

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
SUPERINTENDENT OF PUBLIC INSTRUCTION**

IN THE MATTER OF THE EDUCATION OF:     ) **FINAL ORDER**  
   )  
Student and West Linn-Wilsonville School     ) OAH Case No.: DP 11-122  
District   )  
   )  
   )

**HISTORY OF THE CASE**

On or about August 15, 2011, the Parents filed a due process request for hearing against the West Linn-Wilsonville School District (District) with the Superintendent of Public Instruction. The request for hearing alleged that the Student had been denied a free appropriate public education (FAPE). The parties waived holding a resolution session.

On August 18, 2011, the Superintendent of Public Instruction referred the case to the Office of Administrative Hearings. The case was assigned to Senior Administrative Law Judge (ALJ) Ken L. Betterton.

A telephone pre-hearing conference was held on September 19, 2011. Attorney Diane Wiscarson represented the Parents. Attorney Richard G. Cohn-Lee represented the District. The pre-hearing was continued to October 17, 2011 for the parties to attempt to mediate the case. The mediation was unsuccessful.

A telephone pre-hearing conference was held on October 17, 2011. Attorney Wiscarson represented the Parents. Attorney Cohn-Lee represented the District. The case was scheduled for hearing on February 23, 24, 27-29, and on March 14 and 15, 2012. The parties agreed to extend the 45-day deadline in ORS 343.167(5) for the issuance of the decision in the case to May 18, 2012.

A telephone status conference was held on February 14, 2012 at the request of the District to discuss procedural matters for the hearing scheduled to start February 23, 2012. Attorney Wiscarson represented the Parents. Attorney Cohn-Lee represented the District. The hearing remained scheduled to start on February 23, 2012.

A hearing was conducted at the District's main administrative office in Tualatin, Oregon, on February 23, 24, 27-29, and on March 14 and 15, 2012. Attorney Wiscarson represented the Parents. Attorneys Cohn-Lee and Andrea L. Hungerford represented the District. The hearing did not conclude on March 15 as the parties originally expected. The hearing was continued to May 8-10, 2012.

Shortly before May 8, 2012, the Parents requested that the case be scheduled for a telephone status conference on May 8, 2012, and that the hearing scheduled for May 8, 2012 not

take place because the Student had experienced a recent medical emergency and the Parents were unable to participate in the hearing.

A telephone status conference was held on May 8, 2012. Attorney Wiscarson represented the Parents. Attorney Cohn-Lee represented the Parents. The hearing was rescheduled for August 14-16, 2012. The parties agreed to extend the 45-day deadline in ORS 343.167(5) for the issuance of the decision in the case to October 5, 2012.

A hearing was held August 14-16, 2012 at the District's main administrative office in Tualatin, Oregon. Attorney Wiscarson represented the Parents. Attorney Cohn-Lee represented the District.

The following witnesses testified for the District during the course of the hearing: Jennifer Ziolko, District special education coordinator; Jennifer Patterson, Boones Ferry Primary School (Boones Ferry) principal; John Page, Boones Ferry special education teacher; Cindy Krieg, Boones Ferry teacher; Bill Brant, District school psychologist; and Carolyn Miller, District assistant director of student services.

The following witnesses testified for the Parents during the course of the hearing: Karen Menne, District instructional coordinator; Melissa O'Kelley, Boones Ferry speech language pathologist; Kami Like, Boones Ferry instructional assistant; Kathy Porterfield, District instructional coordinator; Sue Switzer, instructional assistant with the District at Boones Ferry and Stafford Primary School; Kenneth Welch, Ph.D., District director of student services; Karen Roberts, a tutor in private practice (by telephone); Lindsay Rentschler, a social therapist in private practice; Erin Forgeron, an occupational therapist in private practice; Kristina Montgomery, a private educational provider; Jennifer Taylor, a teacher at Building Bridges, a private educational provider; Tricia Hasbrook, founder and director at Victory Academy, a private educational provider; Pam Dahm, a speech language pathologist in private practice; Emma Aglipay, a teacher at Victory Academy; the Student's Father; and the Student's Mother.

The transcript of the hearing held February 23 through February 29, 2012 was provided to the parties and to the ALJ shortly after February 29, 2012. The transcript of the hearing held March 14 and 15, 2012 was provided to the parties and to the ALJ shortly after March 15, 2012. The transcript of the hearing held August 14 through August 16, 2012 was provided to the parties and to the ALJ on or about August 23, 2012.

The parties filed their written closing arguments on September 7, 2012.

The decision in the case was issued by the October 5, 2012 date agreed to by the parties.

## **ISSUES**

(1) Whether the District failed to evaluate the Student in all areas of suspected disability during the 2009-2010 academic year, in violation of the Individuals with Disabilities Educational Improvement Act (IDEA) and Oregon law.

(2) Whether the District failed to provide the Student a free appropriate public education (FAPE) during the 2009-2010 academic year, in violation of the IDEA and Oregon law.

(3) Whether the District failed to provide an appropriate placement for the Student during the 2009-2010 academic year, in violation of the IDEA and Oregon law.

(4) Whether the District failed to evaluate the Student in all areas of suspected disability during the 2010-2011 academic year, in violation of the IDEA and Oregon law.

(5) Whether the District failed to provide the Student a FAPE during the 2010-2011 academic year, in violation of the IDEA and Oregon law.

(6) Whether the District failed to provide an appropriate placement for the Student during the 2010-2011 academic year, in violation of the IDEA and Oregon law.

(7) If the District committed any of the above violations, what is the appropriate remedy?

### **EVIDENTIARY RULING**

Exhibits D1 through D54 (except the last page of Exhibit 52 which refers to another student), offered by the District, were admitted into evidence without objection.

Exhibits P1 through P8, P11 through P92, P93 (pages 8 through 22), P94 through P104, and P109 through P118 (except P7, P8, P11, P12, P29, P38, P62, and P94, which were not offered), offered by the Parents, were admitted into evidence without objection.

The District objected to Exhibits P9, P10, P93 (pages 1 through 7), and P105 through P108, because they contained information about events that occurred more than two years prior to the date the Parents filed their due process hearing request. The District's objection was overruled and the exhibits were admitted into evidence for purposes other than establishing a claim for relief for events that occurred more than two years prior to the date the Parents filed their due process hearing request.

### **FINDINGS OF FACT**

#### *Factual background*

(1) The Student was born on June 6, 2001. (Ex. D1 at 1.) The family has lived in the District in Wilsonville, Oregon during all times relevant to this case. The Parents also have a daughter two years older than the Student and who attends school in the District. (Test. of the Father, Tr. at 99-102 (Aug. 14, 2012).) The Father works as a managing claims adjuster for a medical malpractice insurance carrier in the Portland area. The Mother has a based-home business. Although the Mother travels some in connection with her business, she mostly works from home by computer and telephone conferencing. (*Id.* at 132-35.)

(2) During the 2006-2007 academic year, the Student attended a pre-kindergarten program at Building Bridges, a private educational provider for young children with behavioral problems. The Student was taught by Jennifer Taylor. Ms. Taylor is trained in applied behavioral analysis (ABA) and has experience working with children with autism. (Test. of Taylor, Tr. at 191-93 (Mar. 14, 2012).)

(3) On April 4, 2007, the District referred the Student for an evaluation for special education based on concerns regarding communication, social behavior and autism. In April 2007, Mike Miller, a District school psychologist, evaluated the Student. Mr. Miller's evaluation indicated that the Student had a variety of unusual behaviors, difficulty interacting with peers, difficulty paying attention, and behaviors typical of individuals with autism. (Ex. P107 at 1-4.) Brad Hendershott, autism specialist with Columbia Regional Program, evaluated the Student in April 2007, and concluded that the Student had behaviors typical of individuals with autism. (Ex. P106 at 1-4.) L. Krupa, M.D., provided a medical statement in April 2007 that the Student had diagnoses of autism, attention deficit/hyperactivity disorder (ADHD) and developmental delay. (Ex. P108.) On June 6, 2007, the District found the Student eligible for special education services under Autism Spectrum Disorder (ASD) in a report submitted by Alison Childs, District speech-language pathologist. (Ex. P108.)

