered nurse practitioner acting within the scope of his or her license.

Schools have a responsibility to students with life-threatening health conditions under state law and to students with disabilities under federal law. Schools also may have a responsibility to address other chronic food-related health concerns (non-anaphylactic reactions) that impact students during the school day. Additional information will be provided in Appendix D to address other food-related concerns such as food intolerances.

The guidelines provide:

- General information for school personnel about life-threatening food allergies (Section 1).
- Information concerning state and federal laws (Section 2).
- Guidelines to ensure appropriate planning for a learning environment that is safe for the student (Section 3).
- Information concerning district policies and procedures and staff training (Section 4).
- Suggested roles and responsibilities of school personnel (Section 5).
- Sample forms and tools to document individualized information about students (Section 6).
- Resources (Section 7).
- Frequently Asked Questions (Section 8).

SECTION 1

OVERVIEW OF LIFE-THREATENING FOOD ALLERGIES

Food allergy is a growing concern in the United States (11 million Americans suffer from food allergies) and creates a significant challenge for children in school. Increasing numbers of children are diagnosed with life-threatening food allergies that may result in a potentially life-threatening condition (anaphylaxis). Currently, there is no cure for life-threatening food allergies. The only way to prevent life-threatening food allergies from occurring is strict avoidance of the identified food allergen. Deaths have occurred in schools because of delays in recognizing and responding to symptoms with immediate treatment and further medical interventions. Critical to saving lives are plans that focus on life-threatening food allergy education and awareness, avoidance of allergens, and immediate treatment of anaphylaxis.

Food allergies are a group of disorders distinguished by the way the body's immune system responds to specific food proteins. In a true food allergy, the immune system will develop an allergic antibody called Immunoglobulin E (IgE), sensitive to a specific food protein. Children with moderate to life-threatening eczema have about a 35 percent chance of having food protein specific IgE. Children with allergies to environmental agents such as pollens and dust mites are more likely to develop food allergies, and those with asthma and food allergies are at the highest risk of death from food allergies. Manifestations of food allergies range from mild skin reactions to life-threatening reactions.¹

CAUSES

Ingestion of the food allergen is the principal route of exposure leading to allergic reactions. Even very minute amounts of food particles (for example, a piece of a peanut) can, in some instances, quickly lead to fatal reactions unless prompt treatment is provided. Research indicates that exposure to food allergens by touch or inhalation are extremely unlikely to cause a life-threatening reaction. However, if children with life-threatening food allergies touch the allergen and then place their fingers in their mouth, eye, or nose, the exposure becomes ingestion and could lead to anaphylaxis. The amount of allergen capable of triggering a life-threatening reaction is dependent upon the sensitivity level of each individual child.

The top eight most common food allergens are: milk, eggs, peanuts, tree nuts (such as pecans and walnuts), shellfish, fish, wheat, and soy; although an individual can have an allergy to any food. The most prevalent food allergens for children are milk, eggs, and peanuts while for adults the most prevalent allergens are shellfish and peanuts. Children will frequently outgrow an allergy to eggs, milk, and soy. However allergies to peanuts, tree nuts, fish, and shellfish usually continue into adulthood. **Not eating the foods the child is sensitive to is the only proven therapy for food allergies.**

SYMPTOMS

In some individuals symptoms may appear in only one body system such as the skin or lungs, while in others, symptoms appear in several body systems. The symptoms range from mild to life-threatening and may quickly become life-threatening depending upon the sensitivity of the individual and the amount of food ingested. No one can predict how a reaction will occur or progress.

Food is the leading cause of anaphylaxis in children

Anaphylaxis symptoms usually happen immediately after the offending food is eaten. Sometimes, however, the symptoms subside, then return hours later. In some cases, serious food reactions might take hours to become evident. Children who have asthma are at a greater risk for anaphylaxis and may often react more quickly requiring aggressive and prompt treatment.

Signs and symptoms of adverse reactions may include any or several of the following:

- **Skin:** Hives, skin rashes, or flushing. Itching/tingling/swelling of the lips, palate, tongue, or throat. Nasal congestion or itchiness, a runny nose or sneezing or itchy, teary, or puffy eyes.
- **Respiratory:** Chest tightness, shortness of breath, hoarseness, choking, or wheezing (a whistling sound when breathing).
- **Gastro-Intestinal:** Nausea, vomiting, abdominal cramps, or diarrhea.
- **Cardiovascular:** Fainting, flushed or pale skin, cyanosis (bluish circle around lips and mouth).
- **Mental/Psychological:** Changes in the level of awareness, crying, anxiety, a sense of impending doom.

Any of the above symptoms may require immediate emergency treatment.

Some children have been observed to react in the following more subtle ways:

- Exhibit screaming or crying.
- Very young children will put their hands in their mouth or pull at their tongues.

Or will say:

- This food's too spicy. It burns my mouth or lips.
- There's something stuck in my throat.
- My tongue and throat feel thick.
- My mouth feels funny. I feel funny or sick.²

TREATMENT

Prevention is the most important method to manage food-related anaphylaxis. Treatment will always require specific training and interventions for anyone involved in the care of students with life-threatening food allergies (or other similar conditions). There are several medications that are essential for treating anaphylaxis. However, in the event of an anaphylactic reaction, an epinephrine injection (shot) is the treatment of choice and must be given immediately to avoid death.

Epinephrine, also known as adrenaline, is a natural occurring hormone in the body. It is released in the body in stressful situations known as the "fight or flight syndrome." It increases the heart rate, diverts blood to muscles, constricts blood vessels, and opens the airways. Administering epinephrine by injection (such as an EpiPen® auto-injector) quickly supplies individuals with a large and fast dose of the hormone. An injection of epinephrine will assist the student temporarily. Sometimes, a second dose is needed to prevent further anaphylaxis before the student is transported to a medical facility for further emergency care. If a child is exhibiting signs of a life-threatening allergic reaction, epinephrine must be given immediately and the Emergency Medical Services (EMS) 911 called for transport. There should be no delay in the administration of epinephrine. Sections 4 and 5 cover additional information regarding epinephrine training.

All students, regardless of whether they are capable of epinephrine self administration, will require the help of others. The severity of the reaction may hamper their attempt to self-inject. Adult supervision is mandatory.

The American Academy of Allergy Asthma & Immunology (AAAAI) notes that *"all individuals entrusted with the care of children need to have familiarity with basic first-aid and resuscitative techniques. This should include additional formal training on how to use epinephrine devices..."*³

For additional information and resources concerning life-threatening food allergies, please visit the AAAAI Web site at <http://www.aaaai.org/patients/gallery/foodallergy.asp>.

SECTION 2

STATE AND FEDERAL LAWS

Several state and federal laws provide protection for students with life-threatening food allergies. School districts are legally obligated by these laws to ensure that students with life-threatening food allergies are safe at school. School districts must have and follow their own policies and procedures for the health and well-being of such students.

Washington State Laws

RCW 28A.201.260 Administration of Oral Medication in School

This law describes the administration of oral medications in the school setting. It also states who may administer oral medication and under what conditions and circumstances. See RCW 28A.210.260-270.

RCW 28A.210.270 Immunity from Liability

Under this law districts are not liable for students receiving oral medication administration when the district is in substantial compliance with the law. To review, see RCW 28A.210.260-270 or the OSPI Bulletin B034-01 at <http://www.k12.wa.us/HealthServices/pubdocs/b034-01.pdf>.

RCW 18.79 Nurse Practice Act

This law establishes that only licensed nurses (Registered Nurses or Licensed Practical Nurses) can provide nursing care and medication administration to individuals for compensation. The law includes oral medications, ointments, eye and ear drops, suppositories, or injections. To review, see RCW 18.79. However, under the school law RCW 28A.210.260-270, nurses may delegate, with training and supervision, oral medication administration to unlicensed staff under specific conditions. Another exception in the Nurse Practice Act (RCW 18.79.240 (1) (b)) allows for the administration of medication in the case of an emergency. This exception includes the administration of injectable epinephrine during an anaphylactic, life-threatening emergency.

RCW 28A.210.320 Children with Life-Threatening Health Conditions

This law adds a condition of attendance for students with life-threatening conditions. Treatment and medication orders and nursing care plans requiring medical services must be in place prior to the student's first day of school. For additional information see RCW 28A.210.320 or WAC 392-380-005-080 and OSPI Bulletin B061-02 at <http://www.k12.wa.us/HealthServices/pubdocs/SHB2834-ESSB6641/B061-02.pdf>.

RCW 28A.210.370 Students with Asthma [and Anaphylaxis]

This law directs the Superintendent of Public Instruction and the Secretary of the Department of Health to develop a uniform policy for all school districts providing for the in-service training for school staff on symptoms, treatment, and monitoring of students with asthma. The law also provides that students may self-administer and self-carry medication for asthma and anaphylaxis contingent upon specific conditions. Additionally, students are entitled to have backup asthma or anaphylaxis medication, if provided by the parent, in a location to which the student has immediate access. See RCW 28A.210.370 for further details.

RCW 28A.210.255 Provision of Health Services in Public and Private Schools- Employee Job Description

This law states that any employee of a public school district or private school who performs health services, such as catheterization, must have a job description that lists all of the health services that the employee may be required to perform for students. See RCW 28A.210.255.

RCW 4.24.300 Good Samaritan Law-Immunity from Liability in Medical Care

This law provides immunity from civil damages resulting from any act or omission in the rendering of emergency care for a volunteer provider of emergency medical services, without compensation. In the school setting, trained and compensated staff are responsible to intervene in student emergencies. See <http://apps.leg.wa.gov/RCW/default.aspx?cite=28A.210.360> for details.

Federal Laws and Regulations

Section 504 of the Rehabilitation Act of 1973 (Section 504)

Under this law, public school districts have a duty to provide a Free Appropriate Public Education (FAPE) for students with disabilities. A student with a life-threatening food allergy qualifies as a disabled student under Section 504, if in a licensed health care provider's assessment, the student is at risk of having a life-threatening (anaphylactic) reaction. This section of the federal law protects disabled public school students from discrimination. See 504 fact sheet at <http://www.hhs.gov/ocr/504.pdf> or Frequently Asked Questions (FAQs) and further information from the Office for Civil Rights at <http://www.ed.gov/about/offices/list/ocr/504faq.html>.

The Americans with Disabilities Act (ADA) of 1990

The ADA law also prohibits the discrimination of individuals with a disability. A life-threatening food allergy is identified as a physical disability that substantially limits one or more of the major life activities. For more information, see <http://www.dol.gov/esa/regs/statutes/ofccp/ada.htm>.

The Individuals with Disabilities Act of 1976 (IDEA)

IDEA is a federal law that governs how states and public agencies provide early intervention, special education, and related services. IDEA district procedures must be followed if the student is determined to be eligible for special education services under IDEA. For additional information, visit <http://www.k12.wa.us/SpecialEd/regulations.aspx>.

Accommodating Children with Special Dietary Needs in the School Nutrition Programs-Child Nutrition Program Regulations: 7 CFR Part 15b; 7 CFR Sections 210.10(i)(1), 210.23(b), 215.14, 220.8(f), 225.16(g)(4), and 226.20(h)

The United States Department of Agriculture (USDA) provides guidance for public schools concerning special dietary needs of children. The school must provide a special diet if requested by the parent of a student with a life-threatening food allergy. However, the diet must follow USDA guidelines, including a special diet order as defined under the School Nutrition Services on page 21 of this document. If a student does not have a life-threatening food allergy, school nutrition services may, but are not required to, make food substitutions. To review the entire federal guide, see [http://www.fns.usda.gov/cnd/Guidance/special dietary needs.pdf](http://www.fns.usda.gov/cnd/Guidance/special_dietary_needs.pdf).

The Family Education Rights and Privacy Act of 1974 (FERPA)

Under FERPA, student information is protected by restricting access to individual student records. The law addresses student confidentiality including the notification of student and parental rights regarding access to student records. In schools, specific student information and records may be shared with school personnel only under certain circumstances. See <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>.

Occupational Safety and Health Administration (OSHA)

The federal regulatory agency sets standards that include the provision for the possible employee exposure to bloodborne pathogens. The Washington Industrial Safety Health Act (WISHA) addresses the requirements and procedures for the protection of Washington State workers with the potential for occupational exposure to bloodborne pathogens. See <http://www.lni.wa.gov/wisha/Rules/bbpathogens/PDFs/823-Complete.pdf>.

SECTION 3

SCHOOL DISTRICT GUIDELINES

Any student diagnosed with a life-threatening food allergy, must have an individual health plan (IHP) and/or emergency care plan (ECP). An ECP may be separate or a part of the IHP. The ECP/IHP may also be the 504 plan. The plans must be completed prior to the student attending school. Care plans are developed by the school nurse in collaboration with the family and a team of professionals, addressing the school's overall responsibilities for the provision of a safe school environment. The ECP/IHP is distributed to school staff having contact with the student. The school nurse organizes and trains school staff regarding their responsibilities and care under the guidance of the written care plan(s).

State law requires all students with life-threatening health conditions to have medication or treatment orders, a nursing care plan, and staff training completed prior to attending school.

Prior to the beginning of every school year, the school nurse should review the health history forms submitted by parents and obtain any additional information necessary regarding life-threatening food allergies. The school nurse may request written permission from the parents to communicate with the student's LHCP if needed. An ECP/IHP should then be developed by the nurse with team input including the student and parents. The parents should supply the medications ordered by the LHCP. If the parents do not provide the appropriate information needed to complete the care plans and orders, the school district may exclude students from school as required in RCW 28A.210.320 (requiring a medication or treatment order as a condition for students with life-threatening conditions to attend public school). If the parents are requesting meal accommodations from the district nutrition services, a diet prescription form must also be completed by a licensed physician.

Developing Individual and Emergency Care Plans – The Team Approach

The parents and student are the experts on the student's food allergy. To ensure a safe learning environment for the student with a life-threatening food allergy, the parents and the student should plan to meet with the school nurse, school officials, school nutrition services, and other school staff as necessary to develop the IHP and/or ECP. This meeting needs to occur prior to the student attending school, upon returning to school after an absence related to the diagnosis, and any time there are changes in the student's treatment plan.

Parents of students with life-threatening food allergies are very concerned about their child's welfare during the school day. One parent commented, *"I feel that I am sending*

my child to a school and a district that has not taken seriously enough the responsibility for accommodating kids with food allergies. I do much of the food allergy education; I check up on the substitute teachers; and I try to be in the school as much as possible to make sure I catch what they have missed. It is exhausting." Having the parents actively involved in the development of the IHP/ECP greatly eliminates many unnecessary concerns.

The IHP and/or ECP are integral parts of the overall school policies and procedures for ensuring a safe learning environment for students with life-threatening food allergies. The IHP/ECP may serve as the 504 plan as determined by the district. The general guidelines in this manual must be individualized for each student with a life-threatening allergy to foods.

The ECP is distributed to all appropriate school staff trained to respond to a student's anaphylactic emergency. The ECP is student specific and should have a current picture of the student on the plan to aid in identification. Only those staff who will have direct responsibility for the student will be trained in student specific procedures, but all school staff should receive awareness training yearly in symptoms of anaphylaxis.

The following activities are recommended for school staff and parents in order to complete an ECP:

- Obtain a medication authorization form signed by both parent and LHCP. Obtain a signed release to access information from the student's LHCP, if needed.
- Secure medication and other necessary supplies.
 - Parents should provide all the supplies. Districts may assist families in this process.
 - Districts must provide appropriate, secure, accessible storage as needed. Students may self-carry epinephrine. Backup medication, if supplied by the parent, should be stored in secure designated location.

Note: EpiPen® auto injectors exposed to temperatures below 59°F or above 86°F may not function properly. The auto-injector has not been tested below or above the United States Pharmacopeia Controlled Room Temperature standard. Districts may want to consider sending EpiPens® home over extended winter breaks when thermostats are set below 59°F.

- Develop disaster preparedness plans to accommodate a minimum of 72 hours without outside access to care.
- Establish a plan for in-service training to staff on risk reduction strategies including avoidance prevention, recognizing symptoms of anaphylaxis, administration of epinephrine and other emergency medications, and monitoring of students with life-threatening food allergies. This training should include the student and parents, as appropriate, and should be provided by a RN, ARNP, or LHCP. When the student's IHP/ECP is developed, the school nurse should obtain parent and LHCP written approval to implement the student's plan of care after the IHP/ECP has been developed.

Using the Coordinated School Health (CSH) Model can be quite helpful in planning for students with life-threatening food allergies. Many schools and districts have adopted the CSH Model in an effort to ensure that coordination and collaboration occurs in schools at the highest level for the greatest impact. The model of CSH developed by the Centers for Disease Control and Prevention (CDC)⁴ includes eight interconnecting components. Each component makes an important contribution to students' well-being and readiness to learn. With a coordinated approach, the components complement each other and have a greater impact than each piece could have by itself. See <http://www.k12.wa.us/CoordinatedSchoolHealth/default.aspx> for additional information.

When a student comes to school with a life-threatening food allergy, accommodations are carried out across the school system from the classroom and lunchroom to the playground and on the bus. The CSH structure better ensures that staff in the school system are communicating and working across silos and together with families and communities to create a safety net for students. Below is a sample using the CSH Model for students with life-threatening food allergies.



SCHOOL DISTRICT POLICIES AND PROCEDURES

Accommodations

Under Section 504 of the Rehabilitation Act of 1973, students with life-threatening food allergies must be provided with the environmental accommodations and emergency school health services they need to safely attend school. It is possible that a Section 504 accommodation plan would *not* be required for a student with a food allergy or intolerance *not* considered a life-threatening condition. If the student is determined to be eligible for services under Section 504, then the district's Section 504 procedures

should be followed. The IHP and/or the ECP may serve as the Section 504 accommodation plan. IDEA district procedures must be followed if the student is determined to be eligible for special education services under IDEA.

