BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON DEPARTMENT OF EDUCATION

IN THE MATTER OF:THE EDUCATION OF	)	**AMENDED FINAL ORDER**[1]
	)	
	)	OAH Case No. 2021-ABC-05093
STUDENT AND MEDFORD SCHOOL DISTRICT 549C	)	Agency Case No. DP 21-115
	)	

HISTORY OF THE CASE

On December 14, 2021, Guardian, on behalf of Student, filed a Request for Due Process Hearing (Complaint) with the Oregon Department of Education (ODE) under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 USC §§ 1400 *et seq*.[2] In the Complaint, Guardian alleged procedural and substantive violations of the IDEA, regarding the evaluation, educational placement, and the provision of a free appropriate public education (FAPE) to Student, for the period between December 14, 2019 and December 14, 2021 (the period in issue).

On December 17, 2021, ODE referred the case to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Jessica E. Toth to conduct the due process hearing and issue a Final Order in the case. ALJ Toth presided over a telephonic prehearing conference on January 27, 2022. Attorneys Taylar Lewis (Ms. Lewis) and Diane Wiscarson (Ms. Wiscarson) represented Guardian and Student. Attorney Richard Cohn-Lee represented Medford School District 549C (District). Guardian also participated in the prehearing conference. During the prehearing conference, the ALJ granted Guardian's request to waive the 45-day hearing timeline. The ALJ established a prehearing motion timeline, identified August 8, 2022 as the date certain for issuance of the final order, and scheduled the hearing for May 23 through May 27, 2022. OAH issued a Notice of Hearing on April 13, 2022.

ALJ Toth convened the hearing on May 23 through May 27, 2022, via WebEx video conference. Ms. Lewis and Ms. Wiscarson represented Student and Guardian, accompanied by Guardian and Guardian's wife. Attorney Nancy Hungerford (Ms. Hungerford) represented the District, accompanied by Michele Cleveland, Special Education Director for the District. The

[1] On August 8, 2022, after issuance of the Final Order, Guardian's counsel alerted the ALJ to a scrivener's error under Finding of Fact number 30. This Amended Final Order corrects that scrivener's error. The correction is indicated by bold and underlined type.

[2] In 2004, Congress reauthorized and amended the Individuals with Disabilities Education Act (IDEA) as the Individual with Disabilities Education Improvement Act of 2004 (IDEIA of 2004). Pub L 108-446, 118 Stat 2647 (2004). The Act as amended, applies to the period in issue in this Order but will be referred to as IDEA for readability and convenience.

District provided a court reporter for the hearing. Naegeli Reporting prepared written transcripts of the hearing sessions. At Guardian's request, the hearing was open to the public.

The District presented its case first. In addition to Guardian and Guardian's wife, the following witnesses testified during the hearing:

- Jonathan Barney, White River special education teacher
- Jonathan Barry, District social studies teacher
- Audrey Bowley, District special education teacher[3]
- Matthew Bulkley, Star Guides therapist[4]
- Reg Christensen, White River teacher
- Michele Cleveland, District special education director[5]
- Brenda Dufour, District assistant principal
- Logan Emonds, District teacher
- Jeffrey Fry, Ph.D[6]
- Haley Martin-Sherman, District special education teacher[7]
- Gigi Michaels, District assistant librarian
- Kristy Moody, White River parent liaison
- Erika Ochoa, District school counselor
- Dennon Rawlinson, White River therapist[8]
- Nathan Stokes, District music teacher
- Amy Tiger, District expulsion hearings officer[9]

At the close of the hearing, the ALJ held the record open for receipt of the final hearing transcript and the parties' written closing arguments. Naegeli Reporting provided the completed

[3] Over Guardian's objection, the ALJ qualified Ms. Bowley as an expert in the areas of special education planning and instruction.
[4] Mr. Bulkley testified as an expert in children and adolescent family issues, forensic social work, sexual offenses, and sexual/pornography addiction issues.
[5] Ms. Cleveland testified as an expert in the administration of special education programs.
[6]The ALJ permitted testimony by Dr. Fry, over the District's objection. Specifically, the District objected to Dr. Fry's testimony on the basis that his involvement with Student occurred outside the two-year statute of limitations.
[7] Guardian objected to the designation of Ms. Martin-Sherman as an expert in the area of teaching English literature and writing at the high school and college level, contending that the witness' experience and qualifications did not establish expertise in that area. The ALJ sustained the objection due to the witness' limited qualifications and experience, which included earning a Master's degree in June of 2020, fewer than two years earlier, and being only in her second year of teaching high school English at the time of the hearing.
[8] Mr. Rawlinson testified as an expert in Dialectical Behavioral Therapy, Integrated Crisis Response, Cognitive Behavioral Therapy, Motivational Interviewing, Positive Peer Culture, Acceptance and Commitment Therapy, Addiction Counseling and Trauma-Informed Care.
[9] Ms. Tiger testified as an expert in secondary school administration, and, over Guardian's objection, disciplinary procedures. Guardian's objection to that aspect of the designation stemmed from lack of notice given by the District; the District responded that secondary school administration implicitly includes disciplinary procedures.

transcript on June 23, 2022. The parties filed written post-hearing briefs on July 8, 2022, and the hearing record closed on that date.

ISSUES

1. Whether the District failed to evaluate the Student in all areas of suspected disability during the 2019-20 academic year, in violation of the IDEA and its implementing Oregon Revised Statutes (ORSs) and Oregon Administrative Rules (OARs).

2. Whether the District failed to properly identify Student as a student with a disability in all areas of suspected disability during the 2019-20 academic year, in violation of the IDEA and its implementing OARs and ORSs.

3. Whether the District failed to provide Student with a FAPE during the 2019-20 academic year, in violation of the IDEA and its implementing OARs and ORSs.

4. Whether the District failed to provide an appropriate placement for the Student during the 2019-20 academic year, which denied Student a FAPE in violation of the IDEA and its implementing OARs and ORSs.

5. Whether the District failed to evaluate Student in all areas of suspected disability during the 2020-21 academic year, in violation of the IDEA and its implementing OARs and ORSs.

6. Whether the District failed to properly identify Student as a student with a disability in all areas of suspected disability during the 2020-21 academic year, in violation of the IDEA and its implementing OARs and ORSs.

7. Whether the District failed to provide Student with a FAPE during the 2020-21 academic year, in violation of the IDEA and its implementing OARs and ORSs.

8. Whether the District predetermined Student's placement, failed to provide an appropriate placement for the Student, and denied Guardian participation during the 2020-21 academic year, which denied Student a FAPE in violation of the IDEA and its implementing OARs and ORSs.

9. Whether the District failed to evaluate the Student in all areas of suspected disability during the 2021-22 academic year, in violation of the IDEA and its implementing OARs and ORSs.

10. Whether the District failed to properly identify Student as a student with a disability in all areas of suspected disability during the 2021-22 academic year, in violation of the IDEA and its implementing OARs and ORSs.

11. Whether the District failed to provide Student with a FAPE during the 2021-22 academic year, in violation of the IDEA and its implementing OARs and ORSs.

12. Whether the District predetermined Student's placement, failed to provide an appropriate placement for the Student, and denied Guardian participation during the 2021-22 academic year, which denied Student a FAPE in violation of the IDEA and its implementing OARs and ORSs.

EVIDENTIARY RULINGS

Exhibits D1 through D16, offered by the District, were admitted into the record without objection. Exhibits S1 through S106 were also admitted into the record without objection.

FINDINGS OF FACT

Background Information

1. Student is an 18-year-old who has been under a legal guardianship held by Guardian since 2018. (Ex. S1; Tr. Vol. 3 at 692: 11-25; 693: 1-4.) At all times relevant to the period in issue, Student and Guardian resided within the jurisidictional boundaries of the District. (Ex. S7.)

2. Between 2004 and 2009, Student lived with biological parents, who had substance abuse issues. During that time, Student's parents physically, psychologically and sexually abused Student. (Ex. S83 at 2; Tr. Vol. 5 at 1129: 3-7.) From 2009 through 2014, after Student's removal from the biological parents, Student lived in the foster care system in various states, attending 12 schools in four years. (Ex. S35 at 7; S83 at 2.) At some point in 2017, Student returned to live with Student's biological parents. On October 14, 2017, while Student resided with the biological parents, Student's biological mother died of a drug overdose. (Ex. S83 at 2.)

3. In January of 2013, while residing in a foster placement, Student was diagnosed with attention deficit-hyperactivity disorder (ADHD). (Ex. S2 at 2.) In 2014, Washington Public Schools in Oklahoma conducted a psychoeducational evaluation of Student. The evaluation determined that Student exhibited Average cognitive ability. (Ex. S1.) Washington Public Schools identified Student as eligible to receive special education and related services under the category of Other Health Impairment (OHI) in 2014. (Ex. 2.)

4. On February 3, 2017, Lexington Middle School in Oklahoma held an individualized education program (IEP) meeting for Student. (Ex. S3.) The IEP document noted Student had academic needs in the areas of Written Expression and Math Calculation. (Ex. S3 at 2.)

5. Student thereafter relocated to Florida, where Brevard Public Schools held an IEP meeting on October 31, 2017. (Ex. S4.) The Brevard IEP team continued Student's eligibility under OHI and offered Student 210 minutes per week of special education services in the areas of writing and math. (Ex. S4 at 9.)

6. In the fall of 2018, the start of Student's ninth grade year, Student moved to Oregon and enrolled at South Medford High School (South), in Medford. (Ex. S7.) On August 15, 2018, Guardian's wife filled out registration paperwork with the District, in which she noted that Student had an IEP. (Ex. S7.)