(4) In the fall of 2007, the Student began attending morning kindergarten in the communications resource classroom (CRC) at Stafford Primary School (Stafford) in the District. (Test. of the Mother, Tr. at 102 (Aug. 14, 2012).) The Student also attended afternoon kindergarten at Building Bridges during the 2007-2008 academic year. (Test. of Taylor, Tr. at 195-204 (Mar. 14, 2012).)

(5) The Student returned to the Stafford CRC in the fall of 2008 for the first grade. The Student had behavior and aggression issues at school during the fall of 2008. (Test. of the Mother, Tr. at 107 (Aug. 14, 2012).) Another student, "L," also attended the CRC at Stafford. The Student and "L" were aggressive toward each other and did not get along. (Test. of Switzer, Tr. at 242-47 (Feb. 28, 2012).)

(6) On January 8, 2009, the District convened an IEP meeting and developed an IEP and behavior protocol to serve the Student until January 7, 2010 (January 2009 IEP). (Ex. D1.) The Mother, Karen Menne, a district instructional coordinator, Jackie Hultine, a District staff person, and Jennifer Ziolko, District special education coordinator, attended the IEP meeting. (Ex. D2.) The box on the section for "IEP Meeting Participants" indicated that no regular teacher attended because it was "not necessary due to [the Student's] educational program." (Ex. D1 at 1.)

(7) The January 2009 IEP meeting took place in order to make changes to the Student's IEP in the areas of specially designed instruction, present levels of performance, services summary, and placement in order to reflect the Student's current educational needs. (Ex. D3.) The IEP team decided to send the Student to his neighborhood school, Boones Ferry Primary School (Boones Ferry), and to continue the Student in a self-contained classroom, starting January 20, 2009. (*Id.*)

(8) The January 2009 IEP team determined that the Student needed assistive technology devices or services; that the Student had communication needs; and that the Student exhibited behavior that impeded his/her learning or the learning of others. (Ex. D1 at 2.) The January 2009 IEP addressed in detail the Present Levels of Academic Achievement and Functional Performance, including the strengths of the Student, the concerns of the Parents for enhancing the education of their child; the present level of academic performance of the Student, the present level of developmental and functional performance; and how the Student's disability affected involvement and progress in the general education curriculum. (*Id.* at 3-4.)

(9) The January 2009 IEP addressed Measurable Annual Goals as follows:

Math: [The Student] will increase [his/her] math level. Progress will be measured by the criteria of 2.0 grade level, with evaluation procedures of observation, informal assessment, and work sample.

Writing: [The Student] will increase [his/her] writing skills to be able to write three sentences on a given topic. Progress will be measured by the criteria of 80 percent accuracy, with evaluation procedures of work sample, observation, data collection, and informal assessment.

Reading: [The Student] will increase [his/her] reading level in the areas of comprehension and prediction. Progress will be measured by the criteria of 2.0 grade level, with evaluation procedures of work sample, observation, and informal assessment.

Social Communication: [The Student] will improve social communication skills by increasing [his/her] wait time when others are talking, making comments or asking questions on topic and speaking at appropriate volume level, independently, when excited or upset. Progress will be measured by the criteria of 8/10 opportunities, with evaluation procedures of observation and data collection.

Social Behavior: [The Student] will increase [his/her] self-monitoring skills by stopping to think about [his/her] actions, using [his/her] words, walking away, and/or talking with a teacher when [he/her] is upset (decreasing inappropriate behaviors). Progress will be measured by the criteria of 80 percent of the time in all school settings, with evaluation procedures of observation, role play and data collection.

(*Id.* at 6-10.)

(10) The January 2009 IEP team determined that the Student needed to be removed from participating with non-disabled students in the regular classroom, extracurricular, or nonacademic activities for the provisions of special education services, related services, or supplementary aids and services. The Student would receive his/her specially designed instruction in a self-contained special education setting. The Student would be removed from the regular education classroom over five to six hours per day, out of a six and one-half hour day. He/she would attend lunch and two recesses on a daily basis, with peers. Some days, the Student would spend more times with peers (in the general education classroom). (Ex. D1 at 13.)

(11) The District facilitates opportunities for students in self-contained classrooms to interact with regular education peers for social and academic development by assigning them to regular education classes as “partner classes.” (Test. of Patterson, Tr. at 128-29 (February 27, 2012).)

(12) The January 2009 IEP explained the justification for the removal as follows:

Due to [the Student's] behavior, [he/she] needs support and instruction in the areas of behavior and social communication in a small setting. [The Student] can get overwhelmed with loud noises and a lot of people. In a small setting, [the Student] is learning appropriate behaviors. As [his/her] appropriate behaviors increase, [he/she] has the opportunity to decrease [his/her] time in the general education classroom.

(Ex. D1 at 13.)

(13) The January 2009 IEP team determined that extended school year (ESY) services would not be provided. (Ex. D1 at 13.)

(14) Ms. Ziolko followed up the January 2009 IEP meeting with a Prior Notice of Special Education Action form dated January 8, 2009 to the Parents confirming the action taken by the IEP team and explaining the reasons for the action. (Ex. D3.)

(15) The District established a behavior protocol for the Student on January 8, 2009, that was revised on February 3, 2009, and that, among other things, provided for the Student's Parents to be called if the Student's behavior escalated to an unsafe level and continued for 30 minutes. (Exs. D4 and D5.)

(16) On January 20, 2009, the Student began attending the applied academics (AA) class at the District's Boones Ferry school taught by John Page. The Student's sister also attended Boones Ferry in a general education class. Boones Ferry is located within walking distance of the Student's home. The AA class was a self-contained special education classroom. Mr. Page is a certified special education teacher with a master's degree in special education. He has more than ten years' experience working in special education resource room and self-contained classroom settings and has prior experience working with students with autism. (Test. of Page, Tr. at 233-34 (Feb. 23, 2012).)

(17) Sue Switzer, an instructional assistant (IA) with the District, had worked with the Student in the CRC at Stafford during the 2008-2009 school year. Ms. Switzer went with the Student to Boones Ferry in January 2009 and worked with him/her one-on-one in Mr. Page's AA class from January through June 2009 during the remainder of the Student's first grade. Ms. Switzer observed that the Student acted happy and engaged in his/her academics and believed he/she progressed well in the curriculum from January through June 2009 at Boones Ferry. (Test. of Switzer, Tr. at 249 (Feb. 28, 2012).)

(18) Mr. Page prepared progress notes on June 5, 2009 for the January 2009 IEP and provided copies of the notes to the Parents. (Ex. D6.) Mr. Page believed the Student made meaningful progress toward the IEP goals, including gains in word recognition, reading, comprehension, writing, math, social communication, and social behavior. (Compare D1 and D6; Test. of Page, Tr. at 241-62 (Feb. 23, 2012).) Mr. Page noted that he and other staff in the AA classroom would continue to work on the Student's behavior: "[the Student] is in a much better space and is less likely to become upset or physically strike out at another individual. We continued to work on having [the Student] speak appropriately to adults in his/her environment." (Ex. D6 at 6.)

*Second grade school year (2009-2010)*

(19) The Student returned to the AA class at Boones Ferry in September 2009 for the 2009-2010 school year for the second grade. The Student's partner class for the 2009-2010 school year was taught by Margot Patula, a regular education teacher. At the beginning of the school year, the Student attended lunch, recesses and music with his/her partner class. (Test. of Page, Tr. at 238-39 (Feb. 23, 2012).)

(20) In late September 2009, on school picture day in a gymnasium area, the Student became agitated waiting in line for his/her picture to be taken and kicked Mr. Page in the groin. (Test. of Mr. Page, Tr. at 572 (Feb. 24, 2012).) Mr. Page did not report the incident to the District. As a result, the District's administration was unaware of the incident and took no disciplinary action against the Student. (Test. of the Mother, Tr. at 308 (Aug. 14, 2012).)

(21) On November 20, 2009, the District, through Mr. Page, sent the Parents written notification of an IEP meeting scheduled for December 10, 2009. (Ex. D8.) In preparing for the IEP meeting, Mr. Page prepared an Evaluation Report. (Ex. D9.) In his Evaluation Report, Mr. Page noted the following, in part:

Reading: [The Student] can read through a low second grade level with 94 percent accuracy, but that [he/she] has considerable difficulty with comprehension.

Writing: [The Student] is working on both handwriting and keyboarding, is able to write well when copying information, but continues to require prompting to produce more than one sentence on a topic.