Life-Threatening Food Allergy Policies and Procedures

School districts must have policies and procedural guidelines for students with life-threatening food allergies. Some of the policies and procedures may be common to students with any life-threatening condition and some may be unique to students with life-threatening food allergies.

EMS 911

The school district policy and procedural guidelines must address emergency responses including:

- Who will call 911.
- What kind of medical response is requested.
- Who is to be notified of the call including notification of parents.
- Who is assigned to meet the first responders.
- What paperwork must be completed and by whom.
- What to do with the used epinephrine injector.
- What are the debriefing procedures.

If epinephrine is administered, 911 emergency response must be activated. The standard practice is to transport the student to the local medical facility regardless of the student's status at the time of the EMS arrival. A second dose of epinephrine may be necessary. Once transported to a medical facility the student should be observed for four hours because symptoms can return even after initial treatment with epinephrine.

Incident debriefing must occur at school among those who implemented the ECP, the school nurse, and the building/district administration including risk management. Input may be sought from the parents, the student, the first responder, and the student's LHCP. The ECP must be reviewed and revised, if needed. Subsequent training must then follow to address the revised ECP.

Anti-Bullying Policies and Procedures

The unique health needs of students with life-threatening food allergies may cause them to become targets for harassment, intimidation, and bullying. Parents and students need to know that school districts are required by RCW 28A.300.285 to have anti-bullying policies and procedures. It is expected that students found to be subjecting a student with a life-threatening food allergy to such behavior will be disciplined according to district policies.

For additional resources and information regarding bullying visit OSPI's School Safety Center's Web site at <http://www.k12.wa.us/SafetyCenter/LawEnforcement/StudentDiscipline.aspx>.

All School Staff Training

Awareness training for all school staff must be provided each school year. This could be included in any or all staff training opportunity. The Spokane School District uses the video "It Only Takes One Bite" as one training tool. This video is available to borrow through OSPI Health Services and the School Nurse Corps program in each Educational Service District. The video is a part of the Food Allergy Kit prepared by the OSPI Child Nutrition Services. See the Nurse Administrator contact list at <http://www.k12.wa.us/HealthServices/ESDcontacts.aspx>.

Student Specific Training

The school nurse conducts student specific training for staff who will have responsibility to implement the student's ECP. Student specific training has three components:

- Training in avoidance procedures to prevent exposure of the student to the food allergen.
- Training in the recognition of symptoms, especially early symptoms.
- Training in the administration of epinephrine and other needed emergency medications.

Avoidance training must include establishing a list of food items that commonly contain food allergens that may not necessarily be obvious for possible exposure. Avoidance training is site specific. In the classroom, teachers need to be aware of potential allergens and avoid use in science and laboratory materials, arts and craft materials, snacks, and party foods.

More than one staff person must be trained for each situation or location including, but not limited to: the student's classroom teacher, classroom aides, and any specialists. Special attention is needed to ensure that trained school staff accompanies the student on field trips. **Protocols must be in place to ensure that substitute teachers are informed of the student's life-threatening allergy, the location of the ECP, and duties associated with implementing the ECP.**

ECP Training

Staff designated to implement the student's ECP must be trained in early recognition of symptoms of anaphylaxis and the administration of epinephrine and other necessary emergency medications. The LHCP prescribes the appropriate epinephrine injector which the parent provides for the school. Training needs to occur annually and/or before the start of the school year and/or before the student attends school for the first time. **It is essential to ensuring the child's safety while at school to: secure LHCP orders,**

develop the ECP, and train designated school staff prior to the child attending school.

ECP training components include:

- Avoidance strategies for the identified allergen(s).
- Recognition of symptoms and what to do if the student is exposed to the allergen or exposure is suspected.
- How to administer epinephrine. Epinephrine trainers are available through pharmaceutical or product company representatives or the School Nurse Corps Nurse Administrators in each ESD.
- How to administer oral medication. The student's LHCP may order an oral antihistamine to be administered.
- School notification procedures for notifying 911, school nurse, school administration, and parents.
- Pertinent bloodborne pathogens information training with emphasis on safe handling of contaminated sharps (after an EpiPen is used the needle is exposed).
- Recording of the incident, including medications administered, time, and by whom.
- Confidentiality of health care information.
- Identification of harassment or teasing situations that may result in a student being exposed to the allergen. All students should be taught that bullying, harassing, or intimidating will not be tolerated. It is expected that students found to be subjecting a student with a life-threatening food allergy to such behavior will be disciplined according to district policies.
- Retraining at least each school year, or if the student's condition changes, or if there is a change in staff assigned to implement the ECP.
- At least annual practice ECP drills.

There is a natural reluctance to wait to administer epinephrine until symptoms worsen and you are sure the student is experiencing an anaphylactic reaction. There is the same reluctance to call 911. Many fatalities occur because the epinephrine was not administered in a timely manner. This reluctance can most effectively be overcome by practicing implementation of the ECP.

Important: If the student is also asthmatic, the reaction may be more life-threatening and require earlier and more aggressive management based on LHCP orders. Initial anaphylaxis symptoms may occur and be mistaken for asthma or "an upset stomach" including vomiting and abdominal pain. The mistaken reaction may delay necessary treatment.

SECTION 4

ROLES AND RESPONSIBILITIES

These roles and responsibilities are adapted from Connecticut (2006) and Massachusetts (2002) Guidelines for Managing Life-Threatening Allergies.

Some roles and responsibilities are shared and some are specific to particular individuals and/or school staff. The following section describes the roles and responsibilities by grouping.

All School Staff, Parents, and Students with Life-Threatening Food Allergies:

Emotional Health and Well-Being

School nurses, mental health staff (counselors/psychologists/specialists), and others:

- Work in cooperation to address the anxiety of students, staff, and families.
- Act as a resource regarding anxiety, stress, and normal development.
- Educate staff to avoid endangering, isolating, stigmatizing, or harassing students with life-threatening food allergies.
- Consider starting a small support group where students can express their feelings and concerns, if there are multiple students with life-threatening conditions in the school.
- Offer debriefing if an anaphylactic reaction occurs during the school day.

During Meals/Snacks

- Establish procedures to ensure all students eat only their own food—no sharing!
- Encourage parents to send "safe" snacks for their child.
- Provide classroom eating areas that are safe from allergens, if food allergens are consumed in the room, or consider designating another suitable area as a lunchroom, or limit the areas in a building where food is consumed.
- Avoid cross contamination by enforcing hand washing and clean all eating surfaces.
- Clean per district policy, any allergen-safe tables, using a separate rag or disposable wipe and by vacuuming or sweeping the floor.
- Establish Be a PAL (Protect A Life) or Allergy Aware rooms, zones, or tables. See <http://www.foodallergy.org/downloads.html> for more information.
- Conversely, designate eating areas where students are allowed to eat highly allergenic foods.
- Consider establishing a snack fund and allow parents of children with life-threatening food allergies in the class to provide safe snacks for the whole class.

Field Trips

Various school staff members may prepare and participate in field trips away from the school. Field trips require additional planning and coordination in order to ensure a safe trip for all students.

Note: If the field trip destination is potentially unsafe and/or first responders and medical facilities are too distant for a safe response time, an alternative safer site is recommended for any field trip.

- Collaborate with the school nurse prior to planning a field trip.
- Notify parents about field trips (dates/length of time, location, activities).
- Ensure the ECP, LHCP orders, and emergency medications are taken on field trip. The adult who will supervise the student during the field trip and back to school must carry the student's medications and ECP and be trained in the ECP procedures.
- Ensure more than one person is trained to care for the student and follow the ECP including avoidance/prevention training.
- Ensure the bus driver is also trained in the care and management of students with life-threatening food allergies, if appropriate.
- Ensure communication devices for emergency contact are working and available.
- Avoid high risk places (some sites may be too far away from the EMS or too dangerous), ensure site safety, and attempt to have a designated allergy-safe area during meals.
- Know the closest EMS and medical facility to ensure students are safe.
- Encourage parents to attend the field trip. They are not required to do so; staff are ultimately responsible for the safety of students.
- Make plans for students to wash their hands before and after eating.
- If a sack lunch is provided by nutrition services:
 - The meal must be properly labeled.
 - Assign supervising staff to double check the meals ensuring the sack lunch provided for the student is properly labeled.
 - If in doubt, do not give the student the meal without further follow up.
- The student, if capable, must avoid allergens and inform an adult if they believe they may have ingested or had contact with the allergen or are not feeling well.
- Staff may assist the student in avoiding possible contact with the allergen during the field trip.

Classroom Activities

Note: The classroom is the most common area students in school are reported to have an allergic reaction.⁵

- Avoid, when possible, using foods for activities such as arts/crafts, projects, science, counting, holidays, and other celebrations; and allow parents to substitute safe alternatives when appropriate.
- Encourage nonfood activities, rewards, and treats.

Classroom Teachers/Specialists/After-School Sports/Programs

For students with life-threatening food allergies:

- Have an accessible copy of the ECP and emergency medications.
- Receive training from the school nurse to implement the ECP including:
 - Allergens that cause life-threatening food (and other) allergies.
 - Prevention.
 - Recognition of student symptoms indicating an anaphylactic reaction.
 - Management of an emergency (contacting EMS and administering epinephrine).
- Have a communication plan to contact EMS, the school nurse, and the office.
- Ensure student confidentiality and privacy as appropriate per law.
- Never send a student who is feeling ill to the health room alone. Ask for staff assistance.
- Assist all staff, substitutes, and volunteers working with the student to familiarize them with the student's food allergies and ECP.
- Coordinate with the school nurse, parents, and with student's permission regarding age appropriate classroom instruction about food allergies.
- Educate students about anti-bullying policies and monitor students appropriately.
- Work with the school nurse about educating the parents of all students about life-threatening food allergies and provide information to help keep certain foods out of the classroom, if requested. Written parental consent is needed.
- Seek parental consent for students to participate in and/or consume any project involving food; and provide lists of ingredients and labels and any manufacturer information.
- Ensure trained staff are always present during any activity involving food.
- Inform parents of any school events and activities where food will be served.
- Do not offer foods to students without parental approval.
- Participate with the planning for the student's re-entry to school after an anaphylactic reaction.
- Do not interpret food labels.

Students with Life-Threatening Food Allergies

- Learn to recognize symptoms of an allergic reaction.
- Notify an adult immediately if they eat something they believe may contain the food allergen.
- Notify an adult if they are being bullied, harassed, or intimidated.
- Do not eat anything with unknown ingredients or known to contain any allergen.
- Do not trade food with others.
- Be proactive in the care and management of their food allergies and reactions based on their developmental level.
- Wash hands before and after eating.
- May carry and self-administer epinephrine contingent upon specific conditions.

Note: Students are strongly encouraged to agree to these activities. However, agreement must not lessen the school's diligence in implementing the student's IHP and/or ECP.

Parents of Students with Life-Threatening Food Allergies

- Notify the school of the student's life-threatening food allergy before school starts as required by law.
- Review school district policies and procedures.
- Keep emergency contact information current including phone numbers and addresses.
- Provide a photograph of the student, if requested.
- Provide treatment, medication, and diet orders from the student's LHCP.
- Provide adequate medications including epinephrine and backup medication for students that are self-carrying epinephrine.
- Sign request forms provided by the school in order for school staff to obtain pertinent medical information, as needed.
- **If possible, provide safe meals from home. This is the safest option for students with life-threatening food allergies.**
- Provide safe snacks for the student, if needed.
- Provide additional allergy safe food for disaster planning. School-provided meals for students kept at school because of any emergency or disaster situation may contain food allergens, and substitutions will need to be provided by parents.
- If the student will eat meals provided by the school through nutrition services, a diet order form must be completed by a licensed physician prior to meal service (see forms section for a sample). It is critical that parents contact the district nutrition services department regarding the need to review and plan for the student's school meals. It may be helpful to meet with nutrition services prior to obtaining a diet order to ensure the proper form(s) are used.
- Work with the school team to develop a plan that accommodates the student's needs throughout the school day including the classroom, cafeteria, after-care programs, school-sponsored activities, and on the school bus.
- Replace medications after use or upon expiration.
- Notify the school nurse if changes in the IHP/ECP are needed.
- Review policies/procedures with the school staff, the student's LHCP, and the student (if age appropriate) after a reaction has occurred.
- Participate in the planning for the student's re-entry to school after an anaphylactic reaction.
- Inform the school if bullying or teasing occurs.
- Notify supervisors/coaches or after-school programs that the student has a life-threatening health condition and an IHP/ECP is on file (staff will need training).
- Educate the student in the self-management of their food allergy including:
 - Safe and unsafe foods.
 - Strategies for avoiding exposure to unsafe foods—such as peer pressure to trade foods.

- o Symptoms of allergic reactions and how to describe them.
- o How and when to tell an adult they may be having an allergy-related problem.
- o How to read food labels (age appropriate).
- o Responsibilities in self-carrying medication.
- o Practice drills and role playing.

Parents need to secure updated LHCP orders each school year and to notify the school nurse of any changes in the student's condition or LHCP orders during the school year. A diet order form must be completed by a licensed physician in order for nutrition services to accommodate a life-threatening allergy.

School Nurse

- Meet with the student and parent, prior to entry into school and/or prior to each school year, to develop a current and complete ECP/IHP in coordination with the student's LHCP.
- Train all staff that will be involved in the care of the student during any school-sponsored activity regarding:
 - o Life-threatening food allergy awareness including allergen avoidance and prevention, recognizing symptoms of anaphylaxis, administering epinephrine, and other emergency medication.
 - o The ECP.
- Provide all staff that will be involved in the care of the student during any school-sponsored activity:
 - o Supervision and monitoring.
 - o Drills and practices.
- Communicate and review with the district's nutrition services about the meals program. Jointly develop a communication process for students receiving school meals.
- Periodically review the ECP/IHP and medication orders.
- Communicate with the local EMS about students with life-threatening food allergies.
- Ensure that the medications are accessible and nonexpired including the medication needed for a lockdown, evacuation, or catastrophic event.
- Communicate with the student, staff, and parents on a regular basis.
- Participate in planning for the student's re-entry to school after an anaphylactic reaction.

School Administrators

- Designate time for annual staff training on life-threatening food allergies including:
 - o Risk reduction procedures such as encouraging hand washing before and after eating, increasing school food allergy awareness, and encouraging nonfood (or at least safe food) celebrations and fundraising efforts.
 - o Emergency procedures and drills.
 - o Epinephrine administration.

- Student specific ECPs.
- Providing for a safe environment both physically and emotionally.
- Support staff, parents, students, and communities in the implementation and care of student's with life-threatening food allergies.
- Provide for systems to have ECPs, emergency equipment, and communication devices for all school activities that involve students with life-threatening food allergies.
- Ensure staff are cleaning eating surfaces and food areas per district policies and procedures using a separate rag or disposable wipe for allergen-safe zones.
- Inform (or assign the school nurse to inform) parents if any student experiences an allergic reaction for the first time at school.
- Ensure protocols are in place for the training of any substitute that may have responsibility for a student with a life-threatening food allergy such as substitutes for teachers, school nurses, nutrition services, recess and/or lunch aides, bus driver, and other specialists. Any responsibilities that such individuals have to implement specific IHP/ECP or school-specific food allergy policies must be included in the information provided. Contingency plans must be in place if a substitute cannot be trained to handle a food allergy emergency.
- Ensure all staff supervising the student have ECP training, epinephrine training, and emergency procedures training including a list of Cardio Pulmonary Resuscitation (CPR) certified staff in the building.
- Ensure there are trained staff on the bus that can assist students in the event of an anaphylactic emergency and carry out the ECP.
- Ensure all known students with life-threatening food allergies have a complete ECP in place prior to school attendance.
- Initiate and participate in planning for the student's re-entry to school after an anaphylactic reaction.
- Make sure after-hours users of the school building are aware of all restrictions and rules impacting the use of common spaces and individual classrooms.
- Communicate risk reduction strategies and/or school food allergy policies to the Parent Teacher Association (PTA) or other organizations who work with students and use the school building on a regular basis.
- Ensure nutrition services staff are not determining whether or not a food is safe for a child to eat. The only safe food is contained within a special diet provided by nutrition services or by the parent. Questions about choosing food off of the standard school lunch or breakfast menu should be directed to nutrition services managers.
- Ensure classrooms and after-school activities are conducted in such a way as to be inclusive of all students in the school.
- Discourage the use of food as a reward among school staff.
- Encourage teachers and staff to consider nutritious, low-allergen foods (such as fruits and vegetables) for snacks and celebrations.
- Take advantage of opportunities to educate the school community about school policies and provide general information about food allergies at regular intervals throughout the school year such as through newsletters, school assemblies, and the PTA meetings.

School Custodial Services

- Thoroughly clean all tables, chairs, and floors after each meal, if applicable.
- Any allergen-safe tables must be cleaned per district policy using a separate rag or disposable wipe.

School Nutrition Services

The school nutrition services department is an essential member of the team that contributes to the development and implementation of the IHP for the student with life-threatening food allergies. The school nutrition services administrator has access to educational resources and is responsible for all aspects of meal production and service. The role of the administrator is to clearly communicate their department's capabilities with the school nurse, principal, and parent including food allergy accommodations for students at school.