7. Audrey Bowley (Ms. Bowley) became Student's special education teacher and case manager at the start of the 2018-2019 school year. (Tr. Vol. 1 at 53: 1-7; 161: 9-11.) The District placed Student in Ms. Bowley's tutorial class. At the start of the school year, Ms. Bowley was not aware of the basis for Student's special education placement. (Tr. Vol. 1 at 170: 21-25; 171: 1-8.) Ms. Bowley did not communicate with any of Student's prior teachers. (Tr. Vol. 1 at 118: 2-3.) She did not review Student's middle school records upon receiving Student onto her caseload. (Tr. Vol. 1 at 157: 4-10; 172: 11-16.) Ms. Bowley was also unaware that Student had been in the foster care system in various states for several years. (Tr. Vol. 1 at 147: 16-19.) Unaware of Student's background, on September 5, 2018, Ms. Bowley sent an email to other District personnel in which she described Student as not having been identified as qualifying for special education. (Ex. S8.)

8. On September 7, 2018, Central Middle School in West Melbourne, Florida, sent the District educational records for Student, including the October 31, 2017 IEP and the 2014 psychoeducational evaluation. (Ex. S4 at 1.)

9. Ms. Bowley believed that the District implemented an "interim IEP" for Student at the start of the 2017-2018 school year. According to Ms. Bowley, an interim IEP adopted whatever IEP a newly enrolled student had upon transfer into the District. Typically, the District simply entered the information from the former district's IEP into the District's own IEP form. (Tr. Vol. 1 at 155: 6-25.) Ms. Bowley did not recall the District holding an IEP meeting for Student in the fall of 2018. (Tr. Vol. 1 at 158: 22-25; 159: 1-4.) Ms. Bowley also did not realize that Student's IEP from Brevard Public Schools became a year old as of October 31, 2018. (Tr. Vol. 1 at 177: 7-16.)

10. At that time, the District had a policy of reevaluating special education students every six years. (Tr. Vol. 1 at 120: 20-25; 121: 1-11.) Because she knew that Student had been evaluated while attending school in Oklahoma in 2014, Ms. Bowley determined that Student required no re-evaluation in 2018. (Tr. Vol. 1 at 120: 16-19.) Accordingly, Ms. Bowley did not recommend that the District conduct any evaluations of Student. (Tr. Vol. 1 at 161: 15-17.)

11. On October 1, 2018, the District conducted a confidential file review of Student's educational records. (Ex. S14.) On October 26, 2018, Guardian provided written consent for the District to communicate Student's confidential health and educational information to Southern Oregon Pediatrics. (Ex. S15.) Also on October 26, 2018, Guardian provided written consent for

the District to conduct a special education reevaluation. (Ex. S16.)

12. Ms. Bowley believed that an eligibility of OHI required an observation. (Tr. Vol. 1 at 124: 14-18.) Student underwent observation as part of the eligibility determination in 2014. (Tr. Vol. 1 at 124: 19-25.) Because Student had been observed during the initial evaluation in 2014, Ms. Bowley did not conduct any observation of Student and did not know whether any other District staff conducted an observation of Student to confirm Student's eligibility. (Tr. Vol. 1 at 125: 1-3, 22-25.)

13. Nathan Stokes served as Student's music teacher at South during the 2018-2019 and 2019-2020 school year. The District did not inform Mr. Stokes that Student had an IEP. (Tr. Vol. 2 at 532: 15-25; 533: 1-9; 534: 11-17.)

14. In October 2018, community mental health counselor Esther Mortenson began providing counseling sessions to Student through a program at South. Ms. Mortenson was aware that Student's biological mother had died the year prior, that Student's biological parents were drug addicts, and that Student and siblings had moved in and out of foster care for several years. (Ex. S29.) Although Ms. Bowley was aware that Student participated in grief counseling due to a death in the family, she did not suggest adding any related services for Student in the area of mental health. (Tr. Vol. 1 at 191: 6-25; 192: 1-19.) Ms. Bowley was unaware of whether the District had a legal obligation to offer psychological services to an IEP if a student exhibited a need in that area. (Tr. Vol. 1 at 253: 19-25.)

15. At some point in the fall of 2018, on campus during school hours, Student forcibly touched a female student on her breasts and inner thigh, despite the female student stating that she did not want to be touched, and despite her attempts to remove herself from Student. The victim student informed the District of this incident on or about December 14, 2018. (Ex. S18.)

16. On December 12, 2018, Student was bullied at school when a group of other students took Student's backpack and threw it in the trash, soiling it. (Ex. S18.) Student's winter coat was lost in the incident as well. (Ex. S17.)

17. Also on December 12, 2018, Student engaged in sexual misconduct with two other students at South, on campus during the school day. Student and another student held a third student down and groped her breasts and groin area. A library staff member observed the incident through a window and intervened to stop the assault. Security video of the event showed Student physically restraining the victim, pulling her to the ground by the backpack she wore. (Ex. S18.) The District suspended Student for six days while investigating this incident. (Ex. S21.)

18. On December 14, 2018, Guardian notified Student's science teacher, Nick Soter, that Student reported being bullied at school. Guardian also informed the teacher that Student had been "in a funk," the last couple of months due, in part, to the October anniversary of Student's mother's death, and compounded by moving in with a new family, attending a new school, and being bullied. (Ex. S17.) No one from the District acknowledged or responded to Guardian's email. (Tr. Vol. 3 at 705: 10-25; 706: 1-3.)

19. On December 21, 2018, the District conducted a Manifestation Determination regarding the December 12, 2018 sexual misconduct incident. The Manifestation Determination document identified "Harassment, inappropriate touching" as the behavior subject to disciplinary action. (Ex. D4 at 1.) The District did not conduct a functional behavior assessment (FBA) as part of the Manifestation Determination. (Tr. Vol. 1 at 187: 11-19.) Ms. Bowley participated as a member of the Manifestation Determination team. She did not review Student's prior disciplinary records, which described an incident of "horseplay" in Florida in the first half of 2018. (Ex. S9.) The Manifestation Determination team indicated that it considered Student's "current IEP" as part of the determination process. (Ex. D4 at 1.) However, at the time of the Manifestation Determination, Student had no current IEP. (Tr. Vol. 3 at 607: 10-19.) The Manifestation Determination team nevertheless determined that the behavior in question (forcibly groping another student) did not directly result from the District's failure to implement Student's IEP. (Ex. D4 at 1.)

20. Despite disagreement from Guardian and Guardian's wife, the District determined that Student's behavior was not a manifestation of Student's disability. (Ex. D4 at 1.) Following the Manifestation Determination, the District placed Student on homebound instruction, pending the outcome of an expulsion proceeding. (Ex. S25 at 1, 6.) However, the District failed to provide Student with any instruction for the first several weeks of Student's homebound instruction placement. (Tr. Vol. 3 at 732: 7-20.)

21. On January 7, 2019, Brenda Dufour, assistant principal at South, communicated to Doug Buttorff, lead special education teacher, that the District had not yet developed an IEP for Student. (Ex. S22.) On January 9, 2019, Ms. Dufour asked Student's teachers to communicate with Guardian about work Student could do to earn credits, because Student had been out of school with no instruction since December 17, 2018. (Ex. S25.) On January 17, 2019, Ms. Dufour again contacted Student's teachers after learning from Guardian's wife that no teachers had communicated with the family about work Student could do during homebound instruction. (Ex. S25.) On January 18, 2019, Karl Greidans, a home instruction teacher, contacted Student's World Studies teacher inquiring about picking up class materials for Student. (Ex. S25 at 10.)

22. In January 2019, Student earned F's in various courses after the District failed to provide homebound instruction work. (Ex. S39 at 35.) After Guardian raised a concern with the District about the situation, Ms. Dufour asked Student's teachers if they would be willing to award course credit even with the missing assignments. (Ex. S39 at 69.)

23. Also on January 18, 2019, following an expulsion hearing held January 11, 2019, the District expelled Student until the end of the school year on June 5, 2019. (Ex. D4 at 2.)

24. At some time after Student's expulsion on January 18, 2019, Student enrolled in a District alternative program called Medford Opportunity, at Central High School (Central). (Tr. Vol. 126: 15-25.)

25. On January 10, 2019, school psychologist Jeffrey Fry requested a three-hour testing session for Student to be held on January 24, 2019. Dr. Fry scheduled the evaluation in response

to the consent for evaluation provided by Guardian on October 26, 2018. (Ex. S24.) Dr. Fry did not hold an evaluation planning meeting in preparation for Student's evaluation. (Tr. Vol. 4 at 929: 3-5.) Dr. Fry limited his role to assessing whether or not a student was eligible to receive special education and related services, and did not evaluate what, if any, specific services or other supports a student might require in an IEP. He sought to determine threshold eligibility for special education "in the most efficient way." (Tr. Vol. 4 at 930: 2-10.)

26. Dr. Fry felt "highly encouraged" to evaluate Student's eligibility under OHI "versus other disability categories because it was much more time-efficient and a lot of other procedures did not need to take place [for eligibility under OHI] * * *" (Tr. Vol. 4 at 930: 15-21.) In Dr. Fry's opinion, the eligibility criteria for OHI is very straightforward and simplistic, and does not require a lot of evaluation. (Tr. Vol. 4 at 930: 24-25; 931: 1-5.)

27. On February 4, 2019, Dr. Ahan Newman at Southern Oregon Pediatrics completed a Medical Statement regarding Student. In that Medical Statement, Dr. Newman noted that Student had diagnosed conditions of Adjustment Disorder and Grief. (Ex. S30.)

28. On February 11, 2019, Dr. Fry completed his evaluation report for Student. The District did not inform Dr. Fry of the reasons for Student's expulsion from South. (Tr. Vol. 4 at 935: 3.) Also, Dr. Fry did not receive a copy of Student's most recent IEP as part of his evaluation process. (Tr. Vol. 4 at 938: 8.) In conducting his evaluation, Dr. Fry did not interview Guardian or learn that Student had been in foster care. (Tr. Vol. 4 at 938: 22-25; 939: 1-4.)