Math: [The Student] continues to make good progress in math, and is currently at the 2.19 grade level according to Successmaker [a math program].

Speech/Language: [The Student] has made improvements in social cognition skills, but continues to have difficulty relaying information about a story/event to others with a clear beginning, middle and end.

Social/Emotional/Behavioral: The Student has made great progress behaviorally. This has opened up many more opportunities for [him/her] to participate with same grade peers. [He/she] now attends lunch with a partner (eating in the partner class) and attends both second grade recesses. [He/she] also attends music class with [his/her] partner class. [He/she] transitions independently to and from these classes and attends them WITHOUT an assistant. Additionally, [the Student] participates in the Applied Academics PE class and all AA classroom activities. We have found that [the Student] requires breaks after activities that take place outside of our classroom and after instructional time. Although [the Student] has made great improvements in [his/her] self-management, there are still occasions when [he/she] becomes frustrated or angry to a level that [he/she] threatens others (gestures, verbally, or physically). The team feels that eliminating this threatening behavior is one of our top goals this year.

[The Student] continues to be eligible for special education under the eligibility of ASD.

(*Id.*; emphasis in original.)

(22) On December 10, 2009, the District convened an IEP meeting to develop an IEP to serve the Student through December 9, 2010 (December 2009 IEP). (Ex. D12.) The IEP team determined that the Student was eligible for special education and related services under the disability category of ASD. (Ex. D10 at 3.) The Parents, Mr. Page, Alison Childs, District representative, and Maggie Hotch, occupational therapist, attended the meeting. (Ex. D12 at 1.) Genevieve Stevens-Johnson, a regular education teacher, was listed to attend the meeting, but did not attend because the Student had only been in her class for a short time and she had nothing to report. (Test. of the Mother, Tr. at 26 (Aug. 15, 2012).) The District did not request that the Parents excuse Ms. Stevens-Johnson from attending the IEP meeting. (*Id.* at 27.) The IEP team reviewed the tests and assessments completed on the Student in 2007 by Messrs. Miller, Hendershott, Ms. Childs and Dr. Krupa. (Ex. D10 at 1-2; Test. of Page, Tr. at 16-17 (Feb. 27, 2012).)

(23) The December 2009 IEP team determined that the Student needed assistive technology devices or services; that the Student had communication needs; and that the Student exhibited behavior that impeded his/her learning or the learning of others. (Ex. D12 at 2.)

(24) The December 2009 IEP addressed in detail the present levels of academic achievement and functional performance, including the strengths of the Student; the concerns of the Parents for enhancing the education of their child; the present level of academic performance of the Student; the present level of development and functional performance; and how the Student's disability affected involvement and progress in the general education curriculum. (Ex. D12 at 3-4.) The IEP noted the concern of the Parents as "threatening behavior when upset (gestures, verbally, etc.)." (*Id.* at 3.)

(25) The December 2009 IEP addressed the Student's measurable annual goals as follows:

Reading: [The Student] will increase [his/her] reading decoding and comprehension skills to the beginning third grade level. Progress will be measured by the criteria of 95 percent accuracy for both decoding and comprehension, with evaluation procedures of informal reading inventory and classroom work.

Writing: [The Student] will independently write three complete sentences on a chosen topic with correct capitalization and punctuation. Progress will be measured by the criteria of independently four out of five opportunities, with evaluation procedures of classroom work and teacher data.

Math Calculations: [The Student] will increase [his/her] math skills to the beginning third grade level including double digit addition and subtraction with regrouping, multiplication facts, counting money and making change, and telling time to the minute using an analogue clock. Progress will be measured by the

criteria of 90 percent accuracy on tasks, with evaluation procedures of classroom work and teacher data.

Math Concepts: [The Student] will demonstrate understanding of math concepts and vocabulary to solve real life problems involving time, money, etc. Progress will be measured by the criteria of 80 percent accuracy on second grade story problems, with evaluation procedures of classroom work and teacher data.

Social/Behavior: When angry or upset, [the Student] will minimize threatening behavior (gestures, verbal, or physical) by disengaging from the situation and taking a break, first with teacher prompting then independently. Progress will be measured by the criteria of 80 percent of the time in all school settings, with evaluation procedures of observation, role play, and data collection.

Social/Cognition/Communication: During structural activities, [the Student] will read facial/body language to identify feelings in [himself/herself] and others; as well as make basic inferences in order to read the intent and perspective of others; use language to express frustration given modeling, scripts and/or role plays; and demonstrate [his/her] understanding of at least 10 new basic linguistic concepts (e.g., center, corner, part, some, few, every, half, fewest, as many, least, equal, skip.) Progress will be measured by the criteria of three out of four opportunities, with evaluation procedures of teacher, specialist data with observation.

(*Id.* at 6-11.)

(26) The December 2009 IEP team determined that the Student needed to be removed from participating with non-disabled students in the regular classroom, extracurricular, or nonacademic activities for the provision of special education services, related services, or supplementary aids and services. The IEP team determined that the Student was currently being served in a self-contained special education program throughout the day (over 60 percent) except for music, lunch and recess, and the justification for removal was due to the Student's need for behavioral and academic support. The IEP team determined that ESY services would not be provided. (Ex. D12 at 14.) Mr. Page did not believe that the Student qualified for ESY services because the Student was not demonstrating undue regression. (Test. of Page, Tr. at 276-77 (Feb. 23, 2012); Test. of Page, Tr. at 661 (Feb. 24, 2012).) Mr. Page recalled that the Parents did not disagree with the ESY determination. (Test. of Page, Tr. at 277 (Feb. 23, 2012).) The placement was a self-contained classroom for specially designed instruction in all academic areas for five hours per day, with limited time with non-disabled peers, and mainstreaming when appropriate with non-disabled peers. The Parents were provided with a copy of the placement determination. (Ex. D12 at 15.)

(27) Because the IEP team convened on December 10, 2009, Mr. Page recorded his progress notes for December 10, 2009 on the January 2009 IEP. (Ex. D6.) Mr. Page believed that the Student continued to make meaningful progress toward the IEP goals in reading, math, handwriting, social communication, and social behavior. (Ex. D6 at 1-6; Test. of Page, Tr. at 241-63 (Feb. 23, 2012).) Mr. Page believed that the goals and services in the IEP were providing the Student with a FAPE. (Test. of Page, Tr. at 276 (Feb. 23, 2012).)

(28) On Thursday, December 17, 2009, the Student, escorted by an IA to attend an assembly in the gym at school, kicked an electric pig that was racing another electric pig as part of the assembly events. As the IA was escorting the Student back to the classroom, the Student ran back to the gym and hit Jesse Menzia, Boones Ferry's vice principal, on the forearm. As a result of hitting the vice principal, the District suspended the Student for Friday, December 18, 2009, the last day of school before the Christmas break. (Ex. D13.)

(29) School resumed after the Christmas break on January 4, 2010. On January 5, 2010, Jennifer Patterson, Boones Ferry's principal, Mr. Page, and Mr. Menzia met with the Parents to discuss the Student's behavior and the December 17, 2009 incident. The parties agreed that when the Student got in a "fight or flight" mode, the school would call the Parents and they would pick the Student up at school; that if the Student verbally threatened others, the school would call or email the Parents; that if there was an assembly or other event that might set the Student off, Mr. Page would keep the Student in the classroom; and that if a situation escalated into a physical outburst by the Student, the Parents would meet with Mr. Page and school officials to determine the best course of action. (Ex. P20.)

(30) Mr. Page observed during the 2009-2010 school year that the Student enjoyed a number of very good days and would go for long periods of time without a behavioral incident, but that when there was an incident it was fairly high profile. (Test. of Page, Tr. at 417 (Feb. 24, 2012).) Mr. Page had constant communication with the Parents during the school year about how the Student was doing in class. The Parents kept Mr. Page informed about how the Student was doing at home and encouraged Mr. Page to send homework with the Student for the Student to work on at home. (Test. of the Mother, Tr. at 119 (Aug. 14, 2012).)