Lead nutrition services staff:

- Participate in the team meeting when developing the ECP/IHP, if applicable.
- Post the ECP with parental/student consent, if appropriate.
- Receive all ECPs and are trained on how to access and administer epinephrine, if applicable.
- Establish nutrition services policies and procedures to follow for students with life-threatening food allergies.
- Ensure all nutrition services staff and substitutes are trained to recognize and respond to signs and symptoms of an allergic reaction.
- Communicate menu information to parents, students, and staff and notify them that menu changes may occur.
- Designate trained staff to answer food ingredient questions.
- Make food labels available for parents as requested. Keep a file of food labels and recipes in the nutrition services' administrative office.
- Designate and train specific and appropriate staff to read food labels.
- Designate and train staff on how to accommodate specific diet orders.
- Train staff not to accommodate a diet without a diet order.
- Maintain current contact information with food vendors and other industry resources.
- Train production workers and servers on the prevention of cross contamination of allergenic food products during production and in the cafeteria line.
- Thoroughly clean all tables, chairs, and floors after each meal, if applicable.
- Plan ahead for safe meals on field trips (see forms in Section 5—Sample Sack Lunch Request).
- Have properly functioning communication equipment.
- Take all student complaints seriously and respond as trained.
- Avoid using latex gloves, if indicated for latex allergies.
- Review the signed diet prescription form for adequate detail to clearly identify appropriate food substitutions. The LHCP must identify the student's disability as defined under USDA guidelines. [When in the licensed physician's assessment, food

allergies may result in severe, life-threatening (anaphylactic) reactions, the child's condition would meet the definition of "disability," and the substitutions prescribed by the licensed physicians must be made.]⁶

http://www.fns.usda.gov/cnd/Guidance/special_dietary_needs.pdf.

- o Please note that only a licensed physician may make this determination as described above.
- For students with life-threatening food allergies, a diet prescription form must identify:
 - o The student's disability.
 - o An explanation of why the disability restricts the child's diet.
 - o The major life activity affected by the disability.
 - o The food or foods to be omitted from the child's diet, and the food or choice of foods that must be substituted.

Lunchroom/Playground Assistants

- Post ECP with parental consent, if appropriate.
- Have properly functioning emergency equipment.
- Take all complaints seriously and respond appropriately (follow the IHP/ECP as indicated per training by the school nurse).
- Identify students who have special diets provided by nutrition services.
- Do not interpret food labels or advise children on allergen content.
- Follow district policies and procedures regarding students with life-threatening food allergies.

School Transportation

The supervisor or student's bus driver is encouraged to participate in the development of the student's IHP and/or ECP as needed.

- Have all bus drivers and substitute drivers attend an annual anaphylaxis awareness training (this could be a portion of the general training required for health and emergency preparedness). Only the drivers transporting the students with food allergies will receive student specific ECP training.
- Have all bus drivers trained on emergency preparedness planning and district specific policies and procedures. Such district policies and procedures would include some process and notification system for students who have a specific health requirement.
- Participate in emergency drills.
- Have properly functioning communication equipment and a procedure for out-of service areas.
- Know local EMS procedures.
- Ensure the dispatcher has a list of all students with life-threatening food allergies by bus number/route and instructions for activating EMS.
- Ensure that provisions are made for the student's epinephrine to be on the student's person as well as a copy of the ECP. It is not safe to store epinephrine on the bus for a variety of reasons such as temperature variances and substitution buses.

- Have a backup copy of the ECP on the bus.
- Have procedures for implementing ECPs that address:
 - Calling 911.
 - Location of the epinephrine.
 - Contacting district administration and requesting administrator to contact school nurse and the parents. Buses used to transport teams to extracurricular and sports events may require some adaptation of this policy.
- Ensure that there are trained staff on the bus that can assist students in the event of an anaphylactic emergency and carry out the ECP.
- When possible have a "no eating" policy on buses. Exceptions to this policy will occur for some students that medically require access to food (diabetics) and during certain trips where extenuating circumstances allow for meal consumption on the buses.
- Encourage cleaning of bus surfaces for children with contact anaphylaxis per district policy.
- Students with life-threatening food allergies may need to be seated at the front of the bus to avoid secretive food sharing and to permit the bus driver or assigned school staff to observe the student for development of symptoms.

SECTION 5

SAMPLE FORMS

This section of the guidelines offer various sample forms and tools that districts may use to provide for the care of students with life-threatening food allergies. The forms are samples. School districts are encouraged to modify the forms to incorporate district and student specifics as needed. The following forms are available:

- Sample Student Health Registration Form
- Sample Food Allergy Assessment Form
- Sample Authorization for Exchange of Medical Information
- Sample Authorization for Administration of Medication at School
- Sample LHCP Letter Regarding Unlicensed Staff Administering Emergency Medication at School
- Sample Diet Prescription for Meals at School
- Sample Standard Food Allergy Substitution Order Form
- Sample Licensed Health Providers Orders/Nursing Care Plan/504 Plan/IHP/ECP
- Sample Emergency Action Plan
- Sample Training Program
- Pre-Assessment for Food Allergy Training
- Sample Food Allergy Assessment
- Evaluation for Food Allergy Training
- Sample EpiPen Training for School Staff
- Sample Emergency EpiPen Medication Administration at School Skills Checklist
- Sample Registered Nurse Checklist for Students with Life-Threatening Food Allergies
- Sample Sack Lunch Request Form
- Sample Substitute Letter
- Sample Classroom Letter
- Sample School Letter to All Parents

Student Health Registration Form

This questionnaire is designed to aid school staff in anticipating any health concerns that might affect your child's safety or learning.

Student's Name _____
..... First Middle Last
Grade: _____ Sex: _____ Date of Birth: _____

MEDICAL

Does your child have a doctor or nurse practitioner? Yes ___ No ___
Name of child's doctor or nurse practitioner _____ phone number _____
In the past 12 months, did you have problems obtaining medical care for your child? Yes ___ No ___

DENTAL

Does your child have a dentist? Yes ___ No ___ Name of child's dentist _____ phone number _____
Did your child receive a dental exam in the last 12 months? Yes ___ No ___ Don't know ___
Describe the condition of your child's teeth? Good ___ Fair ___ Poor ___ Don't know ___
In the past 12 months, did you have problems obtaining dental care for your child? Yes ___ No ___

INSURANCE

Does your child have medical insurance coverage? Yes ___ No ___ Don't know ___ Name of provider _____
Does your child have dental insurance coverage? Yes ___ No ___ Don't know ___ Name of provider _____
Does Medicaid insure him/her? (Healthy Options, DSHS, "medical coupon") Yes ___ No ___ Don't know ___

MEDICAL HISTORY

Have you ever been told by a physician or health care professional that your child has:

___ Asthma ___ Seizure disorder ___ Bleeding disorder ___ ADD/ADHD
___ Diabetes ___ Bone/muscle disease ___ Skin condition ___ Learning disability
___ Heart condition ___ Mental health condition (i.e., depression, anxiety, eating disorder) ___ Other _____

Does your child experience any of the following?

___ Nose bleeds ___ Frequent ear aches ___ Overweight for age ___ Physical disability
___ Poor appetite ___ Frequent stomach aches ___ Frequent headaches ___ Fainting spells
___ Tires easily ___ Emotional concerns ___ Underweight for age ___ Other _____

Do any of the above condition(s) limit/affect your child at school? _____

LIFE-THREATENING CONDITIONS

Does your child have a life-threatening health condition? Yes * ___ No ___ Describe: _____

***If yes, a meeting with the school nurse is required. Washington State Law requires that medication or treatment orders and a health care plan be in place prior to starting school.**

ALLERGIES

Plants ___ Animals ___ Food ___ Molds ___ Drugs ___ Bees ___ Other: _____

Please describe the allergic reaction and the treatment _____

Do you plan for your child to receive school prepared meals? Yes * ___ No ___ *an additional form must be completed

MEDICATION

Does your child take any medication? Yes ___ No ___ If yes, name of medication: _____
Purpose: _____ Will medication be needed at school? Yes* ___ No ___

***If your child needs to take medication at school, please contact the office for the necessary authorization form. This form must be completed prior to the administration of any medication at school.**

HEARING/VISION

Do you have concerns about your child's hearing? Yes ___ No ___ Does your child wear hearing aids? Yes ___ No ___
Do you have concerns about your child's vision? Yes ___ No ___ Does your child wear glasses or contacts? Yes ___ No ___

SPEECH/LANGUAGE

Do you have concerns about your child's speech and/or language? Yes ___ No ___ Do others have difficulty understanding your child? Yes ___ No ___ If yes, please explain _____

AUTHORIZATION FOR EMERGENCY MEDICAL TREATMENT

I understand that the information given above will be shared with appropriate school staff to provide for the health and safety of my child. If either I or an authorized emergency contact person cannot be reached at the time of a medical emergency, I authorize and direct school staff to send my child to the most easily accessible hospital or physician. I understand that I will assume full responsibility for payment of any transport or emergency medical services rendered.

Parent/Guardian Signature _____ Date _____
Adapted from Mount Baker School District

Food Allergy Assessment Form

Student Name: _____ Date of birth: _____ Date: _____

Parent/Guardian: _____ Phone: _____ Cell/work: _____

Health Care Provider treating food allergy: _____ Phone: _____

Do you think your child's food allergy may be life-threatening? No Yes
(If YES, please see the school nurse as soon as possible)

Did your student's health care provider tell you the food allergy may be life-threatening? No Yes
(If YES, please see the school nurse as soon as possible)

History and Current Status

Check the foods that have caused an allergic reaction:

- Peanuts
- Peanut or nut butter
- Peanut or nut oils
- Fish/shellfish
- Soy products
- Tree nuts (walnuts, almonds, pecans, etc.)
- Eggs
- Milk

Please list any others: _____

How many times has your student had a reaction? Never Once More than once, explain: _____

When was the last reaction? _____

Are the food allergy reactions: staying the same getting worse getting better

Triggers and Symptoms

What has to happen for your student to react to the problem food(s)? (Check all that apply)

- Eating foods
- Touching foods
- Smelling foods
- Other, please explain: _____

What are the signs and symptoms of your student's allergic reaction? (Be specific; include things the student might say.)

How quickly do the signs and symptoms appear after exposure to the food(s)?
____ Seconds ____ Minutes ____ Hours ____ Days

Treatment

Has your student ever needed treatment at a clinic or the hospital for an allergic reaction?

- No
- Yes, explain: _____

Does your student understand how to avoid foods that cause allergic reactions? Yes No

What treatment or medication has your Health Care Provider recommended for use in an allergic reaction?

Have you used the treatment? No Yes

Does your student know how to use the treatment? No Yes Please describe any side effects or problems your child had in using the suggested treatment: _____

If you intend for your child to eat school provided meals, have you filled out a diet order form for school?

- Yes.
- No, I need to get the form, have it completed by our health care provider and return it to school.

If medication is to be available at school, have you filled out a medication form for school?

- Yes.
- No, I need to get the form, have it completed by our health care provider and return it to school.

If medication is needed at school, have you brought the medication/ treatment supplies to school?

- Yes.
- No, I need to get the medication/treatment and bring it to school.

What do you want us to do at school to help your student avoid problem foods? _____

I give consent to share, with the classroom, that my child has a life-threatening food allergy.

- Yes.
- No.

Parent/Guardian Signature _____ Date: _____

Reviewed by R.N. _____ Date: _____

Adapted from ESD 171 SNC

Authorization for Exchange of Medical Information

SECTION I - DISCLOSURE INFORMATION		
NAME _____	NAME OF PERSON DISCLOSING INFORMATION _____	
AGENCY _____	TITLE _____	
ADDRESS _____ _____		

Name of Student _____	Birth Date _____	Date _____
Specific nature of information to be disclosed: _____ _____ _____ _____		
SECTION II - AUTHORIZATION		
<p>I hereby authorize the release of medical information as described in Section 1 to the individuals who are affiliated with the school/agency indicated in Section III.</p> <p>This authorization expires on: _____</p> <p style="text-align: center;"> _____ Parent Signature Date </p> <p style="text-align: center;"> _____ Student Signature Date </p>		
<p>If the student is a minor authorized to consent to health care without parental consent under federal and state law, only the student shall sign this authorization form.</p>		
SECTION III - AGENCY/PERSONAL INFORMATION		
NAME _____	<p>This information disclosed to you is protected by state and federal law. You are prohibited from releasing it to any agency or person not listed on this form without specific written consent of the person to whom it pertains. A general authorization for release of medical or other information is not sufficient.</p> <p>See chapter 70.02 RCW.</p> <p>Envelope shall be marked "CONFIDENTIAL"</p>	
AGENCY _____		
POSITION/TITLE _____		
ADDRESS _____ _____ _____		

Sample LHCP Letter Regarding Unlicensed Staff Administering Emergency Medication

Date _____
Dear _____:

Recently, I received an order for medications to treat _____, a student at our school. The order directs the nurse to:

- Administer an antihistamine in response to certain symptoms in an anaphylactic student.
- Wait and assess for progression of symptoms.
- Give epinephrine if additional certain symptoms occur.

I am requesting that the order be changed in order to provide for the student's safety during school hours. I cannot delegate to an unlicensed individual the task of assessing for the progression of symptoms and treating based on that assessment because treating based on assessing requires nursing judgment. As you know, the Nurse Practice Act governs my practice as a registered nurse. RCW 18.79.260 Registered nurse—Activities allowed—Delegation of tasks. (3) (e) states "Acts that require nursing judgment shall not be delegated." In my position, I am responsible for managing the student's Individual Health and Emergency Plan which includes the delegation, training, and supervision of medication administration to nonlicensed staff for this student.

In reviewing the medication order, it is my professional judgment that it is neither appropriate nor safe for nonlicensed school staff to delay epinephrine administration for this student, in the way the order is written. The plan for an anaphylactic student who demonstrates symptoms of a possible reaction, or who has a known ingestion of a life-threatening allergen, will be to:

- Give epinephrine per orders;
- Call 911 for transport; and then
- Notify parent or guardian.

Again, I cannot instruct school staff to first give antihistamines, wait, continue to assess for the progression of symptoms, and then give epinephrine. In my professional judgment, this is neither a safe or lawful practice for nonlicensed staff in the school setting. If you order the student to receive the antihistamine, as tolerated, after epinephrine has been given, that is something, as the school nurse, I can delegate. My grave concern is that nonlicensed staff cannot be asked to do the assessments, delaying treatment in a potentially life-threatening situation. The nursing program manager is aware of my concern in this situation and understands the limitation of delegation under these circumstances. If you have questions, please contact me at the number below.

Sincerely,

School Nurse

School _____

Phone _____

Adapted with permission from the Seattle School District

LIFE-THREATENING FOOD ALLERGY
 LICENSED HEALTH PROFESSIONAL (LHP) ORDERS - NURSING CARE PLAN - 504 PLAN

NAME:		Life-Threatening ALLERGY to:	
Student should avoid contact with this/these allergen(s):		Other allergies:	
School:	Birth date:	Grade:	Routine medications (at home/school):
Bus #	Car <input type="checkbox"/>	Walk <input type="checkbox"/>	
Asthmatic? (High risk for life-threatening reaction): <input type="checkbox"/> Yes <input type="checkbox"/> No		Date of last reaction:	

Please list the specific symptoms the student has experienced in the past.
If you suspect a life-threatening allergic reaction to food, immediately administer Epinephrine and call 911.

Symptoms

MOUTH Itching, tingling, or swelling of the lips, tongue, or mouth

SKIN Hives, itchy rash, and/or swelling about the face or extremities

THROAT Sense of tightness in the throat, hoarseness and hacking cough

GUT Nausea, stomach ache/abdominal cramps, vomiting and/or diarrhea

LUNG Shortness of breath, repetitive coughing, and/or wheezing

HEART "Thready" pulse, "passing out," fainting, blueness, and pale

GENERAL Panic, sudden fatigue, chills, fear of impending doom

OTHER _____

ACTION PLAN

1. Administer Epinephrine and call 911 (DO NOT HESITATE to administer Epinephrine).
 2. 911 must be called if Epinephrine is administered.
 3. Advise 911 dispatch that the student is having a life-threatening allergic reaction and Epinephrine is being administered. Request advanced life support.
 4. Note the time of administration _____.
 5. Dispose of Epipen in the sharps container or send with emergency responders along with the care plan.
 6. Call the School Nurse or Health Services Main Office at _____.
 7. Call parents or other emergency contacts.
- It is medically necessary for this student to carry an Epipen during school hours. Yes No
- Student may administer Epipen. Yes No
- Student has demonstrated use to LHP or designee. Yes No

Location(s) where Epipen/Rescue medications is/are stored:

Office Backpack On Person Coach Other

LIFE-THREATENING FOOD ALLERGY
 LICENSED HEALTH PROFESSIONAL (LHP) ORDERS - NURSING CARE PLAN - 504 PLAN

NAME:		Life-Threatening ALLERGY to:	
Student should avoid contact with this/these allergen(s):		Other allergies:	
School:	Birth date:	Grade:	Routine medications (at home/school):
Bus #	Car <input type="checkbox"/>	Walk <input type="checkbox"/>	
Asthmatic? (High risk for life-threatening reaction): <input type="checkbox"/> Yes <input type="checkbox"/> No		Date of last reaction:	

Please list the specific symptoms the student has experienced in the past.
If you suspect a life-threatening allergic reaction to food, immediately administer Epinephrine and call 911.