29. Dr. Fry's report also summarized Student's teachers' responses to the Behavior Assessment System for Children, Third Edition (BASC-III). Teachers reported that Student exhibited needs in attention, that Student was easily distracted from work, and had difficulty initiating work, listening, and concentrating. Teachers also noted that Student often acted without thinking, demonstrated poor self-control, forgot class materials, was poorly organized, and missed deadlines. (Ex. S31.) Dr. Fry did not employ any assessment tool aside from the BASC-III in conducting Student's evaluation. (Tr. Vol. 4 at 951: 8-19.) Dr. Fry also did not conduct any formal academic or cognitive testing or a functional behavior analysis as part of his evaluation. (Tr. Vol. 4 at 953: 9-15.)

30. In his report, Dr. Fry noted that Student participated in grief counseling and had a medical diagnosis of Adjustment Disorder. (Ex. S31.) Regarding the contents of Dr. Newman's Medical Statement, Dr. Fry speculated that Student must have exhibited symptoms "way beyond just normal grieving that will lead to some kind of impairment." (Tr. Vol. 4 at 947: 21-24.) Based on that diagnosis, Dr. Fry would have considered eligibility under emotional behavior disability but did **not** address that question because Student otherwise qualified for special education under the OHI category. (Tr. Vol. 4 at 950: 2-9.) Dr. Fry found Student eligible for special education under the category of OHI. He recommended that Student continue to participate in grief counseling and access school-based mental health services. (Ex. S31.)

31. On March 8, 2019, the District held its first IEP meeting for Student. (Ex. S35.) The IEP team determined that Student exhibited behavior that impeded Student's learning. The team

also identified that Student's impulsivity caused Student to make inappropriate decisions and interactions, and made Student susceptible to peer pressure. (Ex. S35 at 5.) However, in the IEP document, the District stated that social skills were not an area of concern. (Ex. S35 at 7.) Guardian disagreed with that determination, based on Student's recent expulsion for sexual misconduct with another student. For Guardian, Student's assault on another student suggested that Student exhibited deficits in the area of appropriate social behavior. (Tr. Vol. 3 at 740: 7-17.) Guardian likewise disagreed with the IEP's statement that Student exhibited respectful, responsible and mature behavior. (Ex. S35 at 5; Tr. Vol. 3 at 740: 21-25; 741: 1.)

32. The March 2019 IEP noted that Student performed at the sixth grade level in Math and in task-related skills. (Ex. S35 at 8, 9.) The IEP offered Student one annual goal in Math, one annual goal in Task-Related Skills, and two hours each per month of specially designed instruction (SDI) in Behavior and Math. (Ex. S35 at 8, 9, 14.) The IEP team determined that Student required no related services, psychological or otherwise. (Ex. S35 at 14.) The March 8, 2019 IEP placed Student in regular education, with special education services provided in the regular education setting. (Ex. S35 at 21.) Guardian provided consent to implement the IEP on March 8, 2019. (Ex. S35 at 23.)

33. At some point after March 19, 2019, Student returned to South from the program at Central. (Ex. S38.) Assistant Principal Dufour intended to ask school counselor Erika Ochoa and Ms. Bowley to develop a safety plan as part of Student's re-entry to South. (Ex. S38.) Ultimately, Ms. Dufour was unsure whether the District ever developed a safety plan for Student. (Tr. Vol. 3 at 622: 12-17.) Although Ms. Ochoa thought she created a safety plan for Student, she did not place a copy of it in Student's cumulative educational file. (Tr. Vol. 3 at 668: 2-25.) Ms. Ochoa could not recall involving Guardian in development of the plan, distributing the safety plan to teachers, or whether one aspect of the plan included Student staying apart from specific other students. (Tr. Vol. 3 at 669: 1-10.) The District never mentioned a safety plan to Guardian, involved Guardian in the creation of such a plan, or provided a copy of a safety plan to Guardian. (Tr. Vol. 3 at 745: 21-25; 746: 1-4.)

2019-2020 School Year

34. Student began the 2019-2020 school year at South. (Tr. Vol. 1 at 129: 25; 130: 1-2.) Shortly after the school year commenced, school staff Jennifer McKenzie reported observing Student engage in inappropriate behavior with other students on campus on September 10, 2019, as well as during the week prior to that. (Ex. S40.) The reported behavior included roughhousing and touching others inappropriately. (Ex. S40 at 8.) The District did not notify Guardian about Student's inappropriate behavior at school. Had Guardian been notified, he would have sought a more restrictive placement to address what appeared to be escalating negative behaviors. (Tr. Vol. 3 at 746: 7-25; 747: 1-3.)

35. Jonathan Barry, Student's social studies teacher in the 2019-2020 school year, was not aware of any safety plan for Student. (Tr. Vol. 3 at 571: 1-9.) Ms. Bowley never provided Mr. Barry with training regarding implementation of Student's IEP. (Tr. Vol. 3 at 572: 11-13.) Mr. Barry observed that Student did not complete tasks or work in his class. (Tr. Vol. 3 at 560: 3-4.)

36. Regarding progress toward Student's annual IEP goals, the District reported that as of October 24, 2019, Student exhibited insufficient progress toward the task-related skills goal. The progress report stated that Student was "having difficulty demonstrating task-related skills in tutorial as measured by observation conducted on October 24, 2019," but neglected to elaborate on either the difficulty observed or the method of observation. On January 16, 2020, at the next reporting period, the District reported that Student was having the same difficulties. (Ex. S54 at 2.)

37. Meanwhile, on December 17, 2019, Guardian sent an email to Student's teachers expressing his concerns about Student's academic progress. Guardian noted that Student was currently failing most classes and expressed the belief that Student required extra support to make academic progress. (Ex. S43 at 5.) Though teachers responded with offers to schedule a meeting, no meeting was scheduled. (Ex. S43 at 1-5.) The District did not hold an IEP until March 2, 2020. (Ex. S44.)

38. On March 2, 2020, the annual IEP meeting revealed that Student met the previous year's Math goal but did not meet the Task-Related Skills goal. (Ex. S44 at 5.) Despite Student not having met the goal to perform tasks at a sixth grade level, the new Task-Related Skills goal stated that Student would demonstrate task-related skills at an 11th grade level. (Ex. S44 at 7.) In the spring of 2020, as a tenth grader, Student continued to perform at a sixth grade level in Math. (Tr. Vol. 1 at 134: 14-25; 135: 1-5.) The March 2, 2020 IEP offered Student SDI for two hours per month each in Math and Task-Related Skills. The IEP also offered nine hours yearly of transition services but no other related services. (Ex. S44 at 14.)

39. In the spring of 2020, when schools closed for in-person instruction due to the COVID-19 pandemic, the District shifted its instructional delivery model to distance learning. During that time, direct instruction was very limited. Teachers did not work directly with students unless a student reached out to them for assistance. (Tr. Vol. 1 at 130: 3-25; 131: 1-17.)

40. On June 3, 2020, the District reported that Student made satisfactory progress on the task-related skills goal, as measured by observation. The IEP did not explain what form of observation teachers conducted in the distance learning setting. The IEP also stated that Student made satisfactory progress toward the annual math goal as "measured by classroom-based measures," without further explanation of what those measures entailed. (Ex. S47.) Regarding the report's statement that Student made sufficient progress toward both goals, Ms. Bowley did not specify a degree or amount of progress "because we were in COVID." (Tr. Vol. 1 at 230: 4-5.)

2020-2021 School Year

41. By the fall of 2020, Ms. Bowley was not certain whether Student performed at grade level in Math. (Tr. Vol. 1 at 115: 20-25; 116: 1-25; 117: 1-21.) Ms. Bowley did not provide Student's math teacher, Mr. Emonds, with any training about how to implement the math SDI in Student's March 2020 IEP. (Tr. Vol. 2 at 509: 17.) In fact, Mr. Emonds was unaware that Student had an IEP. (Tr. Vol. 2 at 509: 2-3.)

42. As of October 15, 2020, Student had an F grade in English, due to missing assignments. (Ex. S49; Tr. Vol. 2 at 477: 19-25; 478: 1-2.) On October 20, 2020, Student's English teacher, Haley Martin-Sherman, informed Guardian that she unilaterally excused Student from some class assignments because Student had an IEP. (Ex. S50 at 2.) Guardian had concerns about Ms. Martin-Sherman reducing Student's workload, because Student's IEP did not include that modification. (Tr. Vol. 4 at 919: 20-25; 920: 1-12.) Conversely, although Student's IEP contained the accommodation of assistive technology, Ms. Martin-Sherman did not provide Student with any assistive technology in class. (Tr. Vol. 2 at 483: 23-24.)

43. The District's October 2020 and January 2021 IEP Progress Reports addressing the March 2020 IEP goals contained no information about Student's progress as of the respective reporting dates. (Ex. S54.) Ms. Bowley did not know why the District failed to report on Student's goal progress in the fall semester. (Tr. Vol. 1 at 240: 7.)

44. Mr. Stokes awarded Student an A in concert band class on December 17, 2020. (Ex. D2 at 2.) During that fall semester, while distance learning remained in effect, any student who had regular attendance, turned in assignments at any point, and contributed to the final product of the semester received an A. (Tr. Vol. 2 at 538: 4-7.) Mr. Stokes did not know whether Student's IEP accommodations were implemented in music class. (Tr. Vol. 2 at 534: 6.)

45. On December 20, 2020, Student was arrested for Sex Abuse 1 – Incapable of Consent. Student molested a three-year-old niece, Guardian's daughter. (Exs. S52, S53.)

46. On January 15, 2021, Guardian's wife sent an email to Student's teacher, Bryant Rominger, notifying him that Student was going through a difficult time. Nearly six months later, on June 4, 2021, Mr. Rominger replied that he was no longer Student's teacher. (Ex. S68.)