(31) Jennifer Patterson had weekly contact with the Student during the 2009-2010 school year through Ms. Patula's partner class. In her opinion, the Student had a very successful 2009-2010 school year, was positive and independent, ate lunch with peers, initiated and engaged staff and peers in conversation, and transitioned appropriately from activity to activity. (Test. of Patterson, Tr. at 130-31 (Feb. 23, 2012).) Ms. Switzer believed that aside from the pig racing incident in December 2009, the Student did well and had improved behaviorally during the 2009-2010 school year. (Test. of Switzer, Tr. at 258 (Feb. 28, 2012).)

(32) Mr. Page prepared progress notes on June 10, 2010 and provided copies to the Parents. (Ex. D15.) Mr. Page believed that the Student made meaningful educational progress toward the IEP goals in the areas of reading, writing, math and social behavior. (Ex. D15; Test. of Page, Tr. at 424-27 (Feb. 24, 2012).)

(33) The District maintained a sign-out book that parents were required to sign when parents took a child out of school during the school day. A secretary at the school's front door maintained the book and was careful to make sure that parents complied with the policy. (Test. of Patterson, Tr. at 175 (Feb. 23, 2012).)

(34) For the 2009-2010 school year, the sign-out book showed the following sign-outs for the Student: January 29, 2010, the Student and the Student's sister by the Mother, no reason given; March 19, 2010, by the Mother for vacation; April 14, 2010, at 9:56 a.m., by the grandmother for being sick; April 16, 2010, by the Mother for an appointment; and May 10,

2010, by the Mother for being sick. (Test. of Patterson, Tr. at 183 (Feb. 23, 2012); See Ex. P110.).)

(35) On several mornings during the school year, the Mother would go to Boones Ferry to help calm down the Student if the Student was having a rough start of the day and help him/her restart. The Mother believed that approach was helpful to the Student. (Test. of Mother, Tr. at 42-44 (August 15, 2012).)

*Third grade school year (2010-2011)*

(36) The Student returned to the AA classroom at Boones Ferry in September 2010 for the 2010-2011 school year for the third grade. Starting at the beginning of the year, the Student attended lunch in Cindy Krieg's regular education third grade class and went to recess with the rest of the third grade students in the school. (Test. of Krieg, Tr. at 194-96, 205 (Feb. 27, 2012).)

(37) At the beginning of the 2010-2011 school year, "L" began attending Mr. Page's AA classroom. (Test. of Switzer, Tr. at 273-74 (Feb. 28, 2012).) Mr. Page had two IAs in the classroom at the beginning of the year, Ms. Switzer and Kami Like. (Test. of Like, Tr. at 85-86 (Feb. 28, 2012).)

(38) In October 2010, "V," a new student arrived and started attending Mr. Page's classroom. "V" had behaviors that upset and agitated the Student, much like "L's" behavior upset and agitated the Student. (Test. of Switzer, Tr. at 273-74 (Feb. 28, 2012); Test. of the Mother, Tr. at 60 (Aug. 15, 2012).)

(39) On November 29, 2010, the District, through Mr. Page, sent the Parents written notification of an IEP meeting scheduled for December 7, 2010. The notice informed the Parents that Mr. Page and Melissa O'Kelley, a District speech language pathologist, were required to attend, and that Ms. Krieg had been invited to attend. (Ex. D17.) Ms. O'Kelley has worked extensively with ASD students and has attended several trainings and workshops on working with students with autism. (Test. of O'Kelley, Tr. at 9 (Feb. 28, 2012).)

(40) The District convened an IEP meeting on December 7, 2010 to serve the Student through December 6, 2011 (December 2010 IEP). The Mother, Mr. Page, and Ms. O'Kelley, on behalf of the District, attended the IEP meeting. (Ex. D19 at 1.) Ms. Krieg was unable to attend. The Mother signed an agreement that Ms. Krieg's attendance was not required, contingent on her submitting written input into the IEP before the meeting. (Ex. D18.) Ms. Krieg did not provide any written input for the December 7, 2010 IEP meeting. (Test. of Mother, Tr. at 66 (Aug. 15, 2012).)

(41) The December 2010 IEP team determined that the Student did not need assistive technology devices or services, that the Student had communication needs, and that the Student exhibited behavior that impeded his/her learning or the learning of others. (Ex. D19 at 2.) The December 2010 IEP addressed in detail the Present Levels of Academic Achievement and Functional Performance of the Student, including the strengths of the Student, the concerns of the Parents for enhancing the education of the Student; the present level of academic performance of the Student; the present level of developmental and functional performance of

the Student; and how the Student's disability affected involvement and progress in the general education curriculum. (Ex. D19 at 3-4.)

(42) Under Present Levels of Academic Achievement and Functional Performance, the December 2010 IEP noted the following, in part:

The concerns of the Parents for enhancing the education of their child;

Continued academic progress[.]

The present level of developmental and functional performance;

Behavior: [The Student] has made great progress behaviorally over the past year. We have had no incidence of physical threatening. [The Student] is much more capable of regulating [his/her] behavior in a variety of environments. [The Student] attends lunch and recess with a partner class and music with a fourth grade partner class due to scheduling conflicts. [The Student] is able to transition independently throughout the school and can be counted on to complete classroom tasks like taking books to the library. [The Student] continues to have some difficulty transitioning to academic instructional groups and rarely transitions in a calm manner, frequently protesting verbally. [The Student] tends to overreact to small problems that occur throughout a typical school day (forgetting library books, being asked to stop in the middle of a task, getting bumped by a person in large groups, etc.) [The Student] rarely accepts criticism without incident (verbally arguing) in an academic setting.

General Ed: [The Student] eats lunch and goes to recess with a partner class. During lunch, [the Student] is social, usually waiting for someone to talk to [him/her] first. [He/she] is a good problem solver, but may become anxious when the teacher is talking to the class about an assignment or task that does not necessarily involve [him/her]. [The Student] seems to enjoy [his/her] partner class.

How the Student's disability affects involvement and progress in the general education curriculum;

[The Student's] challenge with academics, communication, and social cognition makes it difficult for [him/her] to be successful in the general education classroom.

(Ex. D19 at 3-4.)

(43) The December 2010 IEP addressed the Student's measurable annual goals as follows:

Reading: [The Student] will increase [his/her] reading comprehension skills to the third grade level to including looking back in the text to support [his/her]

answers, rephrasing [his/her] answers to correctly match questions, and answering inferential information and questions requiring [him/her] to take another person's perspective (especially "why" and "how" questions). Progress will be measured by the criteria of two out of three opportunities, with evaluation procedures of classroom work and teacher data.

Math: [The Student] will increase [his/her] math skills and number sense to include doing double digit subtraction with regrouping, counting mixed coins to 1.00 dollar, and multiplication facts from 0 – 5. Progress will be measured by the criteria of 95 percent accuracy, with evaluation procedures of classroom work and teacher observations.

Social communication/behavioral: [The Student] will improve social communication by often transitioning upon teacher directive, often respond appropriately to the size of a problem, and often respond without arguing to criticism during academic tasks. Progress will be measured by the criteria of rarely to often, with evaluation procedures of teacher observation.

Writing: [The Student] will independently write five grammatically correct sentences on a given topic using correct punctuation, capitalization and a variety of sentence patterns. Progress will be measured by the criteria of two out of three opportunities, with evaluation procedures of classroom work and teacher observations.

(*Id.* at 6-9.)

(44) The December 2010 IEP team determined that the Student needed to be removed from participating with non-disabled students in the regular classroom, extracurricular, or nonacademic activities for the provisions of special education services, related services, or supplemental aids and services. The IEP team determined that the Student was currently served in a small, self-contained special education classroom for over 60 percent of his/her school day, and that the justification for removal was that the Student required a small, self-contained classroom due to his/her needs for behavioral support and instruction at his/her academic level in a small group environment. The IEP team determined that ESY services would not be provided. (Ex. D19 at 11.) The placement was a self-contained classroom for specially designed instruction in areas of reading, writing, math, and social/behavioral support for three hours per day, with limited time with non-disabled peers and mainstream when appropriate with non-disabled peers. The Parents were provided with a copy of the placement determination. (*Id.* at 12.)

(45) The December 2010 IEP meeting served as the progress update on the Student's December 2009 IEP. (Exs. D15 and D38.) Mr. Page believed that the goals and progress notes on the December 2010 IEP were measurable, including using the criteria of "rarely" to "often." (Test. of Page, Tr. at 446-55 (Feb. 24, 2012).) Ms. O'Kelley believed that with regard to the social communication behavioral goal, it was appropriate to use the "rarely" to "often" criteria for that goal. (Test. of O'Kelley, Tr. at 16-18 (Feb. 28, 2012).)