Symptoms

MOUTH Itching, tingling, or swelling of the lips, tongue, or mouth

SKIN Hives, itchy rash, and/or swelling about the face or extremities

THROAT Sense of tightness in the throat, hoarseness and hacking cough

GUT Nausea, stomach ache/abdominal cramps, vomiting and/or diarrhea

LUNG Shortness of breath, repetitive coughing, and/or wheezing

HEART "Thready" pulse, "passing out," fainting, blueness, and pale

GENERAL Panic, sudden fatigue, chills, fear of impending doom

OTHER _____

ACTION PLAN

1. Administer Epinephrine and call 911 (DO NOT HESITATE to administer Epinephrine).
2. 911 must be called if Epinephrine is administered.
3. Advise 911 dispatch that the student is having a life-threatening allergic reaction and Epinephrine is being administered. Request advanced life support.
4. Note the time of administration _____.
5. Dispose of Epipen in the sharps container or send with emergency responders along with the care plan.
6. Call the School Nurse or Health Services Main Office at _____.
7. Call parents or other emergency contacts.

It is medically necessary for this student to carry an Epipen during school hours. Yes No

Student may administer Epipen. Yes No

Student has demonstrated use to LHP or designee. Yes No

Location(s) where Epipen/Rescue medications is/are stored:

Office Backpack On Person Coach Other

Emergency Action Plan

School: Teacher: Year:	School: Teacher: Year:	School: Teacher: Year:
------------------------------	------------------------------	------------------------------

EMERGENCY ACTION PLAN: SERIOUS ALLERGY

PICTURE

STUDENT: _____ | _____
Date of Birth

ALLERGY TO: _____
 Type of Reaction: Anaphylaxis Other
 Asthmatic? Yes No

Check here if student is capable of administering emergency medications, (if able), with adult supervision, but school staff should not deviate from the directions in this Emergency Action Plan.

SYMPTOMS	EMERGENCY TREATMENT <small>To be completed by DS/LLP</small>
-----------------	---

MILD SYMPTOMS (Local Reaction):

- Mild Skin Reactions: Hives/Swelling only in the areas of allergen contact.
- Students with Adrenalin (Epi-Pen) or history of anaphylaxis must go home with parental supervision for the remainder of the school day.

SYMPTOMS CAN BECOME MORE SERIOUS VERY QUICKLY OR OVER THE NEXT SEVERAL HOURS.

IF STUDENT HAS MILD SYMPTOMS OR INGESTION IS SUSPECTED :

- Call 9-1-1
- Note time _____ AM and stay with student.
- Watch closely for any serious symptoms.
- Give _____ as ordered by doctor.
- Call Parent or emergency contact (Current emergency contact information is available from the school office).
- Stay with student until Parent or Emergency Medical Services arrives.
- Call School Nurse (reverse side).

DO NOT HESITATE TO CALL 9-1-1 OR TO GIVE EMERGENCY MEDICATION(S).

SERIOUS SYMPTOMS (Systemic Reaction):

- Skin: widespread hives and flushing, widespread swellings
- Mouth: swelling of the tongue
- Throat: itching, or a sense of tightness in the throat, hoarseness, hacking cough
- Gut: vomiting, nausea, cramps, diarrhea
- Lungs: repetitive coughing, wheezing, trouble breathing
- Heart: rapid heart rate, lightheadedness, dizziness, loss of consciousness

IF STUDENT HAS ANY SERIOUS SYMPTOMS:

- Note time _____ AM and stay with student.
- Give _____ as ordered by doctor.
- ADMINISTER ADRENALIN INJECTION (EPI-PEN®) Follow directions on injection device as trained. Note time given: _____ AM
- CALL 9-1-1: Ask for Advanced Life Support for an Allergic Reaction.
- Dispose of used Epi-pen in "sharps" container or give to emergency responders.
- Give copy of "Emergency Action Plan" to emergency responders.
- Call Parent or emergency contacts (Current emergency contact information is available from the school office).
- Call Doctor.
- Call School Nurse (reverse side).



Form 020915 Rev. 1/04 Web Form 02-00431r

POWER
Rev. 5-13-02

Used with permission from Spokane School District

EpiPen Training for School Staff

Verbal	EpiPen Injection Procedure:	Date Step Discussed	Date Skill Demonstrated
	<p>1. Remove the container device from its protective container.</p> 		
	<p>2. Pull off gray safety cap from the fatter end of the device (this "arms" the unit ready for use).</p> 		
	<p>3. Place black flip on outer thigh. Injection into the skin is best, but it can be injected through clothing. Hold the EpiPen in your fist with clenched fingers wrapped around it.</p> 		
	<p>4. Push EpiPen auto-injector against thigh until unit activates (until a loud "click" is heard) and then hold in place 10 seconds.</p>		
	<p>5. Remove the pen from the thigh; be careful with the needle that will now be projecting from the EpiPen when you dispose of the device.</p> 		
	<p>6. Massage the injection site to increase epinephrine absorption. There may be some slight bleeding at the injection site. (Apply firm pressure with a cloth, tissue, clean handkerchief or bandage.)</p>		
	<p>7. Carefully bend needle over on a hard surface and replace into original container if possible.</p>		
	<p>8. Call 911 and stay with the student until EMS arrives:</p> <ul style="list-style-type: none"> • Record the time that the EpiPen was given on the Emergency Care Plan and give EMS a thorough report. • Give EMS the used EpiPen and the Emergency Care Plan. 		

Staff Member Trained: _____

Date _____

School Nurse Trainer: _____

Date _____

Adapted from ESD 114 SNC

Office of Superintendent
of Public Instruction

Sample Emergency EpiPen Medication Administration at School Skills Checklist

Name of student for whom training is needed: _____

Skills List	Demonstration Date	Revisit Date	Rev Date	Rev Date
Review signs and symptoms of life-threatening allergic reaction/anaphylaxis (See Emergency Care Plan)				
Locate student's Emergency Care Plan (ECP)				
Locate student's EpiPen (location noted on the ECP)				
Review criteria on ECP for giving EpiPen				
If administration of EpiPen is indicated, direct another adult to implement school or district Emergency Procedures* or send two students to office for assistance at site. (*review district/school plan)				
Perform Five "Rights" 1. Right person —ask student's full name and compare with EpiPen label 2. Right drug —check EpiPen label for correct student 3. Right amount —check both the ECP directions and the EpiPen label 4. Right time —review criteria in ECP 5. Right method of administration—follow procedure in ECP				
Perform EpiPen injection procedure 1. Pull off gray safety cap 2. Place black tip on upper outer thigh 3. Using a quick motion press hard into upper outer thigh 4. Hold in place and count to 10 5. The EpiPen unit should be removed and held safely away from student and staff 6. Massage the injection area for 10 seconds 7. Bend EpiPen needle back and place unit in storage container				
Reassure and calm student				
Record time EpiPen was given on ECP, initial, and send a copy of the ECP with the ambulance.				
Continue to observe the student for breathing difficulties or further deterioration of consciousness and breathing.				
Administer CPR if no signs of life, i.e., no breathing, gagging, coughing, or chest movement				
Reviewed self-advocacy				

I voluntarily received this training for anaphylaxis and EpiPen use. In the event there are no licensed personnel to administer this life saving medication in an emergency, I will follow the above protocol.

Signed _____ Date _____
 School Staff Member Name

The above faculty/staff has received the above training and demonstrates sufficient knowledge to act in an emergency.

RN Signed _____ Date _____

Adapted from ESD 171 SNC

Sample Registered Nurse Checklist for Students with Life-Threatening Food Allergies

Student: _____ **Allergen:** _____ **School:** _____
Birthdate: _____ **Grade/Teacher:** _____
Allergist or LHCP name and phone number: _____
Age of onset: _____ **Brief history:** _____
Date(s) of hospitalization(s)/ER visits: _____
Concurrent illness or disability or related social/emotional factors: _____

Purpose: To provide a safe environment, promote student self-management of food allergy, recognize signs of anaphylaxis, and provide appropriate assistance and emergency care.

Activities to be reviewed:

1. **Field trips** – All treatment supplies are taken and care is provided:
 - ____ By accompanying parent.
 - ____ By school staff trained in student's emergency care plan.
2. **In the event of classroom/school parties, food treats will be handled as follows:**
 - ____ Student will eat treat if ingredients listed are approved by parent.
 - ____ Parent supplies all snacks and treats for student stored in a marked container kept by the teacher.
3. **After school activities:** _____
4. **Special eating arrangements:** _____

Activities student can self-manage:

1. **Student responsibility:**
 - ____ Will not trade food with others.
 - ____ Will not eat anything with unknown ingredients or known allergen.
 - ____ Will notify an adult immediately if eats something they believe may contain food allergen.
 - ____ Will wear a medic alert bracelet or dog tag necklace.
 - ____ Yes ____ No: Wants the Protect a Life (PAL) or similar education program for schoolmates.
 - ____ Yes ____ No: Will self-carry EpiPen with medical authorization form; location _____
2. **Epinephrine injections:**
 - ____ Yes ____ No: Administers independently (trained/authorized by LHCP and reviewed by school nurse), if able to do so. Trained school staff should be available to supervise and observe.
 - ____ Yes ____ No: Administration by nurse or trained staff. Location of medication: _____

Teacher Responsibilities:

- ____ Know the Emergency Care Plan and classroom accommodations.
- ____ Know the location of all emergency information and medications.
- ____ Be trained to administer EpiPen.
- ____ Inform substitutes of Emergency Care Plan.
- ____ Set up a plan for student to inform you if they are having a reaction.
- ____ Help educate classroom about allergies.
- ____ Be prepared for special events, parties, field trips (contact parent prior to events).
- ____ Instruct students not to share food and eating utensils.
- ____ Read contents of teaching materials such as science kits to identify potential allergens.

Parent Responsibilities:

- ____ Provide EpiPen and/or other prescribed medications with the Medication Authorization Form signed by the LHCP on or before the first day of school.
- ____ Inform nurse of any changes or allergic/anaphylactic episodes.
- ____ Obtain a medic alert bracelet or dog tag style necklace for the student.
- ____ Provide lunch from home (safest option).
- ____ Complete diet order form information for school prepared meals.
- ____ School menus will be previewed by parent and student to self select foods from school menu (be aware that menu items change).

Nurse/School Responsibilities:

- ____ Complete Emergency Care Plan (ECP) and attach to IHP.
- ____ Notify School Nutrition Services Director and Cook at school.
- ____ Review eating arrangements if needed, e.g., peanut free table, desk wipe down.
- ____ Verify School Bus Driver received ECP and training.
- ____ Train School staff (awareness of allergens, allergic symptoms and ECP, conduct mock drill).
- ____ Train School staff in location and administration of emergency medications/EpiPen.

Parent	Date	School Nurse	Date
Teacher	Date	Student	Date

Adapted with permission from Northshore School District

SECTION 7

FREQUENTLY ASKED QUESTIONS (FAQS)

From parents:

- 1. Can the school exclude my child if I do not have a care plan (IHP/ECP) and health care provider orders signed?**

Yes, the school and school district have the authority to exclude children with life-threatening conditions from attendance until treatment and medication orders, and emergency care plans requiring medical services are in place. For additional information see RCW 28A.210.320 or WAC 392.380.045.
- 2. Can my child self-carry epinephrine?**

Yes, under RCW 28A.210.370 students may self-carry and self-administer medication for asthma and anaphylaxis contingent upon specific conditions. Additionally, the student is entitled to have backup medication, if provided by the parent, in a location to which the student has immediate access. This does not infer that school staff have any less responsibility to carry out the student's Emergency Action Plan.
- 3. Can my child's epinephrine be stored in the classroom?**

Yes, as noted above under RCW 28A.210.370 students are entitled to have backup medication in a location to which the student has immediate access. The classroom may very well be an appropriate location to store epinephrine.
- 4. Who can administer an epinephrine auto-injector in schools?**

Under RCW 28A.210.260 to 270, a Registered Nurse can delegate (train and supervise) unlicensed staff to administer oral medications at school under specific conditions. In nursing practice laws, an exception also allows for the administration of medication in an emergency situation. This includes the administration of injectable epinephrine in a life-threatening emergency.
- 5. How do I ensure my child's safety during before-and-after school activities?**

Students may be involved in a number of school sponsored activities throughout the year. It is extremely important that parents talk to the supervising staff of any activity occurring before or after school.
- 6. Can food be restricted from a classroom?**

In some situations it may be reasonable on a case-by-case basis, to request that students do not bring foods containing an allergen into the classroom, especially for younger children who eat meals in the classroom.

- 7. How do I ensure that the school will provide safe meals for my child?**
Follow the school district's policies and procedures. In general the following information must be provided: (See sample Diet Prescription for Meals form)
A diet order completed by a licensed physician including:
- o The disability.
 - o The restriction of the disability.
 - o The major life activity affected.
 - o A list of foods to be omitted and substituted.

It is highly recommended that the student and family work with the school nurse and the nutrition service department while they are in the process of obtaining a diet order from the physician.

- 8. Will the school menu provide me with enough information to accommodate my child's life-threatening food allergies?**
No. The school menu is subject to change for a variety of reasons. Recipes and food labels are constantly changing. Please contact your district nutrition service department for any questions or concerns. See FAQ number 7 above.
- 9. Will school staff assist my child in reading labels?**
No, school staff will be advised not to assist or interpret labels for any child. If in doubt, do not ingest the questionable item!

From school staff:

- 10. How else might a student be exposed to food allergens (other than through meals)?**
Many classroom activities involving art, nature/science projects, and home-life activities often use food based items including paints (some are egg based).
- 11. Can the Nursing Care Plan (IHP/ECP) also serve as the 504 plan?**
Yes, the IHP and/or the ECP may serve as the Section 504 accommodation plan.
- 12. If a student appears to be having an allergic reaction, but I am uncertain if the student was truly exposed to any food containing the allergen, what should I do?**
Treat the student immediately with epinephrine, call 911, and follow the care plan. When in doubt, treat the student! Students may have a delayed reaction! Fatalities frequently occur because the epinephrine was delivered too late!
- 13. What is the most effective way to clean surfaces to remove food allergens?**
Thoroughly cleaning hard surfaces (tables/desks) with methods commonly used in school cafeterias are likely to adequately remove any allergen residue. District policies and procedures should address cleaning methods. It is especially important to use a separate rag or disposal wipe on the allergen safe tables. Rigorous hand washing with soap and water is the most effective method for

students and staff. Hand sanitizer will not remove residue and may in fact spread the residue more easily.

14. What is a gluten sensitivity or intolerance?

Some students may have a diagnosed condition that causes gluten sensitivity such as Celiac Disease or Dermatitis Herpetiformis. Gluten intolerance is the result of an immune-mediated response producing Immunoglobulin (IgA) and/or Immunoglobulin G (IgG) antibodies to the ingestion of gluten (wheat: durum, semolina, kamut, spelt, rye, barley, and triticale). Strict avoidance of all gluten products is the only treatment. For additional dietary information see <http://www.gluten.net/diet.htm>.

SECTION 8

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6. USDA, Food and Nutrition Service, Fall 2001, p. 5. Accommodating Children with Special Dietary Needs in the School Nutrition Programs. Guidance for School Nutrition Services Staff.
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SECTION 9

COMMON DEFINITIONS

Anaphylaxis - Anaphylaxis is a life-threatening allergic reaction that may involve systems of the entire body. Anaphylaxis is a medical emergency that requires immediate medical treatment, and follow up care by an allergist/immunologist.

Diet Order - A medical statement which documents the special nutritional needs of a child requiring dietary modifications.

FAPE - Under the law public school districts have a duty to provide a free appropriate public education (FAPE) for students with disabilities. See section 2.

FERPA - The Family Education Rights and Privacy Act of 1974 (FERPA). See section 2.

Food Allergy - Food allergy is a group of disorders distinguished by the way the body's immune system responds to specific food proteins. In a true food allergy, the immune system will develop an allergic antibody called Immunoglobulin E (IgE).

Food Intolerance - Food intolerance refers to an abnormal response to a food or food additive that is not an Immunoglobulin E (IgE) allergic reaction. See appendix D.

IDEA - The Individuals with Disabilities Act of 1976 (IDEA). See section 2.

504 - Section 504 of the Rehabilitation Act of 1973. See section 2.

APPENDIX A

Food Allergy Advisory Committee 2002: Members and Consultants

MEMBERS

1. **Kathe Reed-McKay**
Health Services Supervisor
Spokane SD
2. **George Sneller**
Director, Child Nutrition Services
OSPI
3. **Anita Finch**
School Nutrition Services Supervisor
Seattle SD
4. **Randy Millhollen**
Regional Transportation Coordinator
Puget Sound ESD 121
Burien
5. **Karen Fukui, MD**
Olympia Pediatrician
6. **School Nurse Corps Supervisors**
Julia Schultz, ESD 101, Spokane
Gini Gobeske, ESD 121, Renton
7. **Roberta Schoot**
Washington State Nursing Commission
8. **Ingrid Gourley**
Washington State School Directors' Association
9. **Sandle Tracy**
Health Services Supervisor
Northshore SD
10. **Mary Sue Linville**
Director, Risk Control
Washington School Risk Management Pool
Puget Sound ESD
11. **Kelle Buttin**
Parent
Kent
12. **Larry Parsons, Superintendent**
Selah SD
13. **Carol Brennan**
School Nutrition Services
Highline SD
Burien
14. **Kay Ware**
Pupil Transportation
Driver Instructor
Highline SD

CONSULTANTS

- Carolyn Madsen**
Office for Civil Rights
- Beth Siemon**
Washington State Department of Health
- Paul McBride, MD**
The Everett Clinic

APPENDIX B
OSPI Budget Proviso

(o) \$45,000 of the general fund-state appropriation for the fiscal year 2008 is provided solely for the office of superintendent of public instruction to convene a workgroup to develop school food allergy guidelines and policies for school district implementation. The workgroup shall complete the development of the food allergy guidelines and policies by March 31, 2008, in order to allow school district implementation in the 2008-2009 school year. The guidelines developed shall incorporate state and federal laws that impact management of food allergies in school settings.