47. In approximately February 2021, Guardian called school counselor Ms. Ochoa to inform her of Student's December 2020 arrest and subsequent police investigation, hoping that Ms. Ochoa might have resources to help Student. (Tr. Vol. 3 at 761: 3-18.) When Ms. Ochoa communicated the information to her supervisor, Mr. Buttorff, he directed her to call Guardian and state that the District could not provide any financial support to Student. (Tr. Vol. 3 at 666: 22-24.) On February 2, 2021, Mr. Buttorff sent an email to Ms. Cleveland, the District's special education director, in which he communicated Guardian's request that the District fund an out of state placement for Student because Guardian could no longer safely keep Student in the family's home. Ms. Cleveland responded that the District would not offer such a placement, concluding that the placement change was not educationally-related. (Ex. D11 at 2.) In forming that conclusion, Ms. Cleveland was not familiar with Student's needs, IEP, progress, grades, or medical diagnosis. (Tr. Vol. 2 at 338: 11-25.) The District did not hold an IEP meeting to address Guardian's concerns. (Tr. Vol. 3 at 667: 2.)

48. On February 8, 2021, Guardian unilaterally enrolled Student in Star Guides, an outdoor behavioral health program for adolescent males with sexual addiction. (Ex. S57; Tr. Vol. 5 at 1033: 8-9; 1066: 4-7.) While enrolled in Star Guides, Student received psychotherapy to treat posttraumatic stress disorder, major depressive disorder, and other specified disruptive,

impulse-control, and conduct disorder. (Exs. S59, S83.) On May 12, 2021, Ms. Cleveland sent an email noting that Guardian requested funding for an out of state placement. In that email, Ms. Cleveland also stated to Ms. Bowley, "I see that [Student] was withdrawn on 3/4/2021," though Ms. Cleveland did not specify where she obtained that information. (Ex. S62 at 10.) Further, on March 1, 2021, Ms. Dufour sent an email stating that Student had not been disenrolled at that point. (Ex. S62 at 5.)

49. Licensed clinical social worker Matthew Bulkley served as Student's therapist at Star Guides. Student participated in two, 45-minute sessions of individual therapy and 45-minute sessions of group therapy every day of each week. (Tr. Vol. 5 at 1037: 11-25; 1038: 1-6.)

50. Mr. Bulkley identified Student as an adolescent with a complex case involving a variety of challenging mental health and behavioral issues. (Tr. Vol. 5 at 1040: 13-16.)

51. Mr. Bulkley observed Student to make progress at Star Guides, including becoming more responsible, more honest, and more capable of accurately interpreting past trauma. (Tr. Vol. 5 at 1041: 15-18.) However, Mr. Bulkley also observed that it took Student a significant amount of time to be able to acknowledge having sexually molested three victims – Student struggled to take ownership of those actions. (Tr. Vol. 5 at 1048: 15-25.) Furthermore, Student struggled to accept the truth of Student's own trauma as a victim of abuse, initially denying that experience. (Tr. Vol. 5 at 1053: 13-22.)

52. The fact that Student victimized multiple children, combined with the slow progress toward taking accountability, caused Mr. Bulkley to believe that Student risked re-offending (assaulting peers and younger children) if returned to the community from Star Guides. (Tr. Vol. 5 at 1049: 19-25.) Based on his work with Student, Mr. Bulkley believed that Student was not ready to transition back into the community from Star Guides, due to Student's ongoing needs in the areas of emotional stability and judgment. (Tr. Vol. 5 at 1049: 1-6.) Star Guides recommended that Student continue treatment in another intensive, therapeutic environment due to the continued risk of re-offense and the need for ongoing support to maintain emotional regulation. (Ex. S84.)

53. White River provides a therapeutic placement in Utah serving boys aged 13-17 with a variety of mental health and addiction issues. White River also includes a state-accredited school program that enables students to earn a high school diploma. (Tr. Vol. 3 at 679: 17-19; 680: 4-12; 725: 15-16; 726: 1-3.) White River's instructional model includes one licensed teacher, one teaching assistant, and eight to 12 students per classroom. (Tr. Vol. 3 at 726: 4-14; 727: 19-25.) White River provides students with career development, work-based learning, ACT testing preparation, support with college applications, and college tours. (Tr. Vol. 3 at 726: 15-25.)

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54. On August 20, 2021, Guardian sent an email to the District expressing 10-day notice of Guardian's intent to enroll Student in private placement at public expense. (Ex. S73.)

55. On August 31, 2021, Ms. Dufour sought a copy of the safety plan she believed had been developed for Student in the spring of 2019. Special education coordinator Kendall Roberts informed Ms. Dufour that he did not have a copy of the plan. (Ex. S74.)

56. The District held an IEP meeting for Student on September 1, 2021. (Ex. S76.) The IEP noted Student's history of trauma due to intense sexual abuse. During the IEP meeting, Guardian's wife summarized Student's history of sexual misconduct, which included victimizing multiple students at South during school, Guardian's three-year-old daughter, Guardian's niece, and animals at Guardian's home. Guardian also informed the IEP team that Student developed an internet pornography addiction while accessing technology during distance learning. Guardian further notified the IEP team that Student required restricted access to the internet and needed supervision on campus to prevent Student from interacting with other children, particularly those who might not be able to effectively advocate for themselves. (Ex. S76 at 2.) Guardian explained that Student would seek out other, vulnerable students to sexually abuse. (Ex. S76 at 5.) Guardian's wife further explained that Student was calculating, and sought out opportunities to evade supervision, such as accessing internet pornography when being supervised by a deaf family member who could not hear the computer audio, or taking a niece into a playhouse where they were obscured from Guardian's view. (Ex. S76 at 5.)

57. Guardian's counsel pointed out language in the draft IEP document indicating that Guardian had disenrolled Student from the District, clarifying that such language was inaccurate. The IEP also documented Mr. Roberts' action of changing the IEP language so that it did not show Guardian withdrawing Student. (Ex. S76 at 3.) In reviewing placement options for Student, Guardian's wife advised the IEP team that home instruction and online instruction were not appropriate placements for Student due to the risk of unsafe computer and internet activity. (Ex. S76 at 4.) When the District described a special day program setting designed for students with emotional disturbance, Guardian's wife expressed concern that students in that type of placement could be vulnerable to victimization by Student. Ms. Cleveland responded to Guardian's wife's concern by noting that peers in that placement would have average cognitive ability. (Ex. S76 at 5.) The District did not propose a safety plan for Student at the September 2021 IEP meeting. (Tr. Vol 3 at 788: 5-10.) The IEP team did not include a task-related skills goal, although Ms. Bowley believed Student still exhibited needs in that area. (Tr. Vol. 1 at 261: 25.) The IEP included one math goal and two social-emotional goals, with 2160 minutes per year of math SDI and 4320 minutes per year of social-emotional SDI. The IEP offered no related services to Student. (Ex. S77 at 9-11.)

58. In the September 2021 IEP, the District offered placement in a special day program setting with less than 40 percent of time in regular education, stating that the offered placement best met Student's needs at that time. (Ex. S78 at 2.) In a prior written notice document, the District stated that the offered placement provided additional supports in relation to Student's previous placement in the District, which the District characterized as successful. (Ex. S79 at 1.) Guardian disagreed with the offered placement. (Ex. S76 at 5.) Guardian informed the District that Student was set to enroll in White River on September 6, 2021. (Ex. S76 at 2.)

59. On September 11, 2021, Star Guides discharged Student following successful program completion. Student transitioned to White River from Star Guides. Student

participated in individual, group, family, and equine therapy as part of the program at White River. (Tr. Vol. 3 at 687: 17-25.) Individual therapy occurred weekly, group therapy occurred five times per week, and family therapy occurred once every two weeks, with Guardian and his wife participating. (Tr. Vol. 5 at 1125: 14-25; 1126: 1-20.)

60. In approximately November 2021, Dennon Rawlinson became Student's primary therapist at White River. (Tr. Vol. 5 at 1121: 13-18.) By that time, Student's diagnoses included post-traumatic stress disorder (PTSD), major depressive disorder, and impulse control disruptive disorder. Those diagnoses remained accurate as of the date of hearing. (Tr. Vol. 5 at 1123: 5-12.)

61. In Mr. Rawlinson's assessment, Student made therapeutic progress at White River, including becoming happier, less oppositional, more open with expressing feelings, and more able to manage behavior. (Tr. Vol. 5 at 1124: 3-18.) Student continued to struggle with age-appropriate social skills. (Tr. Vol. 5 at 1128: 3-24.) Additionally, Student's trauma background of abuse by family members and transient lifestyle in the foster care system resulted in Student's inability to form stable attachments. (Tr. Vol. 5 at 1129: 3-24.) Student's tendencies to seek out pornography or act out sexually stem from a desire to connect and to "feel better" when struggling with mental health. (Tr. Vol. 5 at 1130: 16-25; 1131: 1-6.) Student seeks out vulnerable individuals because conflict is less likely to arise than it might when initiating interaction with more confident individuals. (Tr. Vol. 5 at 1131: 21-25; 1132: 1-6.) Impulsivity stemming from PTSD causes Student to act out based on a feeling in the moment, without considering possible consequences of behavior. (Tr. Vol. 5 at 1134: 8-11.)

62. Student made academic progress and earned grade level credits at White River. (Tr. Vol. 3 at 720: 8-20.) Jonathan Barney, Student's science teacher at White River, observed that Student progressed from initially being quiet and occasionally sleeping in class to participating well in class discussions. (Tr. Vol. 3 at 718: 23-25; 719: 1-5.) Mr. Barney held a special education credential through the state of Utah. (Tr. Vol. 3 at 728: 4-8.)

63. Kristy Moody, Student's parent liaison at White River from September through December 2021, observed that Student struggled a bit at the outset and then performed well, was on track to graduate from high school, and was looking forward to the future. (Tr. Vol. 3 at 681: 14-24; 682: 5-10.) Based on credits earned, White River anticipated that Student would complete all requirements for high school graduation by August 2022. (Tr. Vol. 4 at 824: 3-19.)

64. According to Mr. Rawlinson, Student continues to struggle with being detached from reality but has made progress in that area. (Tr. Vol. 5 at 1142: 14-25.) At the time of the May 2022 due process hearing, Mr. Rawlinson believed that Student required continued treatment at White River. Student had progressed to the point where therapy was very productive and beneficial. Mr. Rawlinson opined that, had Student remained in the public school setting, Student would have continued to engage in sexual acting out behavior which would have been harmful for both for Student and those victimized by Student. (Tr. Vol. 5 at 1143: 1-25.)