(46) On December 7, 2010, Mr. Page provided the Parents with written notice confirming that the following changes were made to the Student's IEP at the meeting on December 7, 2010: "[o]ccupational therapy reduced to consultation one time per month and adding Speech/Language consultation to special education staff for 20 minutes per month." (Ex. D21.)

(47) Ms. Patterson observed that from September 2010 through December 2010, the Student continued the success he/she had enjoyed the previous school year and was a strong participant in his/her classroom and had positive experiences in his/her partner class. (Test. of Patterson, Tr. at 141-42 (Feb. 23, 2012).)

(48) During the 2010-2011 school year, prior to March 2011, even when the Student had behavioral incidents, Mr. Page believed that the incidents did not derail the Student's entire day. He observed that the Student was able to adjust to being frustrated and could recoup and continue with his/her day and the classroom routine. (Test. of Page, Tr. at 419 (Feb. 24, 2012).)

(49) Ms. Krieg observed that when the Student attended lunch with her regular education class, the Student did very well and was well liked by other students. She did not notice any behavioral problems until February 2011, when the Student got frustrated and wanted her to stop reading aloud to the class. The Student got up and walked toward her. She told the Student to go back to his/her seat and sit down. The Student did as directed. (Test. of Krieg, Tr. at 193-97 (Feb. 27, 2012).)

(50) In late March or early April 2011, while Ms. Krieg was reading aloud, the Student shouted for her to stop reading because the Student thought the story "was dumb." (Test. of Krieg, Tr. at 198 (Feb. 27, 2012).) The Student continued going to her class until April 24, 2011. (*Id.* at 196.)

(51) On March 1, 2011, the Student wanted to tell a joke in Mr. Page's classroom and was not allowed to do so. The Student became upset and punched Mr. Page on the jaw, and tried to "kick, hit, and bite" him as the Student was being led from the classroom. (Ex. P71 at 1.) Mr. Page took the Student to the office and conferred with Lindy Sproul, a District instructional coordinator. Mr. Page noted that the Student's emotions escalated very fast and that he had not seen that behavior since the previous academic year. Ms. Sproul telephoned the Student's Mother who picked up the Student from school. Ms. Sproul observed that after the Mother arrived at school, the Student jumped up and began hitting the Mother and pointing his/her finger as if it were a gun and pretending to shoot her. (Ex. P39.) The Student was sent home for the day on March 1, but not officially suspended. (Test. of Patterson, Tr. at 205 (Feb. 23, 2012).) The Parents kept the Student home from school on March 2, 2011. (Ex. D22 at 14.)

(52) On March 10, 2011, the Student threatened Mr. Page and Ms. Like verbally with gestures and refused to follow instructions by making faces and hissing at Ms. Like. (Ex. A40.)

(53) On March 31, 2011, the Student fell during recess and got up and hit another student four times. (Ex. P41 at 2.) Mr. Page communicated with the Mother on March 31 about the incident. Mr. Page explained to the Mother that the Student's behavior on March 31 and recently had been "somewhat different" and "a tone of controlled deviousness and defiance that was not there before." (*Id.* at 1.) Mr. Page questioned whether the change in behavior was due

to a change in the Student's medication before spring break, earlier in March. The Mother offered to pick the Student up from school that day and did so. (*Id.*)

(54) Mr. Page did not ask the District to perform a functional behavioral assessment (FBA) on the Student as a result of the March 31 incident and other recent incidents by the Student. (Test. of Page, Tr. at 90-91 (Feb. 27, 2012).)

(55) On April 4, 2011, Mr. Page and Ms. O'Kelley began tracking the Student's threatening behaviors to look for any patterns by using a red-yellow-green rating system. (Test. of Page, Tr. at 490 (Feb. 24, 2012).) In the rating system, a green day was a day when the Student made no verbal threats and did not engage in physical aggression, a yellow day was a day when the Student made one or more verbal threats but did not engage in physical aggression, and a red day was a day when the Student engaged in one or more acts of physical aggression. (Ex. D49 at 1.) Mr. Page would email Ms. O'Kelley each day with his description of the Student's day and Ms. O'Kelley would record Mr. Page's rating of the Student on a calendar. (Tr. at 44, Feb. 28, 2012).) The District did not inform the Parents about the red-yellow-green rating system. Had the Parents known about the system, they would have been willing and able to provide input on the causes of the Student's behavior and strategies to address them. (Test. of the Mother, Tr. at 98 (Aug. 15, 2012).)

(56) On April 6, 2011, the Student made a claw with his/her hand and swiped at Ms. Like. (Ex. P49 at 3.) In response to the incident, Mr. Page sent the student home. (Ex. P49 at 3; Ex. P111 at 64.)

(57) On April 6, 2011, Ms. Patterson emailed Ms. Menne, Kenneth Welch, Ph.D., the District's director of Student services, and Mr. Page asking for help to address the Student's behavior, explaining, as follows, in part:

[The Student] is becoming increasingly violent, unpredictable, and harder to redirect. \* \* \*. Within the last two months, [the Student] has hit John [Mr. Page], hit IAs, hit other students, and been easily angered. [He/She] is swearing often and the overall picture is quite unstable. [He/she] has been sent home twice since Spring Break. John reports that he is becoming increasingly unsafe and afraid of [the Student].

(Ex. P42.)

(58) On April 18, 2011, the Student told Ms. Like, "I hate you," and made a gun with his/her hand at the edge of the table during math. (Ex. D22 at 39; Test. of Like, Tr. at 115-16 (Feb. 28, 2012).)

(59) In mid-April 2011, the Parents paid to have Lindsay Rentschler meet with Mr. Page and discuss ways to help the Student. (Test. of Page, Tr. 96-97 (Feb. 27, 2012).) Ms. Rentschler is a behavioral therapist at ABA Learning Solutions and had worked as a private tutor with the Student one-on-one since the fall of 2010. (Test. of Rentschler, Tr. at 129-35 (Feb. 29, 2012).) On April 20, 2011, Ms. Rentschler emailed Mr. Page a list of recommendations for a behavior plan for the Student based on the discussions in their meeting. (Ex. P44 at 1.) Ms. O'Kelley also read Ms. Rentschler's email. On April 22, 2011, Ms. O'Kelley sent an email to Mr. Page

expressing her opinion that a successful behavior plan would need to be based on a “thorough needs assessment.” (Ex. P46.)

(60) On Tuesday, April 26, 2012, during the lunch hour, Mr. Page sent an email to the Mother informing her that the Student had raised his/her fist in a threatening stance toward Ms. Krieg the previous Friday [April 22] when she was unable to give the Student her full attention as a fire alarm was about to go off in her class. Mr. Page continued in the email to inform the Mother that he kept the student out of Ms. Krieg’s class for lunch on April 25 due to the incident the previous Friday, and that he believed it was a good idea for the Student to start eating lunch in Mr. Page’s class to ensure the safety of everyone. The Mother told Mr. Page that she was going to pick the Student up at 1:30 p.m. that day. (Ex. P48.)

(61) Also, on April 22, 2011, the Student spit on a peer during the lunch period. (Test. of Mother, Tr. at 94 (Aug. 15, 2012).)

(62) On April 29, 2011, the Student put his/her hand behind Ms. Like’s neck and the other hand on her side. Ms. Like believed the Student was trying to kiss her. She pulled back from the Student and told the Student his/her actions were not appropriate. (Test. of Like, Tr. at 95-96 (Feb. 28, 2012).)

(63) Between April 4 and April 29, 2011, the Student attended school on 19 days. Mr. Page and Ms. O’Kelley recorded on the red-yellow-green rating system that the Student engaged in physical aggression on six days (red days) and verbally threatening behavior on seven other days (yellow days). (Ex. P49 at 1-13; Ex. P50A.)

(64) At some point before the spring of 2011, Mr. Page made a decision to remove the Student from his PE class because of the Student’s behaviors. Mr. Page did not tell the Parents. The Parents did not learn about his decision until later that spring. (Test. of the Mother, Tr. at 99 (Aug. 15, 2012).)