APPENDIX C
Life-Threatening Food Allergy Workgroup Members 2007-08

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Olympia Pediatrics
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Gini Gobeske, RN
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Wendy Heipt
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Kelly Morgan
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BJ Noll, RN
Nursing Commission
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Larry Parsons
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Meg Satz
Parent/Advocate
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Marilee Scarbrough
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Brianna Smith, RD
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Yuchi Yang, RD
Department of Health/Parent
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APPENDIX D Food Intolerances

Students may suffer from food intolerances that do not result in a life-threatening food allergy reaction (anaphylaxis) but still hamper the student's ability to perform optimally.

Food intolerance is sometimes confused with food allergy. Food intolerance refers to an abnormal response to a food or food additive that is not an Immunoglobulin-E (IgE) allergic reaction. For instance, an individual may have uncomfortable abdominal symptoms after consuming milk. This reaction is most likely caused by a mild sugar (lactose) intolerance, in which the individual lacks the enzymes to break down milk sugar for proper digestion. Another example is noted in Celiac Disease. Individuals develop food intolerance to gluten by producing Immunoglobulin G (IgG) and/or Immunoglobulin (IgA) antibodies. Such individuals must avoid all gluten products. Licensed Health Care providers assist families in establishing accurate diagnoses and treatment plans.⁷

Students and families of children with food intolerances should complete a Health Registration Form and a Student Food Allergy Form in order to identify the food item(s) that cause symptoms. The student, family, school nurse, and other appropriate school staff should create a plan to accommodate the individual needs of the student. An IHP may be developed and disseminated to staff as needed in order to meet the student's dietary concerns. A 504 accommodation plan is typically *not* required for a student with a food intolerance *not* considered a life-threatening condition. See USDA guidelines (page 5) at http://www.fns.usda.gov/cnd/Guidance/special_dietary_needs.pdf.

APPENDIX 3

Bethel School District

Policies

265

Client - 2960 - 000544

P000606

MEDICATION AT SCHOOL

Under normal circumstances prescribed oral medication and oral over-the-counter medication should be dispensed before and/or after school hours under supervision of the parent or guardian. Oral medications are administered by mouth either by swallowing or inhaling including through a mask that covers the mouth or mouth and nose.

If a student must receive prescribed or non-prescribed oral medication from an authorized staff member, the parent must submit a written authorization accompanied by a written request from a licensed health professional prescribing within the scope of his or her prescriptive authority.

The superintendent shall establish procedures for:

1. Training and supervision of staff members in the administration of prescribed or non-prescribed oral medication to students by a physician or registered nurse;
2. Designating staff members who may administer prescribed or non-prescribed oral medication to students;
3. Obtaining signed and dated parental and health professional request for the dispensing of prescribed or
4. Non-prescribed oral medications, including instructions from health professional if the medication is to be given for more than 15 days;
5. Storing prescribed or non-prescribed medication in a locked or limited access facility; and
6. Maintaining records pertaining to the administration of prescribed or non-prescribed oral medication.
7. Permitting, under limited circumstances, students to carry and self-administer medications necessary to their attendance at school.

No medication shall be administered by injection except when a student is susceptible to a predetermined, life-endangering situation. In such an instance, the parent shall submit a written and signed permission statement. Such an authorization shall be supported by signed and dated written orders accompanied by supporting directions from the licensed health professional. A staff member shall be trained prior to injecting a medication.

Medications administered by routes other than oral (ointments, drops, nasal inhalers, suppositories or non-emergency injections) may not be administered by school staff other than registered nurses or licensed practical nurses.

If the district decides to discontinue administering a student's medication, the superintendent or designee must provide notice to the student's parent or guardian orally and in writing prior to the discontinuance. There shall be a valid reason for the discontinuance that does not compromise the health of the student or violate legal protections for the disabled.

Legal Ref: RCW 28A.210.260
RCW 28A.210.270
AGO 2-9-89

Policy Revised	<u>February 25, 2003</u>
Policy Revised	<u>April 26, 1994</u>
Policy Revised	<u>March 24, 1981</u>
Policy Adopted	<u>June 9, 1980</u>

Bethel School District #403

P3: 11-4-02

MEDICATION AT SCHOOL

Each school principal shall authorize two staff members to administer prescribed or non-prescribed oral medication. Oral medications are administered by mouth either by swallowing or inhaling and may include administration by mask if the mask covers the mouth or mouth and nose. These designated staff members will participate in an inservice training session conducted by a physician or registered nurse.

Prescribed or over-the-counter oral medication may be dispensed to students on a scheduled basis upon written authorization from a parent with a written request by a licensed health professional prescribing within the scope of their prescriptive authority. Requests shall be valid for not more than the current school year. The prescribed or non-prescribed medication must be properly labeled and be contained in the original container. The dispenser of prescribed or non-prescribed oral medication shall:

1. Collect the medication directly from the parent, if possible, and collect an authorization form properly signed by the parent and by the prescribing health professional;
2. Store the prescription or non-prescribed oral medication (not more than a 20-day supply) in a locked, substantially constructed cabinet;
3. Maintain a daily record which indicates that the prescribed or non-prescribed oral medication was dispensed;
4. Provide for supervision by a physician or registered nurse.

A copy of this policy shall be provided to the parent upon request for administration of medication in the schools.

Medications administered other than orally may only be administered by a registered nurse or licensed practical nurse. No prescribed medication shall be administered by injection by staff except when a student is susceptible to a predetermined, life-endangering situation. The parent shall submit a written statement which grants a staff member the authority to act according to the specific written orders and supporting directions provided by licensed health professional prescribing within his or her prescriptive authority (e.g., medication administered to counteract a reaction to a bee sting). Such medication shall be administered by staff trained by the supervising registered nurse to administer such an injection.

Written orders for emergency medication, signed and dated, from the licensed health professional prescribing within his or her prescriptive authority shall:

1. State that the student suffers from an allergy, which may result in an anaphylactic reaction;
2. Identify the drug, the mode of administration and the dose. Epinephrine administered by inhalation, rather than injection, may be a treatment option. This decision must be made by the licensed health professional prescribing within his or her prescriptive authority;
3. Indicate when the injection shall be administered based on anticipated symptoms or time lapse from exposure to the allergen;
4. Recommend follow-up after administration which may include care of the stinger, need for a tourniquet, administration of additional medications, transport to hospital; and
5. Specify how to report to the health professional prescribing within his or her prescriptive authority and any record keeping recommendations.

If a health professional and a student's parent request that a student be permitted to carry his or her own medication and/or be permitted to self-administer the medication, the principal may grant permission after consulting with the school nurse. The process for requesting and providing instructions shall be the same as established for oral medications. The principal and nurse shall take into account the age, maturity and capability of the student; the nature of the medication; the circumstances under which the student will or may have to self-administer the medication and other issues relevant in the specific case before authorizing a student to carry and/or self-administer medication at school. Except in the case of multi-dose devices (like asthma inhalers), students shall only carry one day's supply of medication at a time. Violations of any conditions placed on the student permitted to carry and/or self-administer his or her own medication may result in termination of that permission, as well as the imposition of discipline when appropriate.

Administrative Procedure
Bethel School District #403

P3: 3-10-03

EMERGENCY TREATMENT

The board recognizes that schools are responsible for providing first aid or emergency treatment in case of sudden illness or injury to a student, but that further medical attention is the responsibility of the parent or guardian.

When a student is injured it is the responsibility of staff to see that immediate care and attention is given the injured party until relieved by a superior, a nurse or a doctor. Word of the accident should be sent to the principal's office and to the nurse. The principal or designated staff should immediately contact the parent so that the parent can arrange for care or treatment of the injured.

In the event that the parent or emergency contact cannot be reached and in the judgment of the principal or person in charge immediate medical attention is required, the injured student may be taken directly to the hospital and treated by the physician on call. However, an injured or ill student should only be moved if a first aid provider has determined that it is safe to do so, or that it is safe to transport the student in a private vehicle. Students with head or neck injuries should only be moved or transported by emergency medical technicians. When the parent is located, he/she may then choose to continue the treatment or make other arrangements.

The district is not qualified under law to comply with directives to physicians limiting medical treatment and will not accept such directives.

The superintendent shall establish procedures to be followed in any accident, and for providing first aid or emergency treatment to a student who is ill or injured.

Policy Revised	<u>April 22, 2003</u>
Policy Revised	<u>March 24, 1987</u>
Policy Adopted	<u>November 13, 1979</u>
Bethel School District #403	

P3: 11-4-02

EMERGENCY TREATMENT

Staff are encouraged to become trained and/or maintain skills in recognized first aid procedures. Staff have the affirmative duty to aid an injured student and act in a reasonable and prudent manner in obtaining immediate care. The staff member who exercises his/her judgment and skills in aiding an injured person during the school day or during a school event is protected by the district's liability insurance except when the individual is operating outside the scope of his/her employment or designated duties.

Any child who appears to be very ill or who has received a serious injury should be either sent home or to a physician or hospital as quickly as possible. The principal shall be responsible for making the appropriate decision. In the event the principal or nurse is not available, the staff member designated by the principal to take charge in emergency situations shall be responsible for the decision. For a life-threatening emergency (severe bleeding, shock, breathing difficulty, heart attack, head or neck injuries), call for an aid car. The principal, nurse, responsible designated person, or involved staff member should contact the parent as quickly as possible to determine whether the child should:

1. be sent to a hospital, or
2. be sent to a doctor, or
3. be sent home, or
4. remain at school.

If the parent cannot be contacted, call the emergency number listed on the child's enrollment card to determine the next course of action.

If a seriously ill or injured child is sent home or to the hospital by private automobile, be sure that someone trained in first aid accompanies the child. This is in addition to the driver of the vehicle. Do not let a child walk home if he/she has a high fever (102°), has a head injury or is likely to go into shock from injury. Even if the parent says to send the child, do not send home unaccompanied if the way home is not likely to be a safe route.

If illness or injury is not life threatening, the parent should arrange transportation, if possible. The child should be sent to the hospital of the parent's choice or EMS personnel's decision. Be sure to notify the hospital that the child is on the way.

If the injury is deemed to be minor, the trained staff member should:

1. Administer first aid to the child as necessary (following flip chart in nurse's office or standard first aid procedure.)

2. Notify the nurse, principal or responsible designated person. The nurse may be consulted by phone if not in the building.
3. Remain with the child until released by the principal, nurse, responsible person or the parent.
4. The nurse, principal or other responsible person so designated should make the decision whether an ill or injured child who has received first aid should return to class. If there is any doubt the parent should be consulted.

If a serious injury occurs during a physical education class or during an athletic team practice or game, emergency procedures shall be conducted in the following manner:

1. Stop play immediately at first indication of possible injury or illness.
2. Look for obvious deformity or other deviation from the athlete's normal structure or motion.
3. Listen to the athlete's description of his complaint and how the injury occurred.
4. Act, but move the athlete only after serious injury is ruled out.

The teacher or coach should avoid being hurried into moving an athlete who has been hurt. He/she should attempt to restore life-sustaining functions (e.g., stop/repair uncontrolled bleeding, suffocation, cardiac arrest) before moving the athlete to an emergency facility. An athlete with a suspected head, neck or spinal injury should not be moved. If no physician is available, call 911 and proceed with caution according to first aid procedures. If he/she must accompany the student to a doctor, the activity or event should cease.

An accident report must be completed by the activity director, as soon as possible, from information provided by the person at the scene of the accident. The written report should include a description of the circumstances of the illness or injury and procedures followed in handling it at school. A copy should be included in the student's folder and a copy should be sent to the superintendent.

School staff may not accept and may not agree to comply with directives to physicians that would withhold or withdraw life-sustaining treatment from students.

Administrative Procedure
Bethel School District #403

P3: 11-4-02

2
Client - 2960 - 000551

P000613

SELF-ADMINISTRATION OF ASTHMA AND ANAPHYLAXIS MEDICATIONS

It is the policy of the board of directors that students with asthma or anaphylaxis are afforded the opportunity to self-administer prescribed medications. The student's parent or guardian shall submit a written request and other documentation required by the schools. The student's prescribing health care provider must provide a written treatment plan.

The student shall demonstrate competence, to possess and self-administer prescribed medications during school and at school-sponsored events, to the school's professional registered nurse.

The superintendent is directed to establish procedures that implement this policy and to develop emergency rescue procedures.

Legal Ref: Public Health Service Act
42 U.S.C. 280, Section 399
Chapter 462, Laws of 2005

Policy Adopted August 26, 2008
Bethel School District #403

P3: 9-5-08

SELF-ADMINISTRATION OF ASTHMA AND ANAPHYLAXIS MEDICATIONS

Students with asthma are authorized, in consultation with the school's professional registered nurse, to possess and self-administer medication for asthma or anaphylaxis during the school day, during school sponsored events or while traveling to and from school or school sponsored activities. The student shall be authorized to possess and self-administer medication if the following conditions are met.

1. The parent or guardian must submit a written request for the student to self-administer medication(s) for asthma or anaphylaxis.
2. A health care practitioner has prescribed the medication for use by the student during school hours and the student has received instructions in the correct and responsible way to use the medication(s).
3. The student demonstrates to the health care practitioner and a professional registered nurse at the school the skill necessary to use the medication and to use the device necessary to administer the medication.
4. The health care practitioner provides a written treatment plan for managing the asthma or anaphylaxis episodes of the student and for use of medication during school hours. The written treatment plan should include name and dosage of the medication, frequency with which it may be administered, possible side effects and the circumstances that warrant its use:
 - a. The parent or guardian must sign a statement acknowledging that the district shall incur no liability as a result of any injury arising from the self-administration of medication by the student and that the parents or guardians shall indemnify and hold harmless the district and its employees or agents against any claims arising out of the self-administration of medication by the student.
5. The authorization to self-medicate will be valid for the current school year only. The parent or guardian must renew the authorization each school year.
6. In the event of an asthma or anaphylaxis emergency, the district shall have the following easily accessible:
 - a. The student's written treatment plan;
 - b. The parent or guardian's written request that the student self-medicate; and
 - c. The parent or guardian's signed release of liability form.

7. Backup medication, if provided by the parent or guardian, shall be kept at a location in the school to which the student has immediate access in the event of an asthma or anaphylaxis emergency.
8. A student's authorization to possess and self-administer medication for asthma or anaphylaxis may be limited or revoked by the building principal after consultation with the school's professional registered nurse and the student's parents or guardian if the student demonstrates an inability to responsibly possess and self-administer such medication.

ASTHMA RESCUE PROCEDURES

In the event of an asthma or anaphylactic episode, the school nurse shall be immediately contacted. In the absence of the school nurse, the person responsible for school health duties will be contacted. The district will follow the procedures outlined in the most recent addition of the AMES (Asthma Management in Educational Settings) including:

1. Managing the students' school environment;
2. Training school personnel in rescue procedures;
3. Accompanying all students exhibiting symptoms;
4. Providing care as designed in the student's emergency care plan
5. Calling 911, if appropriate;
6. Notifying the student's parent or guardian;
7. Documenting interventions; and
8. Reviewing the student's emergency care plan and making changes, if necessary.

Administrative Procedure
Bethel School District #403

CERTIFICATED STAFF RESPONSIBILITIES

Regular building hours for certificated staff shall normally be one-half hour before school starts to one-half hour after school ends including a 30-minute duty-free lunch period. Individual schools may request a waiver from the board of directors to alter these districtwide provisions. The starting and dismissal times for students, which may vary from school-to-school, shall be determined by the district.

Fulfilling professional responsibilities will often require that teachers spend time outside of school hours. Such professional responsibilities include but are not limited to:

1. Preparing lesson plans for the instruction of classes;
2. Consulting with students when necessary;
3. Consulting with parents when it is not possible for the parent to meet with the teacher/specialist during building hours;
4. Participating in professional learning and/or curriculum development committees leading towards the improvement of student learning and educational programs;
5. Attending/participating staff meetings including in-service training provided by the district in the area of enhancing teaching skills needing improvement;
6. Supervising and directing co-curricular activities not specifically included in the district's co-curricular program; and,
7. Participating in such other activities not specifically included in the district's educational program.
8. Supervising students when needed to provide for their overall safety needs.
9. Participating in MDT (Multidisciplinary Team) meetings and IEP (Individualized Education Program) team meetings.

Legal Ref: RCW 28A.150.240 (2)
RCW 28A.405.030, 060, 140
RCW 49.46.120

Policy Revised	<u>January 23, 2007</u>
Policy Revised	<u>June 10, 2003</u>
Policy Adopted	<u>November 13, 1979</u>
Bethel School District #403	

PS: 12-27-06

APPENDIX 4



09-2-16169-6 37319975 ORML 10-17-11

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HONORABLE BRIAN M. TOLLEFSON
TRIAL DATE: 9/15/2011



**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

JEANETTE MEARS, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE FOR
THE ESTATE OF MERCEDES MEARS,
AND AS LIMITED GUARDIAN FOR JADA
MEARS, AND MICHAEL MEARS.

Plaintiff.

vs.

BETHEL SCHOOL DISTRICT, NO. 403, A
MUNICIPAL CORPORATION; RHONDA K.
GIBSON, AND HEIDI A. CHRISTENSEN,

Defendants.