65. On March 1, 2022, Student authorized Guardian to act as Student's education rights holder regarding the instant due process case. (Ex. S90.)

66. Between February and August 2021, Guardian paid $44,500 for Student to participate in the Star Guides program. Between September 2021 and May 26, 2022, Guardian paid $67,164 for Student's tuition at White River. (Ex. S99; Tr. Vol. 4 at 1010: 24-25; 1011: 1.)

67. Student's tuition at White River cost Guardian $6,694 per month. (Ex. S102.) Between May 26, 2022 and August 2022, Guardian anticipated three more months' of tuition costs to complete Student's program through high school graduation. (Tr. Vol. 4 at 1012: 2-6.)

68. In connection with Student's move to White River, Guardian incurred the following expenses: $648.38 for one airline ticket for travel from Medford to Las Vegas on September 5, 2021; $56.08 for a rental vehicle on September 6, 2021; $387.80 apiece for two airline tickets for travel between Medford and Salt Lake City on October 7, 2021; $416.67 for hotel accommodations on October 7, 2021; $57.01 for a rental vehicle on October 11, 2021; $371.47 for hotel accommodations on April 7, 2022; $467.20 apiece for two airline tickets for travel between Medford and Salt Lake City on April 7, 2021; and $718.00 for a rental vehicle on October 7, 2021. (Ex. S100 at 11-57.) White River required Guardian to attend an in-person parent weekend on a quarterly basis as part of the program curriculum. (Tr. Vol. 3 at 797: 14-25; 798: 1-24.)

CONCLUSIONS OF LAW

1. The District failed to evaluate the Student in all areas of suspected disability during the 2019-20 academic year, in violation of the IDEA and its implementing OARs and ORSs.

2. The District failed to properly identify Student as a student with a disability in all areas of suspected disability during the 2019-20 academic year, in violation of the IDEA and its implementing OARs and ORSs.

3. The District failed to provide Student with a FAPE during the 2019-20 academic year, in violation of the IDEA and its implementing OARs and ORSs.

4. The District failed to provide an appropriate placement for the Student during the 2019-20 academic year, which denied Student a FAPE in violation of the IDEA and its implementing OARs and ORSs.

5. The District failed to evaluate Student in all areas of suspected disability during the 2020-21 academic year, in violation of the IDEA and its implementing OARs and ORSs.

6. The District failed to properly identify Student as a student with a disability in all areas of suspected disability during the 2020-21 academic year, in violation of the IDEA and its implementing OARs and ORSs.

7. The District failed to provide Student with a FAPE during the 2020-21 academic year, in violation of the IDEA and its implementing OARs and ORSs.

8. The District predetermined Student's placement, failed to provide an appropriate placement for the Student, and denied Guardian participation during the 2020-21 academic year, which denied Student a FAPE in violation of the IDEA and its implementing OARs and ORSs.

9. The District failed to evaluate the Student in all areas of suspected disability during the 2021-22 academic year, in violation of the IDEA and its implementing OARs and ORSs.

10. The District failed to properly identify Student as a student with a disability in all areas of suspected disability during the 2021-22 academic year, in violation of the IDEA and its implementing OARs and ORSs.

11. The District failed to provide Student with a FAPE during the 2021-22 academic year, in violation of the IDEA and its implementing OARs and ORSs.

12. The District predetermined Student's placement, failed to provide an appropriate placement for the Student, and denied Guardian participation during the 2021-22 academic year, which denied Student a FAPE in violation of the IDEA and its implementing OARs and ORSs.

OPINION

Burden of Proof

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this case, Guardian sought relief and bears the burden of persuasion. The standard of proof applicable to an administrative hearing is preponderance of the evidence. ORS 183.450(2); *Harris v. SAIF, 292 Or 683, 690 (1982)* (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, the standard of proof that generally applies in agency proceedings, including license-related proceedings, is the preponderance standard); *see also Cook v. Employment Div.*, 47 Or App 437 (1980). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractors v. Tandy Corp.,* 303 Or 390 (1987).

Federal and state requirements for use of funds under IDEA

States may access federal funding to provide education to children with disabilities, but the states must provide that education in accordance with federal law. *See* 20 USC §1411 *et. seq*. States receiving funds must have in effect certain policies and procedures. *See* 20 USC §1412 *et seq*. To receive these funds, a state must provide that a "free and appropriate education is available to all children with disabilities[.]" 20 USC §1412(a)(1)(A).

Congress, in amending IDEA in 2004 stated the following:

> The purposes of this chapter are—
>
> (1)
> (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
>
> (B) to ensure that the rights of children with disabilities and parents of such children are protected [.]

20 USC § 1400(d).

Pursuant to the requirements of the IDEA, under 34 CFR part 300 *et. seq*., the United States Department of Education promulgated regulations for state use of funds used to carry out the provisions of the Act. OAR Chapter 581 Division 015, promulgated under ORS Chapter 343, mirrors, for the most part, the requirements set out in the federal regulations. The majority of the opinion below cites to the relevant OAR as the implementing rules for Oregon with which school districts are required to comply.

Student is eligible to receive special education and related services under the IDEA. Guardian alleges that District failed, under the specific allegations set out below, to meet its legal obligation to provide special education and related services, as required under IDEA, to Student. Oregon applies the Ninth Circuit's "snapshot" rule in determining whether a school district's actions complied with the IDEA. *Adams by Adams v. Oregon*, 195 F. 3d 1141, 1149 (9th Cir. 1999) (*citing Fuhrmann ex rel. v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3rd Cir. 1993)) (the court must examine what knowledge the school district reasonably possessed at the time of the action, or lack of action, in question). The ALJ applied the snapshot rule to analysis of Guardian's claims, below.

Issues 1, 5, and 9: Whether the District failed to evaluate the Student in all areas of suspected disability, in violation of the IDEA and its implementing OARs and ORSs during the period in issue.

Guardian contends that the District denied Student a FAPE by failing to evaluate Student in all suspected areas of eligibility throughout the period in issue. This contention has merit.

OAR 581-015-2105 addresses a school district's obligation to evaluate students with disabilities and states, in pertinent part:

> (4) Reevaluation:
>
> * * * * *

(b) A reevaluation for each child with a disability:

(A) May occur not more than once a year, unless the parent and public agency agree otherwise; and

(B) Must occur at least every three years, unless the parent and public agency agree that a reevaluation is unnecessary.

OAR 581-015-2110, addressing evaluation procedures, states, in pertinent part:

(1) Evaluation planning. Before conducting any evaluation or reevaluation of a child, the public agency must conduct evaluation planning in accordance with OAR 581-015-2115.

* * * * *

(4) Other evaluation procedures. Each public agency must ensure that:

* * * * *

(d) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(e) The evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified; and

(f) The evaluation includes assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.

(5) Evaluation timelines:

* * * * *

(b) Reevaluation. A reevaluation must be completed within 60 school days from written parent consent (or from the date the evaluation is initiated under OAR 581-015-2095(3)(c) to the date of the meeting to consider eligibility, continuing eligibility or the student's educational needs.

(c) Exceptions. An evaluation may be completed in more than 60 school days under the following circumstances outside the school district's control.

(A) The parents of a child repeatedly fail or refuse to produce the child for an evaluation, or for other circumstances outside the school district's control.

(B) The student is a transfer student in the process of evaluation and the district and the parents agree in writing to a different length of time to complete the evaluation in accordance with subsection (d);

(C) The district and the parents agree in writing to extend the timeline for an evaluation to determine eligibility for specific learning disabilities in accordance with OAR 581-015-2170.

Throughout the period in issue, the District failed to adhere to its duties under OAR 581-015-2105. Shortly after Student enrolled at South in the fall of 2018, the District was advised that Student was last evaluated in 2014. Yet, apparently due to a District policy of not reevaluating students more frequently than every six years, the District did not conduct any reevaluation of Student during the period in issue. The District's policy runs contrary to the law in Oregon. OAR 581-015-2105(1)(a)(B) clearly requires reevaluation to occur on a triennial basis, unless the parent and district agree otherwise. In this case, Guardian and the District did not agree to a different timeline. Therefore, from the time Student enrolled at South, the District had an ongoing obligation to evaluate Student in all suspected areas of disability.

The "evaluation" conducted by Dr. Fry in early 2019 was not adequate to satisfy the requirements of OAR 581-015-2105(4) and OAR 581-015-2110. Even though Dr. Fry produced his report in March 2019, prior to the start of the period in issue, it is appropriate to analyze its adequacy because it determines whether the District satisfied reevaluation timeline requirements at the start of the period in issue, or was out of compliance with those requirements. As set out above, the District had an obligation to evaluate Student in all suspected areas of disability, and to conduct an evaluation that is sufficiently comprehensive to identify all of Student's special education and related service needs. Dr. Fry did not engage in the evaluation planning required under OAR 581-015-2110(4). Dr. Fry did not evaluate Student in any suspected area of disability other than OHI, contrary to OAR 581-015-2105(4). The evidence presented establishes that the evaluation procedures undertaken by the District in the spring of 2019 and documented in Dr. Fry's report did not satisfy the reevaluation requirements under OAR 581-015-2105. Therefore, the District had a continuing obligation to reevaluate Student as of December 14, 2019.

However, during the period in issue, the District conducted no evaluations of Student. Despite lacking formal academic and psychological testing results obtained within the three years prior to the period in issue, the District did not initiate any new evaluations for Student. Throughout the period in issue, the District possessed no assessment information for Student other than Student's test results from 2014 and the BASC-III results collected by Dr. Fry in 2019. That means that, throughout the period in issue, the District developed and implemented IEPs for Student based on insufficient and outdated evaluation information. By neglecting to reevaluate Student during the period in issue, the District denied Student a FAPE.