(65) On May 3, 2011, Ms. Ziolko observed the Student in the classroom and noted, among other things, that the staff was resistant to making changes to respond to the Student’s behavior, and “[c]lassroom not set-up to play to their [the students] strengths and let them be who they are—trying to ‘fix’ the Autism.” (Ex. P51.) After Ms. Ziolko’s observation, Mr. Page emailed her to express his concern that a great deal of time and energy was being used to accommodate and serve the Student at the expense of other students in the class. (Ex. P52.)

(66) On May 10, 2011, the District hired Jeff Warner, a police officer trainee with no training or experience working with students with disabilities, to serve as an IA and assist Mr. Page in the AA classroom. (Test. of Patterson, Tr. at 160 (Feb. 23, 2012); Test. of Menne, Tr. at 715-17 (Feb. 24, 2012).)

(67) On May 11, 2011, Ms. Ziolko emailed Dr. Welch to inform him that she had sent a draft behavior protocol and data tracking sheet to Mr. Page. The draft behavior protocol and data tracking document discussed, among other things, an FBA to help guide the behavior plan and response to the Student’s behavior, and that the Student would need a send-home plan that would be a modification on his/her IEP. (Ex. P53.) The proposed behavior protocol was never shared

with the Parents, but was not implemented by the District because it was a rough draft. (Test. of Page, Tr. at 505 (Feb. 24, 2012); Test. of Menne, Tr. at 681 (Feb. 24, 2012).)

(68) On May 16, 2011, the Student made a stabbing motion with a pencil toward a teacher and made a gun shape with his/her hand. As a result, the Student had leave Mr. Page's classroom and go out into the hall. (Ex. D27 at 5.)

(69) On May 23, 2011, the Student arrived in Mr. Page's classroom acting agitated and upset. The Student started arguing with Mr. Page and used some profanity. Mr. Page tried to take the headphones off the Student's head so the Student could take a break. The Student pushed Mr. Page on the chest with both hands, punched him on the side of his head and raised his/her hands like he/she was going to hit Mr. Page again. The Student then apologized and started crying. Mr. Page escorted the Student to the school's office. (Ex. D27 at 14.) The Mother arrived at the school a short time later and took the Student home. (Ex. P111 at 86.) Ms. Patterson talked by telephone with the Mother that evening. Ms. Patterson and the Mother agreed it would be best for the Student to stay home from school on May 24. Ms. Patterson agreed not to consider the incident on May 23 as a suspension from school. (Test. of Patterson, Tr. at 140-41 (Feb. 23, 2012).)

(70) On May 24, 2011, Ms. Menne emailed Ms. Patterson and Mr. Page and suggested a strategy for the remainder of the academic year (eleven and one-half days were left) to have the Student work with staff members in an alternative space during the school day. (Ex. P60.)

(71) On or about May 24, 2011, the District hired Victoria Poarch, a certified general education teacher with experience working in a self-contained behavior classroom, to work with the Student one-on-one as an IA. (Ex. P56; Test. of Patterson, Tr. at 155, 222-23 (Feb. 23, 2012).) Ms. Patterson informed the Parents by email on May 25, 2011 that the District had hired Ms. Poarch to work with the Student one-on-one for the remainder of the school year to assist Mr. Page, who would remain the Student's primary teacher. (Ex. D31.)

(72) On May 25, 2011, the District, through Ms. Patterson, scheduled a meeting on May 26, 2011 with the Parents to discuss the Student, and informed the Parents about the meeting by email. (Ex. D31.) However, the meeting had to be cancelled due to Ms. Patterson's illness. (Test. of Patterson, Tr. at 157 (Feb. 23, 2012).)

(73) On May 26, 2011, the Mother learned that the Student was working one-on-one with Ms. Poarch in an office near the front of the school, rather than in Mr. Page's classroom, and was receiving only ten minutes of peer time at the end of the day for being good. The Mother believed that Ms. Poarch had been working one-on-one with the Student in Mr. Page's classroom. (Test. of the Mother, Tr. at 131-33, 135 (Aug. 15, 2012).)

(74) On or about May 26, 2011, Bill Brant, a District school psychologist, conducted an FBA on the Student. (Ex. P63.) He gathered information for the FBA only from Mr. Page. The District did not inform the Parents about the FBA or get permission from them to conduct the FBA. (Test. of Page, Tr. at 132, 177 (Feb. 27, 2012).) The Parents did not know what an FBA was or learn that one had conducted until after they filed their request for due process hearing in August 2011. (Test. of the Mother, Tr. at 136-37 (Aug. 15, 2012).)

(75) Mr. Brant noted in his FBA that Mr. Page indicated that the Student had made very good progress in self-management skills up through the first half of the school year [2010-2011]. Mr. Page, however, further indicated, “In late March, [the Student] began taking Straterra in addition to the Risperdal that [he/she] had been taking, and [his/her] challenging behavior escalated significantly. There was improvement following discontinuance of Straterra, but for the last part of the school year, [the Student’s] functioning has regressed significantly compared to the beginning of the year.” (Ex. P63 at 3.)

(76) Mr. Brant shared the FBA with Mr. Page. Mr. Page, in an email dated May 31, 2011, clarified to Mr. Brant about the Student’s behaviors escalating about mid-year, that he wanted to “make sure that it doesn’t sound like it was just taking the Straterra in late March. That did have a significant impact on [his/her] behavior but [he/she] actually punched me in the face on March 1 and there had been some rumblings prior to that time as well.” (Ex. P66 at 1-2.)

(77) Mr. Brant prepared a revised FBA on or about May 31, 2011 that included Mr. Page’s additional comments. (Ex. P67 at 2.)

(78) The District did not convene an IEP meeting to address the issues raised in Mr. Brant’s FBA. (Test. of Ziolko, Tr. at 113 (Feb. 23, 2012).)

(79) On May 30, 2011, the Mother emailed Ms. Patterson and Mr. Page asking to meet on May 31 to address their concerns that were to have been addressed at the May 26 meeting. (Ex. P64.) The Mother expressed concern that the Parents had just learned that the Student was not eating lunch or going to recess with either Mr. Page’s class or the third grade partner class. The Mother informed Ms. Patterson and Mr. Page that the Student’s self esteem had recently plummeted and that the Student was making comments like, “I just want to die,” and “nobody likes me,” and that the Student acted very sad. (*Id.*) The Mother proposed integrating the Student back into the classroom by working with Ms. Poarch one-one-one in an area away from “L” and “V” and allowing the Student to go to Ms. Krieg’s room for lunch and to recess with Ms. Poarch. (*Id.*)

(80) On May 31, 2011, at 12:08 p.m., Dr. Welch emailed Mr. Page regarding the meeting with the Parents that was scheduled for 3:30 p.m. that day. In his email, Dr. Welch, confirmed his understanding of the supports the District had in place for the Student. Among other things, those supports included have Ms. Poarch, acting as a substitute teacher, work with the Student individually out of Mr. Page’s classroom and support the Student when he/she was in Mr. Page’s classroom; have the Student work on a schedule both in Mr. Page’s classroom and out of his classroom; have Mr. Page determine the Student’s schedule and what instruction he/she would receive; have the plan in place only to finish the current school year; and have an emergency plan in place. (Ex. P65.)

(81) The District did not convene an IEP meeting to discuss whether the supports would meet the Student’s needs or to explore alternative support plans with the Parents. (Test. of Dr. Welch, Tr. at 97-99 (Feb. 29, 2012).)

(82) On May 31, 2011, the District held a meeting with the Parents, Ms. Porterfield, Dr. Welch, Ms. Rentschler, Mr. Page and Ms. Ziolko. The purpose of the meeting was to talk about what was happening with the Student in the classroom and how to make the rest of the school

year successful for the Student. There were approximately seven school days left as of May 31. (Test. of Ziolk, Tr. at 59-62 (Feb. 23, 2012).) Dr. Welch explained that the District was putting together a new and different classroom for the 2011-2012 school year for students with autism. (Test. of Porterfield, Tr. at 201 (Feb. 28, 2012).) Ms. Rentschler pointed out that the Student had recently made statements about being a “bad kid” and “wanting to die.” (Test. of Rentschler, Tr. at 170-71 (Feb. 29, 2012).) At the meeting, either the Parents or Ms. Rentschler, asked about having a one-on-one IA trained in social thinking to work with the Student for the remainder of the school year. Dr. Welch asked some questions about social thinking and how someone would get training in that field. (*Id.* at 278-280.)