NO. 09-2-16169-6

ORDER ON PLAINTIFFS' MOTIONS IN
LIMINE

THIS MATTER having come before the court on the Plaintiffs' Motions In Limine and the Plaintiffs being represented by Ben F. Barcus of *The Law Offices of Ben F. Barcus & Associates, PLLC*, and Thaddeus P. Martin of *Thaddeus P. Martin & Associates* and the Defendants being represented by Gerald Moberg and Jessie Harris of *Williams Kastner*, and the court being duly advised does hereby enter the following Order on Plaintiff's Motions in Limine.

ORIGINAL

ORDER ON PLAINTIFFS' MOTIONS IN LIMINE-1

Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

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4.1 PLEAS OF POVERTY ARE INADMISSIBLE AND IMPROPER

Granted: X

Denied:

Reserved:

Limitations: _____

4.1.1 EXCUSES BY BETHEL THAT IT FAILED TO TAKE ANY ACTION BECAUSE OF LIMITED RESOURCES SHOULD NOT BE PERMITTED.

Granted: X

Denied:

Reserved:

Limitations: _____

4.1.2 SUGGESTIONS BY BETHEL THAT THE TAX PAYERS WILL SUFFER IF THEY RETURN A LARGE VERDICT SHOULD NOT BE ALLOWED.

Granted: X

Denied:

Reserved:

Limitations: _____

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4.1.3 EXCUSES BY BETHEL THAT IT WAS ALLOWED TO VIOLATE STATE STATUTES, DOCTOR'S ORDERS AND IT'S OWN POLICY DIRECTIVES BECAUSE OF THE "REALITY" OF PROVIDING CARE TO STUDENTS SHOULD BE EXCLUDED.

Granted: X

Denied:

Reserved:

Limitations: _____

4.1.4 TESTIMONY OR ARGUMENT REGARDING DEFENDANTS' FINANCIAL CONDITION OR ABILITY TO PAY SHOULD NOT BE ALLOWED.

Granted: X

Denied:

Reserved:

Limitations: _____

4.1.5 THAT BETHEL'S AVAILABLE RESOURCES CAUSED A SHORTAGE OF NURSING OR HEALTH CLERK STAFF AND ITS RESOURCE ALLOCATION POLICY, SHOULD NOT BE DISCUSSED AT TRIAL.

Granted: X

Denied:

Reserved:

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Limitations. _____

4.1.6 USE OF A "POVERTY DEFENSE" IS IMPROPER, INADMISSIBLE AND UNTRUE.

Granted: X

Denied: _____

Reserved: _____

Limitations: _____

4.1.7 FINANCIAL STATUS OF THE PARTIES.

Granted: X

Denied: _____

Reserved: _____

Limitations: _____

4.1.8 ARGUMENT, TESTIMONY, OR COMMENT WHEREIN DEFENDANTS ASSERTS THAT IT COULD NOT AFFORD OR HAD THE BUDGET FOR A "FULL-TIME" NURSE AT CLOVER CREEK ELEMENTARY.

Granted: X

Denied: _____

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Reserved: _____

Limitations: _____

4.1.9 ARGUMENT, TESTIMONY, OR COMMENT REGARDING BUDGET CUTS THAT BETHEL OR OTHER SCHOOL DISTRICTS HAVE HAD OR WILL HAVE IN THE FUTURE.

Granted: X

Denied: _____

Reserved: _____

Limitations _____

4.2 CONTRIBUTORY FAULT IS INADMISSIBLE

4.2.1 CLAIMS BY BETHEL THAT IT COULD NOT ENFORCE DR. LARSON'S MEDICAL ORDERS BECAUSE THE ORDERS WERE DEFICIENT IN ANY WAY SHOULD NOT BE PERMITTED.

Granted: X as to Jada Mears, Mercedes Mears and Mr. And Mrs. Mears

Denied: _____

Reserved: X Re: Dr. Larson

Limitations: See Order on Summary Judgment re: Dr. Larson
IF MOTHERS DO NOT ATTEND DR. LARSON'S ORDERS THEN
THE MOTHER IS GRANTED

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4.2.2 SUGGESTIONS THAT ENTITIES SUCH AS DR. LARSON WERE SOMEHOW AT FAULT FOR BETHEL'S FAILURE TO TAKE ANY ACTIONS SHOULD BE EXCLUDED.

Granted: _____

Denied: _____

Reserved: X

Limitations: See Order on Summary Judgment re: Dr. Larson

4.2.3 SUGGESTIONS BY BETHEL THAT JEANETTE, MICHAEL SR. OR JADA MEARS SOMEHOW ARE RESPONSIBLE FOR MERCEDES' OWN DEATH SHOULD NOT BE PERMITTED.

Granted: X

Denied: _____

Reserved: _____

Limitations: _____

4.2.4 ARGUMENT, TESTIMONY, OR COMMENT THAT NY PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT SHOULD BE EXCLUDED.

Granted: X

Denied: _____

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Reserved: _____

Limitations _____

4.3 SETTLEMENT

4.3.1 OFFERS AND NEGOTIATIONS ARE INADMISSIBLE

Granted: X

Denied: _____

Reserved: _____

Limitations _____

4.3.2 EVIDENCE, DISCUSSION OR INFERENCES REGARDING SETTLEMENT OFFERS OR DISCUSSIONS THAT OCCURRED DURING THE COURSE OF SETTLEMENT NEGOTIATIONS, INCLUDING SETTLEMENT DEMANDS AND TORT CLAIMS ARE INADMISSIBLE AND SHOULD BE EXCLUDED.

Granted: X

Denied: _____

Reserved: _____

Limitations: _____

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4.3.3 ANY REFERENCE TO THE AMOUNT STATED IN PLAINTIFFS' RESPONSE TO STATEMENT OF DAMAGES OR CLAIM FOR DAMAGES SHOULD BE EXCLUDED.

Granted: X

Denied:

Reserved

Limitations: _____

4.3.4 SELF-SERVING STATEMENTS ALLUDING TO FAILED SETTLEMENT NEGOTIATIONS HAVE NO PLACE AT TRIAL.

Granted: X

Denied:

Reserved:

Limitations: _____

4.4 COLLATERAL SOURCE IS INADMISSIBLE

Granted: X

Denied:

Reserved:

Limitations: _____

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4.5 USE OF VERDICT FUNDS BY PLAINTIFFS IS INADMISSIBLE

Granted: X

Denied:

Reserved:

Limitations: _____

4.5.1 ARGUMENT OR EVIDENCE REGARDING PROBATE ISSUES OR THAT ANY OF THE PLAINTIFFS MAY BE BENEFICIARIES OF MERCEDES MEARS ESTATE MUST BE EXCLUDED.

Granted: X

Denied:

Reserved:

Limitations: _____

4.6 CONSULTING EXPERTS

Granted X

Denied:

Reserved:

Limitations: _____

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4.7 UNDISCLOSED EVIDENCE

Granted: X
Denied:
Reserved:

Limitations: _____

4.7.1 DEFENSES NOT CONTAINED IN DISCOVERY OR INTERROGATORY RESPONSES SHOULD NOT BE PERMITTED.

Granted: X
Denied:
Reserved:

Limitations: _____

4.7.2 DOCUMENTS NOT PROVIDED TO PLAINTIFFS DURING THE DISCOVERY PROCESS SHOULD NOT BE ADMISSIBLE.

Granted: X
Denied:
Reserved:

Limitations: _____

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4.7.3 DOCUMENTS, PHOTOS, VIDEO RECORDINGS, MOTION PICTURE IMAGES NOT PROVIDED TO PLAINTIFFS DURING THE DISCOVERY PROCESS MUST BE EXCLUDED.

Granted: X

Denied:

Reserved:

Limitations: _____

4.8 TAX EFFECT ON RECOVERY IS INADMISSIBLE

Granted: X

Denied:

Reserved:

Limitations: _____

4.9 GENERAL EVIDENTIARY ISSUES

4.9.1 BETHEL CANNOT ARGUE THAT THE PLAINTIFFS MUST PROVE THAT MERCEDES WOULD HAVE BEEN ALIVE TODAY IF GIVEN EPI-PEN, IN ORDER TO PREVAIL SHOULD NOT BE PERMITTED.

Granted:

Denied:

Reserved: ✓

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Limitations: _____

4.9.2 ARGUMENT, TESTIMONY, OR COMMENT WHEREIN DEFENDANTS ASSERT THAT IT WAS NOT RESPONSIBLE FOR THE HEALTH, SAFETY AND WELFARE OF PLAINTIFF WHILE SHE WAS IN BETHEL'S CARE.

Granted: X

Denied: _____

Reserved: _____

Limitations: _____

4.9.3 DEFENDANTS SHOULD BE PREVENTED FROM REFERRING TO THE FOOD ALLERGY HEALTH PLAN AS AN "EMERGENCY HEALTH CARE PLAN."

Granted: _____

Denied: _____

Reserved: X

Limitations: All documents in the case must be described properly during trial.
(Carefully)

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4.9.4 ANY TRAINING PROVIDED TO GIBSON THAT IS NOT VERIFIED IN WRITING SHOULD BE EXCLUDED.

Granted: Re: Documentary Evidence

Denied: Re: Testimony

Reserved: _____

Limitations: _____

4.9.5 ARGUMENT, TESTIMONY, OR COMMENT THAT GIBSON PROVIDED ANY SORT OF HEALTH/MEDICAL CARE OR ATTENTION TO MERCEDES MEARS ON OCTOBER 7, 2008.

Granted: _____

Denied: question of examination/cross examination

Reserved: _____

Limitations: _____

4.9.6 ARGUMENT, TESTIMONY, OR COMMENT WHEREIN DEFENDANTS DID "EVERYTHING IT COULD" TO HELP/SAVE/CARE FOR MERCEDES.

Granted: _____

Denied:

Reserved: _____

Limitations: Matter for examination/ cross examination

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4.10 INSURANCE IS INADMISSIBLE

Granted: X

Denied:

Reserved:

Limitations: _____

4.11 ISSUES REGARDING WITNESSES

4.11.1 ANY AND ALL OPINIONS AND THE ISSUES OF OPINIONS OF DR. GERALD ROSEN SHOULD BE EXCLUDED.

Granted: X

Denied:

Reserved:

Limitations: No reference to Dr. Rosen in front of the jury.

4.11.2 FAILURE TO CALL WITNESSES

Granted: X

Denied:

Reserved:

Limitations: _____

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Reserved: _____

Limitations: Past counseling before death of daughter must have an offer of proof, outside the presence of the party - SEE PLAINTIFF MOTION AND COURT ORDER ON SAMUELING AND OTHER CLAIMS - SUPERSEDED BY SEPARATE ORDER.

4.14 UNSUPPORTED TESTIMONY IS INADMISSIBLE

4.14.1 MEDICAL TEXTS, THEORIES AND/OR TESTIMONY NOT SUPPORTED BY LIVE EXPERT AND/OR AN APPROPRIATE EXPERT IS NOT ADMISSIBLE.

Granted: _____

Denied: _____

Reserved: _____

Limitations: _____

4.15 GENERAL ER 403 INADMISSIBILITY

4.15.1 SPECULATION

4.15.1.1 ARGUMENT, TESTIMONY, OR COMMENT THAT MERCEDES SHOULD HAVE BEEN KEPT HOME ON OCTOBER 7, 2008 BY DEFENDANT IS IMPROPER.

Granted: _____

Denied: _____

Reserved: _____

Limitations: _____

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4.15.1.2 ARGUMENT, TESTIMONY, OR COMMENT THAT MERCEDES' INTERACTION WITH MS. DOTSON ON OCTOBER 7, 2008 HAD ANY NEGATIVE HEALTH EFFECT ON PLAINTIFF SHOULD BE EXCLUDED

Granted

Denied:

Reserved:

Limitations: _____

4.15.2 CHARACTER EVIDENCE IS INADMISSIBLE

4.15.2.1 ARGUMENT, TESTIMONY, OR COMMENT RELATED TO ALLEGATIONS OF ABUSE RELATED TO JEANETTE MEARS AND JADA MEARS SHOULD BE EXCLUDED.

Granted:

Denied:

Reserved:

Limitations: _____

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4.15.3 EVIDENCE OF PRIOR BAD ACTS NOT SUPPORTED BY CONVICTIONS SHOULD BE EXCLUDED.

Granted:

Denied:

Reserved:

Limitations: _____

4.15.4 EVIDENCE OF UNRELATED ISSUES SUCH AS MARITAL ISSUES, ORDERS OF PROTECTION, OR CRIMINAL MATTERS NOT INVOLVING PLAINTIFF SHOULD BE EXCLUDED.

Granted:

Denied:

Reserved:

Limitations: _____

4.15.5 ARGUMENT, TESTIMONY, OR COMMENT THAT MERCEDES SHOULD HAVE CARRIED HER OWN EPI-PEN ON OCTOBER 7, 2008 IS IMPROPER.

Granted:

Denied:

Reserved:

Limitations: _____

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4.15.6 ARGUMENT, TESTIMONY, OR COMMENT RELATED TO ANY DESCRIPTION OF GIBSON OR OTHER STAFF MEMBERS ACTIONS TOWARD MERCEDES MEARS AS "COMFORTING" OR "CALMING" MERCEDES.

Granted: _____

Denied: _____

Reserved: _____

Limitations: _____

4.15.7 ARGUMENT, TESTIMONY, OR COMMENT THAT PLAINTIFFS' HOME CONTAINED AN ALLERGEN.

Granted: _____

Denied: _____

Reserved: _____

Limitations: _____

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4.15.8 ARGUMENT, TESTIMONY OR COMMENT THAT THE MEARS PARENTS FAILED TO PROVIDE ANY MEDICAL CARE TO MERCEDES ON THE DAY OF HER DEATH, OR PRIOR TO HER DEATH.

Granted:

Denied:

Reserved:

Limitations: _____

4.15.9 ARGUMENT, TESTIMONY OR COMMENT REGARDING ANY FAILURE TO BOND BETWEEN JEANETTE MEARS AND HER DAUGHTER JADA MEARS.

Granted:

fits relationship of Jada and

Denied:

Jeannette + JADA Jeannette

Reserved:

Limitations: *1) D - Jada & Jeannette
2) G - Jada & Mercedes
3) J - Jeannette & Mercedes
at the presence of Janyoung*

4.16 FEE AGREEMENTS OF PLAINTIFFS AND THEIR COUNSEL ARE INADMISSIBLE.

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4.16.1 DISCUSSION OR ALLUSIONS TO CONTINGENCY FEES OR PREVIOUS FINANCIAL SUCCESS BY PLAINTIFFS' ATTORNEYS HAVE NO PLACE AT THIS TRIAL.

Granted:

Denied:

Reserved:

Limitations: _____

4.17 PASSION OR PREJUDICE ARGUMENTS

4.17.1 THE "EASY STREET" OR "LAWSUIT LOTTERY" ARGUMENT

Granted:

Denied:

Reserved:

Limitations: _____

4.18 GOLDEN RULE ARGUMENTS

Granted:

Denied:

Reserved:

Limitations: _____

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4.19 JURY NULLIFICATION IS IMPROPER

Granted

Denied:

Reserved:

Limitations: _____

4.20 PERSONAL OPINION OF DEFENSE COUNSEL IS INADMISSIBLE

Granted:

Denied:

Reserved:

Limitations: _____

4.21 EVIDENCE OF PRIOR OR SUBSEQUENT LAWSUITS IS INADMISSIBLE.

Granted:

Denied:

Reserved:

Limitations: _____

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4.22 LEGISLATIVE IMMUNITY

STATUTORY

4.22.1 ARGUMENT REGARDING LEGISLATIVE IMMUNITY SHOULD NOT BE ALLOWED

Granted:

Denied:

Reserved:

Limitations: Witness cannot use word "immunity"
or

AS TO LEGISLATIVE IMMUNITY what is for the courts to instruct on.

4.23 SUBSEQUENT REMEDIAL MEASURES

4.23.1 ARGUMENT, TESTIMONY, OR COMMENT REGARDING SUBSEQUENT MEASURES, UNLESS DONE BY SOMEONE OTHER THAN THE DEFENDANT.

Granted:

Denied:

Reserved:

Limitations: _____

W/ [Signature]

4.24 PRESERVING OBJECTIONS

Granted:

Denied:

Reserved:

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Limitations: _____

4.25 TIME OF PLAINTIFF'S ARRIVAL AT SCHOOL

4.25.1 BETHEL SHOULD NOT BE ALLOWED TO ARGUE THAT THE FACT THAT MERCEDES ARRIVED AT SCHOOL A FEW MINUTES EARLY ABSOLVES BETHEL OF ANY RESPONSIBILITY.

Granted: LEGAL ISSUE

Denied: _____

Reserved: _____

Limitations: Res. Duty of Care - granted - fact as to when Mercedes arrived at school is ok

4.26 COURT OF APPEALS/COURT RULINGS

4.26.1 ISSUES RESOLVED BY THIS COURT AND/OR THE COURT OF APPEALS SHOULD NOT BE BROUGHT UP IN THIS CASE.

Granted:

Denied: _____

Reserved: _____

Limitations: _____

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4.27 LACK OF MEDICAL CONDITION/TREATMENT

4.27.1 ARGUMENT, TESTIMONY, OR COMMENT RELATED TO THE FACT THAT MERCEDES MEARS NEVER HAD AN ALLERGIC REACTION, MEDICAL CONDITION/REACTION THAT PREVIOUSLY REQUIRED USE OF AN EPI-PEN AT HOME OR SCHOOL.

Granted: _____

Denied: _____

Reserved: _____

Limitations: _____

4.28 ASTHMA NOT WELL-CONTROLLED

4.28.1 ARGUMENT, TESTIMONY OR COMMENT THAT MERCEDES' ASTHMA WAS NOT WELL CONTROLLED BY HERSELF OR HER PARENTS AND SOMEHOW CONTRIBUTED TO HER DEATH.