Issues 2, 6, and 10: Whether the District failed to properly identify Student as a student with a disability in all areas of suspected disability, in violation of the IDEA and its implementing OARs and ORSs during the period in issue.

Public school districts have an affirmative duty to locate, identify, and evaluate "[a]ll children with disabilities residing in the [district] * * * regardless of the severity of their disabilities * * * who are in need of special education and related services * * * * *." 20 USC §1412(3); *see also* OAR 581-015-2080. This "child find" duty "is triggered when the [local education agency] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability." *Dept. of Educ. of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001).

OAR 581-015-2145 defines the requirements for determining eligibility under the category of Emotional Disturbance[10]:

> (1) If a child is suspected of having an emotional disturbance, the following evaluation must be conducted:
>
> (a) Social-emotional evaluation. An evaluation of the child's emotional and behavioral status, including a developmental or social history, when appropriate.
>
> (b) Medical or health assessment statement. A medical statement or a health assessment statement indicating whether there are any physical factors that may be affecting the child's educational performance;
>
> (c) Behavior rating scales. The completion of at least two behavior-rating scales, at least one of which is a standardized behavior measurement instrument;
>
> (d) Observation. An observation in the classroom and in at least one other setting by someone other than the child's regular teacher;
>
> (e) Other:
>
> (A) Any additional assessments necessary to determine the impact of the suspected disability:
>
> (i) On the child's educational performance for a school-age child; or
>
> (ii) On the child's developmental progress for a preschool child; and
>
> (B) Any additional evaluations or assessments necessary to identify the child's educational needs.

[10] ORS 343.035 was amended and now uses the term Emotional Behavior Disability to describe this category of eligibility for special education and related services.

(2)(a) To be eligible as a child with an emotional disturbance, the child must meet the following minimum criteria:

(b) The child exhibits one or more of the following characteristics over a long period of time and to a marked degree;

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms, or fears associated with personal, or school problems.

(3) For a child to be eligible for special education services as a child with emotional disturbance, the eligibility team must also determine that:

(a) The child's disability has an adverse impact on the child's educational performance; and

(b) The child needs special education services as a result of the disability;

(4) A child who is socially maladjusted may not be identified as having an emotional disturbance unless the child also meets the minimum criteria under this rule.

The District had reason to suspect emotional behavior disability as an area of disability for Student. By failing to identify Student as such, the District could not, and did not, offer an IEP reasonably calculated to meet Student's unique needs during the portions of the 2019-2020, 2020-2021, and 2021-2022 school years relevant to the period in issue. With that failure, the District denied Student a FAPE during the period in issue.

By the beginning of the period in issue, as of December 14, 2019, District staff working directly with Student knew that Student participated in grief counseling due to the death of Student's mother. Guardian communicated to District staff that Student experienced bullying and exhibited negative effects of coping with the anniversary of Student's biological mother's death. District staff knew that Student exhibited inappropriate behavior with peers on multiple occasions, one of which was serious enough to result in Student's expulsion. Despite having that information, the District failed to offer to conduct any further evaluation of Student.

In the 2020-2021 school year, in addition to all prior knowledge about Student's potential needs in the area of emotional behavioral disability, the District also became aware that Student's sexual misconduct behaviors had escalated. In February 2021, the District learned of Student's December 20, 2020 arrest for sexual molestation of a young child in the family home. The District knew that Guardian placed Student in an intensive sexual misconduct treatment program (Star Guides) to address Student's behavioral and mental health issues. Guardian contacted the District and requested support and/or reconsideration of Student's placement. Despite having that information, the District failed to offer to conduct any further evaluation of Student.

In the portion of the 2021-2022 school year relevant to the period in issue, through December 14, 2021, the District gained a wealth of knowledge about Student's needs that reasonably should have made the District suspect an emotional behavioral disability. Despite having that information, the District failed to offer to conduct any further evaluation of Student.

Throughout the period in issue, the District had reason to suspect an emotional behavior disability as an area of disability applicable to Student. OAR 581-015-2145 includes numerous Emotional Disturbance eligibility criteria relevant to Student. Over a long period of time and to a marked degree, Student demonstrated an inability to build or maintain satisfactory interpersonal relationships with peers and teachers. OAR 581-015-2145(2)(b)(B). Student engaged in inappropriate behavior under the normal circumstance of the school setting. OAR 581-015-2145(2)(b)(C). Student exhibited a general pervasive mood of unhappiness or depression, consistent with Student's diagnoses of Adjustment Disorder and Grief. OAR 581-015-2145(b)(2)(D). Those facts triggered a duty on the District to initiate further evaluation of Student. OAR 581-015-2145(1)(a). Subsequent to that evaluation, the District should have held an IEP meeting to analyze possible eligibility in accordance with OAR 581-015-2145(3). Having done none of those things during the period in issue, the District failed to properly identify Student in all suspected areas of disability in violation of the IDEA.

Issues 3, 7, and 11: Whether the District failed to provide Student with a FAPE, in violation of the IDEA and its implementing OARs and ORSs during the period in issue.

Guardian alleges that the District denied Student a FAPE during the period in issue by inadequately reporting on Student's present levels of performance (PLP), failing to develop an IEP reasonably calculated to confer educational benefit in light of Student's unique circumstances, and failing to materially implement Student's IEPs.

The IDEA defines FAPE as special education and related services that: (a) have been provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the state educational agency; (c) include an appropriate preschool, elementary, or secondary school education in the state involved; and (d) are provided in conformity with the IEP required under §1414(a)(5) of the IDEA. 20 USC §1401(a)(18); *Amanda J. v. Clark County School Dist.,* 267 F3d 877, 890 (9th Cir. 2001). The Supreme Court set out the requirements of a "free appropriate public education" in the seminal case of *Board of Educ. of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982). Regarding the "appropriate" aspect of FAPE, a school district must "be able to offer a cogent and responsive explanation for their decisions that

shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1002 (2017).

Following identification and evaluation requirements, the cornerstone for educating a student under the IDEA occurs through developing a procedurally and substantively sufficient IEP which provides an offer of FAPE. The IDEA requires that "at the beginning of the school year, each local educational agency * * * shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program[.]" 20 USC § 1414(d)(2)(A); 34 CFR §300.323(a). OAR 581-015-2220 mirrors the federal requirement, requiring that:

> (1) General:
>
> (a) At the beginning of each school year, a school district must have in effect an IEP for each child with a disability within the district's jurisdiction.
>
> (b) School districts must provide special education and related services to a child with a disability in accordance with an IEP.

In relevant part, OAR 581-018-2200, addressing the content of the IEP, provides:

> (1) The individualized education program (IEP) must include:
>
> (a) A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum.
>
> (b) A statement of measurable annual goals, including academic and functional goals (and, for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of short-term objectives) designed to:
>
> (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
>
> (B) Meet each of the child's other educational needs that result from the child's disability.
>
> (c) A description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
>
> (d) A statement of the specific special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement

of the program modifications or supports for school personnel that will be provided for the child:

(A) To advance appropriately toward attaining the annual goals;

(B) To be involved and progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and

(C) To be educated and participate with other children with disabilities and children without disabilities,

(e) The projected dates for initiation of services and modifications and the anticipated frequency, amount, location and duration of the services and modifications described in subsection (1)(d) of this rule.

(f) An explanation of the extent, if any, to which the child will not participate with children without disabilities in the regular class and activities described in subsection (1)(d) of this rule[.]

The IEP team is also directed to develop, review, and revise a student's IEP in consideration of the special factors set out in OAR 581-015-2205. OAR 581-015-2205, entitled "IEP Team Considerations and Special Factors[,]" requires that:

(1) In developing, reviewing and revising the child's IEP, the IEP team must consider:

(a) The strengths of the child;

(b) The concerns of the parents for enhancing the education of their child;

(c) The results of the initial or most recent evaluation of the child; and

(d) The academic, developmental, and functional needs of the child.

(2) In developing, reviewing and revising the child's IEP, the IEP team must consider the following special factors:

(a) The communication needs of the child; and

(b) Whether the child needs assistive technology devices and services.

(3) In developing, reviewing and revising the IEP of children described below, the IEP team must consider the following additional special factors:

> (a) For a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies to address that behavior;
>
> * * * * *
>
> (4) If, in considering these special factors, the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) for the child to receive free appropriate public education, the IEP team must include a statement to that effect in the child's IEP.

OAR 581-015-2070, addressing non-academic services, states:

> (1) School districts must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP team, to provide nonacademic and extracurricular services and activities in a manner to afford children with disabilities an equal opportunity to for participation in those services and activities.
>
> (2) Nonacademic and extracurricular services and activities may include meals, recess periods, counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school district, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the school district and assistance in making outside employment available.

Provision of special education occurs through implementation of the IEP. A failure to implement an IEP will constitute a violation of a student's right to a FAPE only if the failure was material. There is no statutory requirement that a district must perfectly adhere to an IEP, and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a disabled student fall significantly short of the services required by the IEP. *Van Duyn, et al. v. Baker School District 5J* 481 F.3d 770 (9th Cir. 2007). A party challenging the implementation of an IEP must show more than a minor failure to implement all elements of that IEP, and instead, must demonstrate that the school district failed to implement substantial and significant provisions of the IEP. *Id*. However, the materiality test is not a requirement that prejudice must be shown. *Id.* at 822 ("[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail.")

At the start of the period in issue, as of December 14, 2019, Guardian lacked sufficient information about Student's PLPs to determine Student's degree of progress toward annual goals. For example, the most current progress report at that time, from October 2019, contained only a vague statement about Student's progress toward task-related skills being measured by observation. The progress report contained no explanation or detail describing what the observation entailed. The report stated that Student exhibited difficulty with the task-related skills goal and labeled it as insufficient progress, but did not provide further explanation.

Additional progress report entries from January, March and June 2020 contained only vague statements without measurable data or other specific information to enable Guardian to gain a clear understanding of Student's progress, or lack thereof.