(83) The May 31, 2011 meeting was not an IEP meeting. (Test. of Porterfield, Tr. at 208 (Feb. 28, 2012).) No changes were made to the Student’s IEP following the May 31 meeting. (Test. of Ziolk, Tr. at 101-02 (Feb. 23, 2012).)

(84) The District did not convene any further meeting to address the Student’s educational and/or needs or explore alternative support plans with the Parents during the remainder of the 2010-2011 school year. (Test. of Mother, Tr. at 143 (Aug. 15, 2012).)

(85) For May 2011, on the green-yellow-red rating system that Mr. Page and Ms. O’Kelley used to track the Student’s behavior, there were 16 green days, three yellow days and four red days. (Test. of Patterson, Tr. at 150 (Feb. 23, 2012).)

(86) In June 2011, on the green-yellow-red rating system, the Student attended four days of school and engaged in physical aggression on one of those days. (Ex. P75.)

(87) On or about June 6, 2011, the District sent the Student’s report card for the 2010-2011 school year to the Parents in the Student’s backpack. (Ex. P73; Test. of Page, Tr. at 685-86 (Feb. 24, 2012).) The Student’s report card indicated that he/she was “developing and improving” in music through the entire school year. (*Id.* at 2.) However, Mr. Page had stopped sending the Student to music class about the time of the December 2010 IEP meeting. (Test. of Page, Tr. at 596-98 (Feb. 24, 2012).)

(88) On June 7, 2011, Mr. Page and the Parents exchanged emails. (Ex. P76.) The Parents expressed concerns that leaving the Student in a room alone with an IA, instead of participating in a classroom with peers, where the Student would feel like part of the class, was causing the Student significant depression. (*Id.* at 1.) Mr. Page emailed the Parents in response that he was trying to “make it to the end of the year without another blowout and trying to minimize the possibility of something triggering [the Student].” (*Id.* at 2.)

(89) For the 2010-2011 school year, Mr. Page could recall only three or four times when he called the Parents to come and pick up the Student for behavioral reasons. (Test. of Page, Tr. at 394 (Feb. 24, 2012).)

(90) For the 2010-2011 school year, the Boones Ferry sign-out book for parents showed the following sign-outs for the Student: September 13, 2010, by the Mother at 11:30 a.m., with no reason given; December 7, 2010, by the Mother, for illness; December 10, 2010, by the Mother at 1:40 p.m., with the reason given as “hookey;” December 17, 2010, by the Mother at noon, for an appointment; March 31, 2011, by the Father, no reason given; April 6, 2011, by the

Mother at 8:30 a.m., no reason given; April 18, 2011, by the Mother at 1:00 p.m., as sick; April 22, 2011, by the Father at approximately 12:30 p.m. or 1:00 p.m., no reason given; April 26, 2011, by the Mother at 1:40 p.m., no reason given; May 4, 2011, by the Mother, no reason given; May 20, 2011, the Student signed himself/herself out to the Mother at 9:00 a.m., with no reason given; and May 23, 2011, by the Mother at 8:45 a.m., with no reason given. (Test. of Patterson, Tr. at 181-83 (Feb. 23, 2012); See generally Ex. P111.)

(91) The Father failed to sign-out the Student on two occasions because he was angry or frustrated, but was unsure whether those occasions occurred during the 2009-2010 or the 2010-2011 school years. (Test. of the Father, Tr. at 142-43 and 253-54, 266-69 (Aug. 14, 2012).)

(92) In addition to signing the Student out from school, approximately once every two weeks from January 2011 through June 2011, the Parents kept the Student home from school because they did not believe he/she had an attitude that would be productive for going to school. (Test. of the Mother, Tr. at 81-82 (Aug. 15, 2012).)

(93) Sometime in late May or early June 2011, the Parents decided to place the Student in a private school for the next school year. (Test. of the Father, Tr. at 201-02 (Aug. 14, 2012).)

(94) On June 5, 2011, the Parents sent Dr. Welch a letter informing him that the District was not meeting the Student's educational needs, and that the Parents intended to place the Student in a private school for the 2011-2012 school year at public expense. (Ex. P72.) Dr. Welch did not respond to the Parents' letter. (Test. of Dr. Welch, Tr. at 110 (Feb. 29, 2012).)

(95) The Parents had no further contact with the District after school ended in mid-June until July 29, 2011, when Ms. Carolyn Miller, the District's Assistant Director of Student Services, telephoned the Mother to ask about scheduling an IEP meeting for the 2011-2012 school year. (Test. of Miller, Tr. at 258 (Feb. 27, 2012); Ex. D41.)

(96) During June and July 2011, after finalizing its budget in May 2011, the District developed a new classroom through a CRC model for the 2011-2012 school year to serve students with autism. (Test. of Miller, Tr. at 258-61 (Feb. 27, 2012).) The Parents agreed to meet with Ms. Miller to learn more about the new CRC program. (Ex. D41.)

(97) On August 3, 2011, Ms. Miller sent a letter to all parents with students in the AA classroom, informing the parents about the new CRC program for student with autism. (Ex. D42.) The letter explained that a new CRC for grades three through five would be at Boones Ferry for the 2011-2012 academic year, and that Mr. Page would not be teaching in the CRC. (Ex. D42.)

(98) The Parents met with Ms. Miller on August 3, 2011. At the beginning of the meeting, Ms. Miller gave the Parents their copy of the August 3, 2011 letter she had sent to parents with students in the AA classroom. Ms. Miller explained to the Parents the District's plans for the new CRC. The Parents shared their concerns and frustrations about the previous school year and their belief that the Student had not been well served in the AA classroom, and that they were not pleased with the CRC the Student had been in at Stafford. (Test. of the Mother, Tr. at 154-57 (Aug. 15, 2012).) The Parents told Ms. Miller they would get back to her after an upcoming vacation to discuss the matter further. (Ex. D41.)

(99) The Parents did not contact Ms. Miller after the August 3, 2011 meeting to schedule an IEP meeting because they had decided not to return the Student to the District for the 2011-2012 school year. (Test. of the Mother, Tr. at 157-58 (Aug. 15, 2012).)

(100) The District has not contacted the Parents since the August 3, 2011 meeting, to schedule an IEP meeting or to ask to do any evaluations of the Student. (Test. of the Mother, Tr. at 158 (Aug. 15, 2012).)

(101) On August 15, 2011, the Parents filed a request for a due process hearing. In the request, the Parents request an evaluation planning meeting; evaluations of the Student; a FBA; an IEP meeting to develop an appropriate IEP for the Student; a placement meeting to determine an appropriate placement for the Student; a prospective placement at Victory Academy; training for District staff on IEP team meetings, including the need to hold one before changing a student's placement; reimbursement for expenses of educating the Student since August 15, 2009; and reimbursement of their reasonable attorneys' fees and costs. (Request for Due Process Hearing; Test. of the Mother, Tr. at 245-48 (Aug. 15, 2012).)

#### *Victory Academy and the fourth grade school year (2011-2012)*

(102) On June 6, 2011, the Parents began the application process to place the Student at Victory Academy (Victory), a private school. (Ex. P96.) Victory was founded in 2009 by Tricia Hasbrook and Thea Schreiber to provide students with ASD a place to have academics and therapies presented in a single location using an integrated model. The integrated model includes differential academics, speech and language therapy, occupational therapy, music therapy, behavior therapy, and social thinking, in both one-on-one and small group settings. (Test. of Hasbrook, Tr. at 231-34 (Mar. 14, 2012).) Ms. Hasbrook has masters' degrees in teaching and in English. Between 1997 and 2008, she worked as an intervention/prevention specialist with the Beaverton School District (Oregon) and as a private consultant to the Multnomah Educational Service District (Oregon). She has taught regular and special education students and also has received training in ABA. (Ex. P5; Test. of Hasbrook, Tr. at 240-43 (Mar. 14, 2012).)

(103) Victory has approximately 20 students divided into three classrooms, roughly based on their communication and social interaction skill levels. (Test. of Aglipay, Tr. at 64-65 (Aug. 14, 2012).) Victory is a year-round school with educational programming all twelve months. (Test. of Aglipay, Tr. at 250 (Mar. 15, 2012).)