Granted. _____

Denied. _____

Reserved: _____

Limitations: _____

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4.29 MEDICAL EXAMINER/LACK OF AUTHORITY

4.29.2 ARGUMENT, TESTIMONY, OR COMMENT WHEREIN DEFENDANTS ATTEMPT TO USE THE MEDICAL EXAMINERS' CONCLUSIONS RELATED TO THE CAUSE OF DEATH AS PROOF OF HER ACTUAL CAUSE OF DEATH.

Granted:

Denied:

Reserved:

Limitations: Sp. Dist. 1980

4.30 GOOD SAMARITAN DEFENSES ARE INADMISSIBLE

4.30.1 ARGUMENT, TESTIMONY, OR COMMENT WHEREIN DEFENDANTS DESCRIBE THEMSELVES AS GOOD SAMARITANS.

Granted:

Denied:

Reserved:

Limitations: _____

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4.31 PLAINTIFF NOT IN DEFENDANT'S CUSTODY ARGUMENTS

4.31.1 ARGUMENT, TESTIMONY, OR COMMENT WHEREIN DEFENDANTS ARGUE THAT MERCEDES WAS NOT IN THEIR CUSTODY.

Granted:

Denied:

Reserved:

Limitations: _____

4.32 DEFENDANT WAS "NOT A HOSPITAL" ARGUMENTS

4.32.1 ARGUMENT, TESTIMONY, OR COMMENT ALLUDING THAT PLAINTIFFS HAD THE EXPECTATION THAT CLOVER CREEK ELEMENTARY WAS A HOSPITAL OR THAT THERE WOULD BE HEALTH CARE PROVIDERS AT THE SCHOOL.

Granted:

Denied:

Reserved:

Limitations UNLESS PLAINTIFF SPOKE THE WORD

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4.33 HYPOTHETICAL MEDICAL CONDITIONS

Granted:

Denied:

Reserved:

Limitations: NO SPECIFIC QUESTIONS THAT ARE NOT BASED UPON REASONABLE MEDICAL PSYCHIATRIC, PSYCHOLOGICAL PROBABILITY OR EVIDENCE.

4.34 USE OF DEMONSTRATIVE EVIDENCE/EXHIBITS

Granted:

Denied:

Reserved:

Limitations: BOTH SIDES SHOULD SHOW EXHIBITS TO THE OTHER SIDE BEFORE SPEAKING TO THE JURY.

4.35 PLEADINGS REGARDING MOTIONS ARE INADMISSIBLE

4.35.1 ALL PLEADINGS FILED IN COURT SHOULD BE EXCLUDED.

Granted:

Denied:

Reserved:

Limitations: _____

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4.36 FILING OF MOTIONS

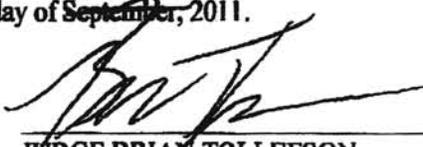
Granted:

Denied:

Reserved:

Limitations: UNSTATED - PRIZE CREDITS IF -
QUESTIONS TOUCHES UPON MOTIONS IN LIMINE
AS OBJECTION.

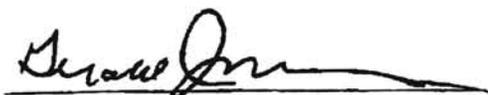
DONE IN OPEN COURT this 10th day of September, 2011.


JUDGE BRIAN TOLLEFSON

Presented by:


Ben F. Barcus, WSBA #15576
Attorney for Plaintiff

Approved as to Form and Content;
Notice of Presentation Waived:


Gerald Moberg, WSBA #5282
Attorney for Defendants


Jessie Harris, WSBA #29399
Attorney for Defendants

FILED
DEPT. 8
IN OPEN COURT
OCT 10 2011
By BM
DEPUTY

APPENDIX 5



09-2-16169-6 37319887 ORML 10-17-11

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HONORABLE BRIAN M. TOLLEFSON
TRIAL DATE: 10/6/2011



**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

JEANETTE MEARS, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE FOR
THE ESTATE OF MERCEDES MEARS,
AND AS LIMITED GUARDIAN FOR JADA
MEARS, AND MICHAEL MEARS,

Plaintiff,

vs.

BETHEL SCHOOL DISTRICT, NO. 403, A
MUNICIPAL CORPORATION; RHONDA K.
GIBSON, AND HEIDI A. CHRISTENSEN,

Defendants.

NO. 09-2-16169-6

**ORDER ON PLAINTIFFS'
SUPPLEMENTAL MOTION IN LIMINE
REGARDING GAMBLING, ETC.**

THIS MATTER having come before the court on the Plaintiffs' Supplemental Motion In
Limine Regarding Gambling, Etc. and the Plaintiffs being represented by Ben F. Barcus of *The Law
Offices of Ben F. Barcus & Associates, PLLC*, and Thaddeus P. Martin of *Thaddeus P. Martin &
Associates* and the Defendants being represented by Gerald Moberg and Jessie Harris of *Williams*

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Kastner, and the court being duly advised does hereby enter the following Order on Plaintiff's Supplemental Motion in Limine Regarding Gambling, Etc.

PLAINTIFFS' SUPPLEMENTAL MOTION IN LIMINE REGARDING GAMBLING, ETC.

Granted:
Denied:
Reserved:

* Limitations: ~~ANY EVIDENCE RE GAMBLING IS EXCLUDED. IADA HEARS (pre-death) IS OUT. MARRIAGE DISCORD ISSUE OF MRS WEARS HEARS IS EXCLUDED. NO QUESTIONING OF POST DEATH ISSUE WITHOUT COMPETENT (COURT) EVIDENCE. MRS. WEARS WITHHELD A MURDER IS EXCLUDED.~~

DONE IN OPEN COURT this 10th day of October, 2011.

[Signature]
JUDGE BRIAN TOLLEFSON

PREJUDICIAL
ANY ACTION STRICKEN OF MRS WEARS IS EXCLUDED. POST-DEATH ISSUES RE: IADA IS OUT.

Presented by:
[Signature]
Ben F. Barcus, WSBA #15576
Attorney for Plaintiff

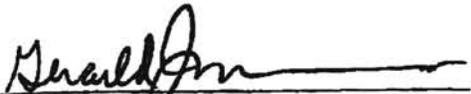
* SEE THE COURT'S OTHER RULINGS

FILED
DEPT. 8
IN OPEN COURT
OCT 10 2011
By *[Signature]*
DEPUTY

Law Offices Of Ben F. Barcus & Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

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Approved as to Form and Content;
Notice of Presentation Waived:



Gerald Moberg, WSBA #5282
Attorney for Defendants



Jessie Harris, WSBA #29399
Attorney for Defendants

APPENDIX 6



09-2-16169-6 37379213 INS 10-26-11

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HONORABLE BRIAN M. TOLLEFSON,



**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

JEANETTE MEARS, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE FOR
THE ESTATE OF MERCEDES MEARS,
AND AS LIMITED GUARDIAN FOR JADA
MEARS, AND MICHAEL MEARS,

Plaintiff,

vs.

BETHEL SCHOOL DISTRICT, NO. 403, A
MUNICIPAL CORPORATION; RHONDA K.
GIBSON, AND HEIDI A. CHRISTENSEN,

Defendants.

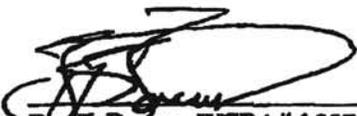
NO. 09-2-16169-6

PLAINTIFFS' PROPOSED CURATIVE
INSTRUCTION RE FLOVENT AND
FAULT OF OTHERS

Plaintiffs propose that the following curative instruction be read to the jury forthwith, in an attempt to mitigate the prejudice of the testimony and evidence proffered by the defense relating to

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4 the use or non-use of Flovent medication by Mercedes Mears, and the direct or indirect inferences,
5 based upon defense counsel questioning and admitted medical history documentation, concerning the
6 comparative fault of Mercedes Mears, Jeanette Meas, Michael Mears, Jada Mears, Dr. Larry Larson,
7 or any other non-named party. In addition, the Plaintiffs' re-assert that there is no evidence causally
8 relating to the use or non-use of Flovent to Mercedes Mears death on October 7, 2008, and that the
9 defense has not properly disclosed any admissible expected opinions of its experts, that must be
10 excluded, consistent with the court's prior pre trial rulings.
11

12 RESPECTFULLY SUBMITTED this ^{24th} day of October, 2011

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15 Ben F. Barcus, WSBA# 15576
16 Of Attorneys for Plaintiffs
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PROPOSED CURATIVE INSTRUCTION - 2

Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

Plaintiffs' Curative Instruction RE: M's past medical history & use/non-use of Flovent – any alleged fault of others –

You are instructed that testimony and evidence concerning Mercedes Mears' past medical history has been allowed only for the limited purpose of her prior asthma condition. It has not been allowed to suggest that any party, including Mr. and Mrs. Mears, Mercedes, her sister Jada, or any party such as Dr. Larry Larson, were in any way negligent or comparatively at fault in causing or contributing to Mercedes' death; and it has not been allowed to suggest that the use or non-use of medication such as Flovent at some time in the past, in any way caused or contributed to Mercedes Mears death on October 7, 2008.

You must disregard any evidence that is not supported by a proper evidentiary standard concerning medical issues, that is, "on a more probable than not basis" or "to a reasonable degree of medical certainty." Those terms are used interchangeably, under the requirement that you must determine all evidence under that standard of "what is more likely true, than not true."

There has been no evidence submitted to you on a proper legal basis that the use or non-use of Flovent by Mercedes Mears, caused, or in some way contributed to her death on October 7, 2008, and it must therefore be fully disregarded by you.

APPENDIX 7



HONORABLE BRIAN F. TOLLEFSON
Trial Date: October 6, 2011



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**SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF PIERCE**

JEANETTE MEARS, individually and as
personal representative for the Estate of
Mercedes Mears and as Limited Guardian for
JADA MEARS; and MICHAEL MEARS,

Plaintiffs,

vs.

BETHEL SCHOOL DISTRICT, NO. 403, a
municipal corporation; RHONDA K. GIBSON;
and HEIDI A. CHRISTENSEN,

Defendants.

No. 09-2-16169-6

**PLAINTIFFS' PROPOSED
JURY INSTRUCTIONS (CITED)**

DATED this 14 day of November, 2011.

**THE LAW OFFICES OF BEN F. BARCUS &
ASSOCIATES, P.L.L.C**

Paul A. Lindenmuth, WSBA #15817
Attorney for Plaintiffs
4303 Ruston Way
Tacoma, WA 98402
(253) 752-4444

Law Office of Ben F. Barcus & Associates,
PLLC
4303 Ruston Way
Tacoma, WA 98402
Phone 253-752-4444, Fax 253-752-1035

INSTRUCTION NO. 28

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the injury to the plaintiffs. The Court will provide you with a special verdict form for this purpose. your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may include only the named defendants in this action. you are not to consider in apportioning fault, any action or inactions on the part of the parents, Michael and Jeanette Mears, Mercedes Mears, Jada Mears, Mercedes' treating physician, Dr. Lawrence Larson, or any other non-named party. It has already been determined as a matter of law that no actions or inactions on the part of these individuals caused or contributed, in any way, to the death of Mercedes Mears, and/or their own injuries or damages.

INSTRUCTION NO. 29

You are instructed that testimony and evidence concerning Mercedes Mears' past medical history has been allowed only for the limited purpose of her prior asthma condition. It has not been allowed to suggest that the use or non-use of medication such as Flovent at some time in the past, in any way caused or contributed to Mercedes Mears' death on October 7, 2008.

You are also instructed that you are not to consider whether Mercedes Mears had a cold, or an upper respiratory tract infection in determining whether the defendants were negligent and whether such negligence was a proximate cause of Mercedes Mears' death on October 7, 2008.

You are not to discuss this evidence when you deliberate in the jury room, except for the limited purpose of discussing Mercedes Mears' past asthma condition.

You must disregard any evidence that is not supported by a proper evidentiary standard concerning medical issues, that is, "on a more probable than not basis" or "to a reasonable degree of medical certainty." Those terms are used interchangeably, under the requirement that you must determine all evidence under that standard of "what is more likely true, than not true."

There has been no evidence submitted to you on a proper legal basis that the use or non-use of Flovent by Mercedes Mears, or a cold or an upper respiratory tract infection, caused, or in some way contributed to her death on October 7, 2008, and it must therefore be fully disregarded.

INSTRUCTION NO. 30

Medical testimony must establish the causal relationship of an injury and the alleged negligence of a defendant. Such testimony must be in terms of "probability." In other words, medical testimony in terms of possibility, speculation or conjecture is not sufficient. Medical testimony that an incident "could" cause, "can" cause, "may" cause, or "might" cause such an injury is not sufficient because these terms indicate a possibility, rather than a probability.

Young v. Group health, 85 @n.2d 332, 534 P.2d 1349 (1975); *Safeway v Martin*, 76 Wn. App 329, 885 P.2d 842 (1994); *Ford v. Chaplin*, 61 Wn. App. 896, 900, 812 P.2d 532 (1991); *Richards v Overlake Hosp.*, 59 Wn App. 266, 278, 796 P.2d 737 (1990); *Bryant v Dept. of labor and Indus* , 23 Wn. App. 509, 514, 596 P.2d 291

APPENDIX 8



**SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE**

**JEANETTE MEARS, individually and as
personal representative for the Estate of
Mercedes Mears and as Limited Guardian for
JADA MEARS; and MICHAEL MEARS;**

NO. 09-2-16169-6



Plaintiff,

v.

**BETHEL SCHOOL DISTRICT, NO. 403 a
municipal corporation; RHONDA K. GIBSON;
and HEIDI A. CHRISTENSEN;**

Defendant(s).

THE COURT'S INSTRUCTIONS TO THE JURY

DATED November 21st, 2011.

Honorable Brian Tollefson

[Signature]
Judge

ORIGINAL

INSTRUCTION NO. 6

Medical testimony must establish the causal relationship of an injury and the alleged negligence of a defendant. Such testimony must be in terms of "probability." In other words, medical testimony in terms of possibility, speculation or conjecture is not sufficient. Medical testimony that an incident "could" cause, "can" cause, "may" cause, or "might" cause such an injury is not sufficient because these terms indicate a possibility, rather than a probability.

INSTRUCTION NO. 7

You are instructed that testimony and evidence concerning Mercedes Mears' past medical history has been allowed only for the limited purpose of her prior asthma condition.

You are not to discuss this evidence when you deliberate in the jury room, except for the limited purpose of discussing Mercedes Mears' past asthma condition.

APPENDIX 9

PHYSICIAN'S ORDERS FOR MEDICATION AT SCHOOL

Patient: Mercedes B Mears
DOB: 11/6/1997

Please dispense the medication as instructed below. Medication is ordered to be given to a student at school only when absolutely necessary. It is understood by the parent that the medication will be dispensed by the principal or his/her designee if the school nurse is not present.

Medication and dosage form: EpiPen.
Dose and mode of administration: Self injected in the thigh.
Hour(s) to be given: In allergic emergency. Call 911 if EpiPen used.
Duration without subsequent order: School Year.
Side effects of drug (if any) to be expected: None at site.

9/24/2008

Signature:

[Handwritten Signature]
Lawrence Larson, DO

PARENT'S PERMISSION

I request that the school nurse, principal or staff member designated by him/her be permitted to dispense to my child, Mercedes B Mears, the medication indicated above.

The medication is to be furnished by me in the original container labeled by the pharmacy or physician with the name of the medicine, the amount to be taken, and the time of day to be taken. The physician's name is on the label. I understand that my signature indicates my understanding that the school accepts no liability for untoward reactions when the medication is administered in accordance with the physician's directions. This authorization is good for the current school year only. In case of necessity the school district may discontinue administration of the medication with proper advance notice. If notified by the school personnel that medication remains after the course of treatment, I will collect the medication from the school or understand that it will be destroyed. I am the parent or the legal guardian of the child named.

Date: 9/24/08 Signature of Parent or Guardian: *[Handwritten Signature]*

Student's Home Address: *[Handwritten Address]*

School: *[Handwritten School Name]*

316 Martin Luther King Jr. Way
Suite 212
Tacoma, WA 98405
253-383-5777
800-639-5777

34503 9th Ave. S
Suite 220
Federal Way, WA 98003
253-927-3243 / 253-941-7229
800-639-5777

4700 Pt. Fosdick Dr. NW
Suite 211
Oig Harbor, WA 98335
253-851-5665
800-639-5777

1624 South Mildred
Suite 101
Tacoma, WA 98465
253-564-8005
800-639-5777

[Handwritten initials]

APPENDIX 10

PEDIATRICS NORTHWEST
PHYSICIAN'S ORDERS FOR MEDICATION AT SCHOOL

Patient: Mercedes B Mears

Medication is ordered to be given to a student at school only when absolutely necessary. Whenever possible, the parent and physician are asked to design a schedule for giving medication outside of school hours. If this is not possible, it must be understood by the parent that the medication will be dispensed by the principal or his/her designee if the school nurse is not present. The principal will designate the person responsible to dispense medication on an individual basis.

The school accepts no responsibility for untoward reactions when the medication is dispensed in accordance with the physician's directions.