Student's March 2020 IEP reported that Student had not met a sixth grade level task-related skills goal over the year prior. Inexplicably, in response to that lack of progress, the District added to the March 2020 IEP a task-related skills goal that was five grade levels higher. The IEP contained no explanation of how Student was to achieve an 11th grade level goal that year, after failing to achieve a sixth grade level goal in the same subject area. Student's social studies teacher reported that, during the 2020-2021 school year, the District did not provide him with a safety plan for Student or any training regarding how to implement Student's IEP.

Furthermore, despite reporting that Student performed at a sixth grade level in Math, in the 10th grade, the District offered only two hours per month of SDI in Math. Similarly, the District offered Student only two hours per month of SDI in Behavior, though Student had an annual goal to achieve five grade levels of progress in one year on the task-related skills goal. The amount of SDI offered to Student in the March 2020 IEP did not line up with the severity of Student's need for SDI in either Math or Behavior.

During the fall semester of the 2020-2021 school year, the District failed to implement Student's SDI minutes. While school occurred via distance learning, the District delivered Student's SDI through general education teachers rather than directly via a special education teacher qualified to provide that type of instruction. Student's special education teacher and case manager provided no guidance to the general education math teacher regarding Student's IEP. In fact, Student's math teacher did not even know that Student had an IEP. Given that Student's math teacher was unaware that Student had an IEP, let alone an annual goal in Math, it is impossible to conclude that Student received SDI instruction in math. Moreover, no evidence demonstrated that Student's teachers provided Student with any SDI in the area of task-related skills, or behavior needs, during the 2020-2021 school year.

Also during that fall semester of the 2020-2021 school year, Student's general education English teacher unilaterally reduced Student's workload by excusing Student from completing some class assignments due solely to the fact that Student had an IEP. Student's IEP did not call for a workload reduction. That same teacher admitted to failing to implement any assistive technology for Student, despite the fact that Student's IEP included it as a needed accommodation. Student's music teacher in that semester did not know whether Student's IEP accommodations were implemented in the music class setting. These facts, taken together, established that the District engaged in material failures to implement Student's IEP, as described in *Van Duyn*, 481 F.3d 770, in the 2020-2021 school year.

In the September 1, 2021 IEP meeting, despite receiving significant new information regarding the seriousness of Student's behaviors and needs, the District declined to offer an IEP with meaningfully more supports or services. Most noticeably absent from the IEP was any offer of related service in the area of mental health or behavior support. Although District staff was aware that Student had mental health diagnoses, had been arrested for sexual misconduct, and had been placed in an intensive therapeutic program for adolescents with sexual acting out

behavior, the IEP offered no counseling, no psychological services, no individual behavior aide, or any other service that could possibly address Student's serious behavior needs.

Throughout the period in issue, in the various ways identified above, the District failed to meet Student's unique needs, both academically and behaviorally. That failure occurred both through material errors in implementing Student's IEP and lack of appropriate supports and services offered through the IEP. Consequently, Guardian has demonstrated that the District denied Student a FAPE during the 2020-2021 school year.

Issues 4, 8, and 12: Whether the District failed to provide an appropriate placement, which denied Student a FAPE in violation of the IDEA and its implementing OARs and ORSs during the period in issue.

Guardian alleges that the District failed to offer placement in the least restrictive environment appropriate to meet Student's needs and predetermined Student's educational placement during the period in issue. This contention has merit.

20 USC §1412(a)(5)(A) sets forth the IDEA's requirement that disabled students be educated in the least restrictive environment (LRE) appropriate for the student's needs and requires that school districts ensure:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Similarly, OAR 581-015-2240 provides state requirements in Oregon for compliance with the IDEA's LRE mandate and provides, in part:

> School districts must ensure that:
>
> (1) To the maximum extent appropriate, children with disabilities * * * are educated with children who do not have a disability and
>
> (2) Special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

OAR 581-015-2245 outlines the requirements for alternative placements and supplementary aids and services and reads, in part:

> School districts must ensure that a continuum of alternative placements is

available to meet the needs of children with disabilities for special education and related services. The continuum must:

(1) Include as alternative placements, instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions;

(2) Make provision for supplementary aids and services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement[.]

OAR 581-015-2250 identifies requirements for appropriate placements of children with disabilities and provides, in relevant part:

School districts must ensure that:

(1) The educational placement of a child with a disability:

(a) Is determined by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options;

(b) Is made in conformity with the Least Restrictive Environment (LRE) provisions of OAR 581-015-2240 to 581-015-2255.

(c) Is based on the child's current IEP;

(d) Is determined at least once every 365 days; and

(e) Is as close as possible to the child's home;

(2) The alternative placements under OAR 581-015-2245 are available to the extent necessary to implement the IEP for each child with a disability;

(3) Unless the child's IEP requires some other arrangement, the child is educated in the school that he or she would attend if not disabled;

(4) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs; and

(5) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

A school district that unilaterally decides upon a student's educational placement separate and prior to an IEP meeting impermissibly predetermines the placement. See *Deal v. Hamilton*

Board of Education, 42 IDELR 109 (6th Cir. 2004), *cert. denied*, 110 LRP 46999, 546 U.S. 936 (2005). A procedural violation of predetermination must result in actual injury to justify a parent's request for relief. *See, e.g., L.M.P. v. School Bd. of Broward County, Fla.*, 71 IDELR 101 (11th Cir. 2018).

Failure to Offer Placement in the Least Restrictive Environment Appropriate for Student

During 2019-2020 and 2020-2021 school years, the first two school years relevant to the two-year period in issue, the District failed to offer Student placement in the least restrictive environment appropriate to meet Student's needs. From December 14, 2019 through the end of the 2020-2021 school year, Student exhibited significant social-emotional and behavioral needs, the nature and severity of which prevented FAPE from being satisfactorily achieved in the placement the District provided. Prior to the period in issue, Student exhibited behavior so serious that it resulted in expulsion and removal from South for several months. Upon return to South in late March 2019, Student resumed exhibiting the same type of behavior, as observed by school staff. Despite this, the District took no action to identify a different educational placement for Student in the 2019-2020 and 2020-2021 school years to address Student's social-emotional and behavior needs through a more structured, more restrictive setting.

The District offered that same placement in the March 2020 IEP. By December 2020, Student's continued negative behaviors included the molestation of a three-year-old niece. The fact that no serious behavior incidents occurred on campus after formulation of the March 2020 IEP does not serve to establish that Student's educational placement was appropriate. Rather, in actuality, Student was prevented from exhibiting serious behavior incidents on campus from that point because schools were closed to in-person learning.

Predetermination of Placement

In February 2021, the District predetermined placement when Ms. Cleveland stated to Mr. Buttorff, outside of the IEP process, that the District would not consider funding residential placement for Student. The District did not offer to hold an IEP meeting to discuss Guardian's request for funding for a private placement. The District made no effort to ascertain from Guardian the reasons for Guardian's decision to move Student into a private placement. In fact, when the District's special education director declined Guardian's request, she was not even familiar with Student's needs, IEP progress, grades, or medical diagnosis. Consequently, the preponderance of the evidence demonstrates that, by the time of the September 1, 2021 IEP meeting, the District predetermined Student's placement and therefore did not seriously consider residential placement even when presented with a wealth of new information about Student's then-current and very significant social-emotional and behavioral needs. In failing to meaningfully consider a range of placement options including residential placement, the District offered an inappropriate educational placement, denying Student a FAPE.

The decisions made by the District regarding Student's educational placement resulted in a denial of a FAPE to Student over the course of the period in issue. As of December 14, 2019, Student was placed in an environment lacking the support, specifically in the form of adult supervision, to meet Student's needs. The District failed Student during that time by neglecting

to offer a more restrictive placement. Then, as of the development of the September 1, 2021 IEP, the District denied Student a FAPE by predetermining the educational placement.

Appropriateness of Private Placement

Looking specifically at residential private placements in the context of special education, residential placement is appropriate only when necessary to provide a student with FAPE. *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493 (9th Cir. 1996); *see also Clovis Unified School District v. California Office of Administrative Hearings*, 903 F2d 635 (9th Cir. 1990) "our analysis must focus on whether [the residential] placement may be considered necessary for *educational* purposes." Further, if "the placement is a response to medical, social, or emotional problems * * * quite apart from the learning process," then it would not be deemed necessary in terms of provision of FAPE. *Clovis* at 643. A private placement may be deemed educationally necessary if it provides supports that fit the IDEA's definition of related services, including but not limited to counseling, social work services, and psychological services. *Edmonds Sch. Dist. v. A.T.*, 74 IDELR 218 (9th Cir. 2019, *unpublished*). The private placement does not need to meet state educational standards in order for the placement to be proper. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 14 (1993).

White River constituted an appropriate placement for Student in that it provided a highly structured and intensive therapeutic environment targeted toward the types of social-emotional needs that Student exhibited. White River placed Student with similarly situated peers in an environment tailored to address Student's needs, with mental health services delivered every day and an academic program that enabled Student to earn the remaining credits necessary to achieve a high school diploma. White River provided post-secondary transition support by offering assistance with college visits and applications, standardized testing preparation, and career exploration. Student made therapeutic progress at White River in that Student became less oppositional, more open with expressing feelings, and better able to manage behavior.

Reimbursement for Private Placement

Parents are entitled to private school tuition reimbursement where the child's district failed to offer the child FAPE and the parents' unilateral private placement is appropriate. 34 CFR 300.148(c). *See also Florence County*; and *School Comm. of Burlington v. Department of Ed. of Mass.* at 369. However, reimbursement may be denied or limited if parents fail to provide notice of the student's private placement enrollment in a timely manner, fail to make the student available for an evaluation, or act unreasonably in the course of the IEP's development. 34 CFR 300.148(d) states that reimbursement can be reduced or denied:

> (1) If -
> (i) At the most recent IEP team meeting that the parents attended prior to the child's withdrawal from public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the district (including stating their concerns and their intent to enroll their child in a private school at public expense); or

(ii) at least 10 business days (including any holidays that occur on a business day) prior to the removal of the child from public school, the parents did not give written notice to the district of the same information;

(2) If, prior to the parents' removal of the child from the public school, the district informed the parents, through the notice requirements described in 34 C.F.R. 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

OAR 581-015-2515(4) reflects the same standard.

OAR 581-015-2515 provides additional guidance regarding reimbursement for private placement and provides, in part:

(1) If a private school child with a disability has available a free appropriate public education and the parents choose to place the child in a private school, the public agency is not required to pay for the cost of the child's education, including special education and related services, at the private school. However, the public agency must include that child in the population whose needs are addressed as parentally-placed private school children consistent with OAR 581-015-2475.

(2) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child and the question of financial responsibility are subject to the due process procedures under OAR 581-015-2340 through 581-015-2385.

(3) If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or an administrative law judge may require the agency to reimburse the parents for the cost of that enrollment if the court or administrative law judge finds that the agency had not made a free appropriate public education (FAPE) available to the child in a timely manner before that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by an administrative law judge or a court even if it does not meet the State standards that apply to education provided by public agencies.

Citing *Forest Grove School District v. T.A.*, 638 F.3d 1234 (9th Cir. 2011), the District contends that Student's private placement was not appropriate, and therefore Guardian is not entitled to any reimbursement. The evidence establishes otherwise with regard to White River.

In *Forest Grove,* the Ninth Circuit denied parents recovery of private placement tuition costs because of extenuating circumstances. The Ninth Circuit observed that although nothing in the IDEA requires that the private placement be the result of the student's disability, the evidence supported a finding that the unilateral private placement was motivated by student's substance abuse and behavioral problems, factors that were unrelated to the student's disability (a diagnosis of ADHD). The Ninth Circuit based its determination on statements the parents made on the private school application, which showed that the student's enrollment was unrelated to his disabilities. The parents identified inappropriate behavior, opposition, and drug use as events that precipitated the student's enrollment, and did not indicate any academic reasons for the private placement.

As addressed above, and contrary to the circumstances in *Forest Grove*, Guardian met his burden to prove that the District denied Student a FAPE and that the unilateral private placement at White River was educationally-related. In Student's case, the evidence established that Student required a more restrictive educational environment than what had been offered by the District. Student demonstrated unique social-emotional and behavioral needs impacting Student's ability to access Student's educational program. The impact on Student's educational progress entitled Student to more services and support in those areas, and a more restrictive educational placement, than the District offered or provided.

Regarding the District's contention that Guardian failed to satisfy the notice requirement of 34 CFR 300.148(d) and OAR 581-015-2515(4), the ALJ disagrees with the District's position that Student had already been removed from the public school system at the point when Guardian provided notice of his intent to privately place Student at public expense. The facts of Student's case did not show a clear disenrollment at any point. First, Guardian's act of placing Student at Star Guides did not constitute an educational placement, as Star Guides offered no academic curriculum as part of its program. In other words, it was not the case that Student's schooling shifted from South to Star Guides. The time at Star Guides should more accurately be characterized as a temporary, albeit lengthy, absence from school while participating in a rehabilitation program. Second, the District presented no formal documentation, such as records from Student's cumulative file, showing a date of disenrollment. The date cited in the District's post-hearing brief originated from a statement in an email between the special education director and the case manager in which the director stated that she could "see [Student] was withdrawn," with no further explanation regarding the source of that information. (District's post-hearing brief at 52, footnote 10.) Third, during the September 1, 2021 IEP team, Guardian's counsel explicitly stated that language in the draft IEP document describing Student as "unenrolled" was inaccurate, to which the District responded that the document language would be changed to show that Guardian did not withdraw Student from enrollment. The evidence presented at hearing did not establish that Student had already been removed from the public school at the time notice was given, based on Student participating in the Star Guides program.

Guardian satisfied the notice requirement of 34 CFR 300.148(d) and OAR 581-015-2515(4) with the August 20, 2021 letter to the District declaring his intent to privately place Student at public expense ten days later, and then going forward with the placement at White River on September 6, 2021, more than ten days after giving the notice. Additionally, the placement at White River was otherwise appropriate, as required by CFR 300.148(c) and OAR

581-015-2515. Guardian therefore met the requirements for reimbursement for Student's placement at White River.

As noted above, concerning Guardian's earlier decision to unilaterally place Student in the Star Guides wilderness program, Star Guides provided solely therapeutic services and included no educational component. Guardian did not meet his burden to prove that Star Guides was an educationally necessary placement for Student. Therefore, Guardian failed to establish entitlement to reimbursement of costs associated with Student's participation in Star Guides.

Remedies Sought

As set forth throughout this order, the District committed various violations of the IDEA that denied Student a FAPE during the period in issue. Guardian seeks multiple remedies for these violations including District reimbursement for funding of a wilderness program, a residential placement, and associated expenses; funding for continued residential placement; compensatory education; evaluations of Student in all areas of suspected disability; an IEP meeting with necessary experts to produce an appropriate IEP; and training for District staff. As a result of the District's failure to comply with the procedural and substantive requirements of the IDEA, Student has been denied educational opportunities and has been deprived of educational benefit. Student is thus entitled to a remedy as addressed below.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. 20 U.S.C. § 1415(i)(1)(C)(iii); *see School Committee of the Town of Burlington, Massachusetts v. Dept. of Education*, 471 U.S. 359, 369 (1985). Hearing officers/administrative law judges in special education cases have similar broad equitable powers. *Forest Grove School Dist. v. T.A.*, 557 U.S. 230 (2009). In determining the equitable remedy, the hearing officer or ALJ may consider the school district's failure to update student's IEP, placements, and other documents, and their refusal to cooperate. *See Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1059-1060 (9th Cir. 2012) Under the IDEA, the court or ALJ shall "grant such relief as [it] determines is appropriate" if a public agency has denied a FAPE to the student. 20 U.S.C. §1415(i)(2)(B)(iii); *Hacienda La Puente,* 976 F.2d at 492. Equitable considerations are relevant in fashioning relief. *Sch. Comm. of the Town of Burlington v. Dept. of Educ.,* 471 U.S. 359, 374 (1985). The conduct of both parties must be reviewed to determine whether relief is appropriate. *See Target Range,* 960 F.2d at 1486.

Reimbursement for private placement tuition may be an appropriate equitable remedy in securing a FAPE for a student. *S.V. v. Sherwood Sch. Dist.*, 31 LRP 5784 (OR 1999), citing *Pihl v. Massachusetts Dept. of Educ.*, 9 F.3d 184, 188 (1st Cir. 1993.) When evaluating the requested remedy of tuition reimbursement, "equitable considerations are relevant in fashioning relief." *Florence County*, 510 U.S. at 15-16. Doing so requires a consideration of "all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Id.* at 16.

Guardian is entitled to reimbursement in the amount of $87,246 for Student's tuition and

fees at White River between September 6, 2021 and August 2022.[11] In addition, Guardian is entitled to reimbursement in the amount of $3,977.61 for necessary travel and lodging expenses associated with Guardian's efforts in transporting Student to White River and for Guardian and his wife to make two trips to White River to participate in family therapeutic activities as part of Student's program.[12] This totals $91,223.61 for reimbursement of tuition and related expenses incurred by Guardian as a result of Student's placement at White River.

Student's additional requests for relief are denied. As discussed above, Guardian did not meet his burden to prove entitlement to reimbursement for Star Guides. Regarding the remaining requested remedies of continued placement at White River, evaluation, an IEP meeting, and staff training, evidence presented at hearing established that Student was expected to complete all remaining coursework and graduate from high school in August 2022. The additional requested remedies therefore are not warranted, given that Student will have successfully completed a high school education. Further, as noted previously, the evidence demonstrated that Student made appropriate academic progress while at White River, and therefore Guardian did not establish that Student requires post-graduation compensatory education.

Guardian also requests reimbursement for attorney fees and costs associated with enforcing Student's rights under the IDEA. 20 USC § 1415(i)(3)(B) permits an award of attorney's fees to parents or guardians that prevail in actions brought under the IDEA. Nonetheless, this tribunal lacks the authority to grant such an award to Guardian. Rather, Guardian must petition the district court for such an award. 20 USC § 1415(i)(3)(A) (granting jurisdiction over attorney fee awards to "the district courts of the United States."). As such, this order does not address the merits of Guardian's attorney fee claim.

ORDER

Guardian has shown by a preponderance of the evidence that the District did not provide Student with a FAPE as required under IDEA. **Accordingly, it is ordered that:**

The District shall reimburse Guardian $91,223.61 for the cost of tuition and expenses associated with Student's placement at White River Academy between September 6, 2021 and August 2022.

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[11] This amount was determined by combining the $67,164 tuition already paid at time of hearing and three additional months at $6,694 per month (6,694 x 3 = 20,082). $67,164 + $20,082 = $87,246.

[12] This amount was determined by totaling the following expenses: $648.38 for one airline ticket for travel from Medford to Las Vegas on September 5, 2021; $56.08 for a rental vehicle on September 6, 2021; $387.80 apiece for two airline tickets for travel between Medford and Salt Lake City on October 7, 2021; $416.67 for hotel accommodations on October 7, 2021; $57.01 for a rental vehicle on October 11, 2021; $371.47 for hotel accommodations on April 7, 2022; $467.20 apiece for two airline tickets for travel between Medford and Salt Lake City on April 7, 2021; and $718.00 for a rental vehicle on October 7, 2021.

Jessica E. Toth
Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

NOTICE TO ALL PARTIES: If you are dissatisfied with this Order you may, within 90 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(i)(2). Failure to request review within the time allowed will result in **LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER.**

ENTERED at Salem, Oregon this 9th day of August, 2022, with copies mailed to:

Jan Burgoyne, Oregon Department of Education, Public Services Building, 255 Capitol Street NE, Salem, OR 97310-0203.

CERTIFICATE OF MAILING

On August 9, 2022 I mailed the foregoing AMENDED FINAL ORDER issued on this date in OAH Case No. 2021-ABC-05093**.**

By: Certified and First Class Mail

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