Is it necessary for the medication to be given during school hours? YES

Diagnosis: Asthma
Drugs and dosage form: Albuterol MDI
Dose and mode of administration: 2 sprays
Hour(s) to be given: every 4-6 hours PRN or 20 min. prior to exercise
Duration without subsequent order: remainder of the present school year
Side effects of drug (if any) to be expected: tremor
Inhaler to be carried by student: Yes

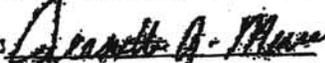
9/24/2008

Signature: 

PARENT'S PERMISSION

I request that the school nurse, principal or staff member designated by him/her be permitted to dispense to my child, Mercedes B Mears, the medication prescribed by Lawrence Larson, DO for the remainder of the present school year.

The medication is to be furnished by me in the original container labeled by the pharmacy or physician with the name of the medicine, the amount to be taken, and the time of day to be taken. The physician's name is on the label. I understand that my signature indicates my understanding that the school accepts no liability for untoward reactions when the medication is administered in accordance with the physician's directions. This authorization is good for the current school year only. In case of necessity the school district may discontinue administration of the medication with proper advance notice. If notified by the school personnel that medication remains after the course of treatment, I will collect the medication from the school or understand that it will be destroyed. I am the parent or the legal guardian of the child named.

Date: 9/24/08 Signature of Parent or Guardian: 

Student's Home Address: 16802 25th Ave. E. Tacoma, WA 98445

School: Clover Brook Elementary

APPENDIX 11

MEDS RECEIVED

Mercedes Moas

Student Name

Albuterol Inhaler

Medication MG Amount

Jeanette A. Moas

[Signature]

Received By

9/25/08

Date

MEDS RECEIVED

Student Name

Medication MG Amount

Parent Signature

Received By

Date

MEDS RECEIVED

Student Name

Medication MG Amount

Parent Signature

Received By

Date

MEDS RECEIVED

Student Name

Medication MG Amount

Parent Signature

Received By

Date

MEDS RECEIVED

Student Name

Medication MG Amount

Parent Signature

Received By

Date

MEDS RECEIVED

Student Name

Medication MG Amount

Parent Signature

Received By

Date

APPENDIX 12

Care Plan for Food Allergies

prepared by Heidi Christensen, R.N., School Nurse (07/08)

Student Information: Mercedes Mears has been diagnosed with a food allergy. She is allergic to peanuts, dairy products, eggs wheat products, soy products chicken, fish, and turkey. She is currently enrolled at Clover Creek Elementary in Mrs. Jensen's 5th grade class. Contact Parent/School Nurse for questions and concerns.

Background Information: True food allergy involves an interaction between food, the gastrointestinal tract, and the immune system. Most symptoms will occur within a few minutes to two hours after ingestion. More children and adolescents die annually from food-induced Anaphylaxis than from insect stings. Reactions occur from eating food that was thought to be safe. There is no way to predict how severe the reaction will be or how quickly it will progress. Therefore, **ALL COMPLAINTS FROM STUDENTS WITH FOOD ALLERGIES MUST BE TAKEN SERIOUSLY.**

Definition: Anaphylaxis is a sudden, severe allergic reaction that involves various areas of the body simultaneously. Anaphylaxis happens when a student is exposed to an allergen (an allergy causing substance) to which he or she has been previously sensitized. Usually anaphylaxis is a systemic reaction - this means it affects the entire body.

Signs and Symptoms are usually severe and appear rapidly - within seconds or minutes - after an exposure to an allergen, but in a few cases reaction can be delayed as much as two hours.

- **Respiratory Symptoms:** Complaint of a tingling, itchiness or metallic taste in the mouth, swelling and/or itching of the mouth and throat area, wheezing, shortness of breath, coughing, difficulty in swallowing and/or breathing.
- **Gastrointestinal Symptoms:** nausea, vomiting, cramps and abdominal pain, and diarrhea.
- **Skin Symptoms:** itchy, swelling, hives, red and blotchy area, and paleness.
- **Cardiovascular Symptoms:** feeling faint, irregular heart beat, shock, drop in blood pressure, and loss of consciousness.

Medication: Mercedes has Benadryl, an Epi-pen and an inhaler in the health room.

Physician: Dr Larson 383-5777

Parent/Emergency Telephone Numbers:

Educational Implications:

- Strict avoidance of the food is the only way to avoid a reaction.
- Food items should not be used in classroom projects or as incentives or rewards.
- Field trips may need to be reconsidered to places that would not put the student at increased risk for a reaction.
- If preparing food in the classroom - use separate utensils and pans to prevent traces of the "forbidden" food from getting into the meal and causing cross-contamination.
- Be alert to treats for celebrations or snacks. Let the parent know when there are snacks being brought in so that the parent can make an alternative "safe" snack.
- Read food labels of all food that is brought in for a classroom snack.
- Handwashing before and after lunch
- Restrict food trading at lunch and on the bus
- Designate certain tables in the lunch room to be milk/ and or peanut free zones.
- All reactions need to be taken seriously and treated promptly.

- Recognize the signs and symptoms of an allergic reaction.
- Check the uvula - if swollen can close off in a matter of minutes

Treatment for Anaphylaxis:

- Anaphylaxis is a medical emergency that requires immediate action. The most important drug for the treatment of anaphylaxis is epinephrine. The sooner the reaction is treated the less severe it will be.

Call Parent, 911 and School Nurse

Monitor breathing and circulation (if needed administer CPR)

Parent Signature

Date

School Nurse Signature *Heidi C. Brown*

Date *8-25-08*

APPENDIX 13

Care Plan for Food Allergies

Prepared by Heidi Christensen, R.N., School Nurse (07/08)

Student Information: Mercedes Mears has been diagnosed with a food allergy. She is allergic to peanuts, dairy products, eggs, wheat products, soy products, chicken, fish, and turkey. She is currently enrolled at Clover Creek Elementary in Mrs Benjamin's 4th grade class. Contact Parent/School Nurse for questions and concerns.

Background Information: True food allergy involves an interaction between food, the gastrointestinal tract, and the immune system. Most symptoms will occur within a few minutes to two hours after ingestion. More children and adolescents die annually from food-induced Anaphylaxis than from insect stings. Reactions occur from eating food that was thought to be safe. There is no way to predict how severe the reaction will be or how quickly it will progress. Therefore, **ALL COMPLAINTS FROM STUDENTS WITH FOOD ALLERGIES MUST BE TAKEN SERIOUSLY.**

Definition: Anaphylaxis is a sudden, severe allergic reaction that involves various areas of the body simultaneously. Anaphylaxis happens when a student is exposed to an allergen (an allergy causing substance) to which he or she has been previously sensitized. Usually anaphylaxis is a systemic reaction - this means it affects the entire body.

Signs and Symptoms are usually severe and appear rapidly - within seconds or minutes - after an exposure to an allergen, but in a few cases reaction can be delayed as much as two hours.

- **Respiratory Symptoms:** Complaint of a tingling, itchiness or metallic taste in the mouth, swelling and/or itching of the mouth and throat area, wheezing, shortness of breath, coughing, difficulty in swallowing and/or breathing.
- **Gastrointestinal Symptoms:** nausea, vomiting, cramps and abdominal pain, and diarrhea.
- **Skin Symptoms:** itchy, swelling, hives, red and blotchy area, and pale areas.
- **Cardiovascular Symptoms:** feeling faint, irregular heart beat, shock, drop in blood pressure, and loss of consciousness.

Medication: Mercedes has Benadryl, an Epi-pen and an inhaler in the health room.

Physician: Dr Larson 383-5777

Parent/Emergency Telephone Numbers:

Educational Implications:

- Strict avoidance of the food is the only way to avoid a reaction.
- Food items should not be used in classroom projects or as incentives or rewards.
- Field trips may need to be reconsidered to places that would not put the student at increased risk for a reaction.
- If preparing food in the classroom - use separate utensils and pans to prevent traces of the "forbidden" food from getting into the meal and causing cross-contamination.
- Be alert to treat for celebrations or snacks. Let the parent know when there are snacks being brought in so that the parent can make an alternative "safe" snack.
- Read food labels of all food that is brought in for a classroom snack.
- Handwashing before and after lunch
- Restrict food trading at lunch and on the bus
- Designate certain tables in the lunch room to be milk/ and or peanut free zones.
- All reactions need to be taken seriously and treated promptly.

Check the label - it should say "use only in a medical emergency"

Treatment for Anaphylaxis:

Anaphylaxis is a medical emergency that requires immediate action. The most important drug for the treatment of anaphylaxis is epinephrine. The sooner the reaction is treated the less severe it will be.

Call Parent, 911 and School Nurse

Monitor breath, ag and circulation (if needed administer CPR)

Parent Signature *Jeanette A. Mears*

Date *9-20-07*

School Nurse Signature *Lachelle*

Date *9-5-07*

APPENDIX 14

Conference Summary – Preschool Health Procedures
September 10, 2008

To: Heidi Christensen
From: Kimberly Hanson

Thank you for meeting with Kelli Meyer and I to clarify health procedures and roles of the Preschool Family Support Services and the Nurse. Below are the items we covered:

1. **Staff Training:** You are responsible for training staff on the administration of medical procedures/administration of medical orders. The training needs to occur before the child attends school. This may be arranged with the parent, if the parent can bring the medicines with the child the day they arrive. You would need to meet the parent in the classroom to provide training for staff if this were to occur.

Because you were unclear about who you had trained for which medications, I directed you to have staff sign off on medical trainings. This will help to clarify who has been trained and give us accurate records.

2. Students may not attend school until their medical equipment or medication is at school. This includes a doctor's order giving the school permission to administer the medication.

The mother of [REDACTED] indicated that you had given her husband permission for [REDACTED] to attend school without these in place. You shared that this was not the information that you had provided. You followed up with a phone call to clarify the need to have things at school.

3. **Health Plan Forms:** You are responsible for calling parents about medical needs that are indicated on their initial forms when it appears that there are special needs. After discussing the health needs with the parent, you are responsible for completing a health care plan as needed and review this with the parent. After you have reviewed this with the parent, the parent may sign the plan in your presence, or Kelly Meier can follow up on the signature. Your signature on the plan indicates that you have discussed the plan with the parent and it is ready for Kelly to call for completion.

**Today we discussed a plan for [REDACTED]. She indicated she had signed the form with you. You could not locate the form she had signed. Therefore, you followed up with her to obtain her signature again.*

**Today we also discussed a plan for [REDACTED]. When Kelly called the mother to ask her to come and sign the plan, the mother indicated that she had not discussed the plan with you. You indicated that you had discussed the plan with her. You followed up on a call to mom to review the plan again.*

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Today you shared your frustration with the preschool expectations. I explained that preschool would have responsibilities that will need to be followed. You were present at a meeting on September 9, 2008 with Sally Keeley, Janice Doyle, Reba Bruner-Croft, Kim Hanson and Kelli Meier. This meeting was held to clarify these expectations because it was clear there was confusion. Please review the notes that were emailed to you on September 12, 2008.

Cc. Sally Keeley, Robert Maxwell

APPENDIX 15

NURSE MEETING
Wednesday, September 10, 2008
10:00 a.m. - 12:00 p.m.
BSA Conference Room

AGENDA

I. Announcements and Celebrations

Attendance: Janice Doyle, Pam Thornton-Fulgham, Deborah Williamson, Sandra Boyer, DeAnn Wood Sellars, Heidi Christiansen, Cassandra Hayes, Heather Julian, Susan Dalbey, Petrina Gavrilis, Sharon Miller-Calapp.

- **Note taker:** Cassandra Hayes
- **Official minutes** need to be taken and circulated to the members of the meeting. Please send to Janice for review and she will send them out.

II. General Business

- **Nurse coverage:** Nurse schedule 08-09 sent around room for corrections.
- **New nurse hired** to start Monday at PVE and SM. Janice has been covering PVE/SM. Susan has been covering the preschools at SM and PVE.
- **Emergency phone tree:** Emergency phone list sent around for changes/updates. Emergency phone tree to be used for snow days and other emergencies. Continue to move down list until you get an answer, but leave messages for the others. The district office has an emergency line that you can call from home if you have any question of school being in session. The phone number is **683-6001**.
- **2 hour late starts:** The district cannot gift funds to employees. Employees are expected to arrive at school on time if weather permits and conditions are safe. If you arrive late then you should stay late.
- **AESOP:** Point of contact is Rick Ward. Aesop is the new attendance call in system. SEMS is no longer in place. Letters with passwords were sent to nurses' schools, if you did not receive one please check with Renee Cappetto. Aesop is located on the Bethel website home page. Once entered into the system as an absence, Lorella will be able to view these and place name on board as an absence. Absences can be entered by phone or computer. Call Rick Ward for any problems.
- **TRI:** Selection must be completed by Monday, September 15th. Self directed and Core training can be entered via the computer throughout the school year. Remember 7 hours of the Self directed Tri should be fulfilled by community time. Call personnel for any questions.
- **Life-threatening conditions:** Cannot exclude without prior written notification- Due process requirement. Janice will send out entire packet.
- **Immunizations** (emailed Aug 25th) Janice has sent out the new immunization bulletin. Please read and reference for all changes effective for this school year. Immunization report is due November 1st. Faxed reports are no longer

accepted. Must send in online. Remember initial attendance is dependant on proof of immunization. Exclusion process is the same as Life threatening. Written notice of exclusion must be given in person or sent certified mail in the native language of parent. Janice will check into resources for other languages. FYI – new nurse speaks Spanish. Remember the Principals do the excluding not the nurse.

- **Scoliosis report** – due October 1st. Reports were emailed September 10th,
- **Field trips/medication training:** Nurses should have a general training for all staff and individualized training as need for specific students. Lists should be received from staff in a timely manner and protocol for this is in the staff handbooks.
- **Evaluations – goal setting:** Bob Maxwell is supervising some of the nurses but not all. The evaluation list will be coming. Renee will be contacting nurses to schedule 2 observations. 1st observation before Thanksgiving. 2nd observation before March. Observation will last 30-40 minutes. Will observe screenings, assessments, MDT participation, paperwork and records. Bob will email observation notes to nurses. Evaluation criteria is in the Collective Bargaining Agreement. Appendix E-8 pages 98-99. You can view this online or hardcopy at the ESC.
- Bob and Janice have talked about putting together an orientation training manual especially for new nurses. They would like this to be a goal for the nurses to complete this year. It was suggested that we divide into groups and take different topics. Suggested topics include: forms, conferences out of district, meds/field trips, immunizations, ECP's, laws/guidelines, end of year checkout, timelines, list of resources, district phone numbers and computer issues. More to come.
- **Health Services Training Manual:** When the manual is completed it will be put on the FirstClass desktop.
- **Food allergy orders:** We can no longer accept "watch and wait" Benadryl/EPI PEN orders. If Epi pen is ordered it must be written to give immediately after exposure to allergen. Janice was notified by Sue Asher (Pierce County Medical Society) that this information was not yet given to physicians. A bulletin will go out to the HCP's this week if they are members of the PCM Society. FYI Group Health and Tricare are not members.
- **Transportation – health concerns:** All health care plans for transportation should be faxed or couriered to Sherry Johnson. Fax# 683-5998 Phone#683-5900. She will notify bus drivers, bus assistants and place info in the route books and make physical contact with the drivers.
- **Preschool Family Support Specialists:** Now doing health clerk job as well. There is no longer funding for a separate health clerk position. Janice has completed general training with them. They are new to the role and need our support.
- **Pictures on emergency care plans:** Heather has found out how to attach pictures to our care plans. Attached you will find the very user- friendly directions. Thank you Heather!

- **FYI: Medicaid Training is coming up (WAMR). This is a requirement to receive funding. Nurses will be notified of training times. Flexible training times may be possible. Ad Match is gone – funding source eliminated. Monthly WAMR reports will be sent.**

Conferences: Need to obtain pre-approval to attend. Nurses still get \$150 per year (full time employees) for conferences and \$85 per year for supplies. Bob states we can always ask our building principals to sponsor our conferences. Show how it will be beneficial to their buildings as nurses are under General Education.

**Next Meeting Wednesday, October 8, 2008
10:00 a.m. – 12:00 p.m.
Bethel Support Annex Conference Room**

APPENDIX 16

May 28, 2008

Dear Parent/Guardian of _____,

The state of Washington has published new guidelines for care of students with life-threatening allergies. The guidelines are comprehensive; however, the message to alert health care providers who prescribe emergency medications to be given at school to students who had a contact with an allergen is:

For students with a medical order to administer epinephrine at school to treat anaphylaxis or possible anaphylaxis, the recommended protocol after exposure is to immediately:

- 1. Call 911**
- 2. Administer Epinephrine**
- 3. Call Parents**

Previously, schools were honoring orders to administer Benadryl (or another antihistamine by mouth) and wait and watch to see if symptoms of anaphylaxis occur. If signs and symptoms occurred, the Epinephrine was administered.

Benadryl can no longer be administered first and there cannot be a "wait and watch" period of time. This change is necessary because:

1. Most schools do not have full time nurses in the building. Even if the nurse is in the district, it is impossible for the nurse to be on location at all times to provide an *accurate assessment of the student's health status*.
2. Unlicensed school staff (health clerks, secretaries, principals, teachers, coaches, bus drivers, etc.) will be the front line adults on site when the student has a contact to the specific allergen causing potential anaphylaxis.
3. Unlicensed school staff members are unprepared to assess the student's health status to determine whether or not to administer epinephrine and/or when to administer it. *Registered nurses may not delegate assessment and clinical judgment to unlicensed school staff.*
4. For the safety of the student, epinephrine will be administered immediately as ordered by your health care provider.

Attached is a letter for your health care provider that explains this requirement.

Please contact me if you have any questions.

Sincerely,

Janice Doyle, RN
School Nurse

Client - 2960 - 004670

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