(104) Victory accepted the Student. The Student began attending the fourth grade at Victory on September 7, 2011. (Test. of Montgomery, Tr. at 149 (Mar. 14, 2012).) The Student attended a class taught by Emma Aglipay, the lead teacher, with two assistant teachers. There were six students in the class. (Test. of Aglipay, Tr. at 215-16 (Mar. 15, 2012).)

(105) Ms. Aglipay became a credentialed elementary school teacher in California in 2008 and worked in California as an assistant teacher and as a substitute teacher in a self-contained special education class in a public school. (Test. of Aglipay, Tr. at 205-09 (Mar. 15, 2012).) She is not licensed to teach in Oregon. (*Id.* at 214.) Ms. Aglipay started working at Victory in August 2010 as an assistant teacher and became a lead teacher in June 2011. (*Id.* at 211-13.)

(106) By the end of the winter 2012 term, the Student had made progress in reading, social thinking, math, problem solving, science, social studies, writing, art, music, and theory of mind. (Ex. P113 at 1-8.) From September 2011 to March 2012, the Mother observed that the Student was happy to go to school, was learning a lot, and was able to work successfully on academics, social skills and behavioral skills. (Test. of the Mother, Tr. at 205-06 (Aug. 15, 2012).)

(107) In early March 2012, the Student had a medical procedure that required general anesthesia. After the Student had the procedure and came out from the anesthesia, and over the next few weeks, the Student became progressively more agitated and his/her behavior became progressively more aggressive at home, and at Victory toward peers and staff. (Test. of the Father, Tr. at 224-30 (Aug. 14, 2012).)

(108) On April 17, 2012, Lauren Corder, M.A., a child and family therapist, met with the Student, the Parents and Victory staff to gather information about the Student and to address his/her needs. (Ex. P117 at 1-7.)

(109) As a result of the Student's behavior, the Parents and Victory staff agreed on April 27, 2012 to remove the Student from Victory until he/she could be examined by a doctor to determine what was causing the behavioral and medical problems. (Test. of the Father, Tr. at 230 (Aug. 14, 2012).)

(110) On May 2, 2012, Lance Turner, M.D., a child and adolescent psychiatrist, began treating the Student. In a report dated June 11, 2012, Dr. Turner identified diagnoses of Major Depression and Asperger's Disorder for the Student. (Ex. P117 at 40.) Dr. Turner changed the Student's psychotropic medication in early June 2011. As a result of that change, the Parents subsequently reported to Dr. Turner that the Student's behavior had improved. Dr. Turner opined that the Student could resume daily activities, including return to school based on a schedule developed by the Parents and Victory staff. (*Id.* at 41.)

(111) The Student returned to Ms. Aglipay's class at Victory on June 27, 2012. (Test. of Aglipay, Tr. at 41 (Aug. 14, 2012).) The Student started out attending school two hours a day, then gradually increased his/her time at school each week, with the goal that he/she would be back at school full time when school resumed on September 4, 2012 after the school's regular short break at the end of August. (Test. of Aglipay, Tr. at 42-44 (Aug. 14, 2012); Test. of the Mother, Tr. at 242-43 (Aug. 15, 2012).)

(112) The Parents are very pleased with the education the Student has been receiving at Victory. They believe that the Student is learning and making good progress academically, socially, emotionally, and behaviorally. The Parents want the Student to continue at Victory for the 2012-2013 school year. (Test. of the Mother, Tr. at 243-45 (Aug. 15, 2012).)

(113) The monthly tuition for the Student to attend Victory during the 2011-2012 school year was \$1,700. The tuition continues at \$1,700 per month for the 2012-2013 school year. (Ex. P115; Test. of the Mother, Tr. at 180 (Aug. 15, 2012).) From September 2011 through February 2012, the Parents paid tuition at Victory in the total amount of \$10,200 (six months). (Ex. P115.) From March 2012 through August 2012 (with the exception of June, which Victory excused

because the Student was not in school), the Parents have paid an additional \$6,800 (four months) in tuition. (Ex. P116; Test. of the Mother, Tr. at 178-83 (Aug. 15, 2012).)

*Other educational services paid by the Parents*

(114) From June 2009 through December 2011, the Parents hired and paid private tutors to supplement the education provided to the Student by the District and by Victory. (Test. of the Mother, Tr. at 178 (Aug. 15, 2012).) The Parents paid the following: ABA Learning Solutions, between June 2010 and December 2011, \$5,300.22; Social Thinking Group, between March 2010 and March 2011, \$1,850.00; Speech Therapy, between September 2009 and September 2011, \$6,684.53; Tutoring, between January 2010 and May 2011, \$2,857.00; and Building Bridges, between September 2009 and August 2010, \$2,845.50. (See Exs. P81, P115; Test. of the Mother, Tr. at 165-175 (Aug. 15, 2012).)

## **CONCLUSIONS OF LAW**

(1) The District did not fail to evaluate the Student in all areas of suspected disability during the 2009-2010 academic year.

(2) The District did not fail to provide the Student a FAPE during the 2009-2010 academic year.

(3) The District did not fail to provide an appropriate placement for the Student during the 2009-2010 academic year.

(4) The District failed to evaluate the Student in all areas of suspected disability during the 2010-2011 academic year.

(5) The District failed to provide the Student a FAPE during the 2010-2011 academic year.

(6) The District failed to provide an appropriate placement for the Student during the 2010-2011 academic year.

(7) The remedies are set forth in the Order section of this Final Order.

## **OPINION**

The Parents have alleged numerous violations of the IDEA in their due process request for hearing, and allege that the Student has been denied a FAPE by the District. The burden of proof in an administrative hearing challenging a violation of the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 US 49, 59 (2005). The Parents have the burden of proof in this matter.

The standard of proof in an administrative hearing is by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995). 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 Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

The purpose of the IDEA is to ensure that all children with disabilities are provided a FAPE by giving them special education and related services designed to meet their unique needs. 20 USC § 1400(d)(1). The Act does not aim “to maximize the potential of each handicapped child” but rather merely “to provide them with access to a free public education.” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 US 176, 200 (1982) (*Rowley*). One of the IDEA’s most important mechanisms for achieving these goals is the formulation and implementation of an individualized education program (IEP). Under § 1414(d)(1)(B), every disabled child must have an IEP drafted and put into effect by the local educational authority. The Court in *Rowley* set out a two-part test for evaluating complaints about the content of an IEP: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” *Id.* at 206-07.

The Parents have alleged in their due process request for hearing that the District failed to evaluate the Student in all areas of disability, and that the District failed to provide a FAPE and failed to make an appropriate placement for the Student during two school years, 2009-2010 and 2010-2011. The allegations are addressed in turn for each school year.

#### *2009-2010 school year*

The Student had two IEPs that applied to the 2009-2010 school year, the January 2009 IEP and the December 2009 IEP. Because the Parents filed their due process request for hearing on or about August 15, 2011, they are limited in seeking relief for violations that occurred on or after August 15, 2009.<sup>1</sup> The January 2009 IEP was in effect until December 2009, when the December 2009 IEP became effective.

The 2009-2010 school year covered the Student’s second grade in Mr. Page’s AA classroom at Boones Ferry. The Parents raise numerous procedural and substantive defects about the IEP meetings that encompassed the 2009-2010 school year, the two IEPs, and the education the Student received during the 2009-2010 school year, and that the Student was denied a FAPE.

The question is whether the Student received educational benefit during the 2009-2010 school year. The court addressed the educational benefit standard in *G.R. ex rel v. Dallas School District No. 2*, 823 F Supp2d 1120 (D Or 2011) (*G.R.*) as follows:

Some confusion exists in this circuit regarding whether the Individuals with Disabilities Education Act requires school districts to provide disabled students with “educational benefit,” “some educational benefit” or “meaningful educational benefit. See, e.g., *Hellgate*, 541 F.3d at 1212-13. As we read the

---

<sup>1</sup> Only alleged violations during the two years prior to the filing of a due process hearing request may be the basis for any finding against a school district under Oregon’s two-year statute of limitation for cases under IDEA. ORS 343.165(3)(a).

Supreme Court's decision in *Rowley* [*Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)], all three phrases refer to the same standard. School districts must, to "make such access meaningful," confer at least "some educational benefit" on disabled students. See *Rowley*, 458 U.S. at 192, 200, 102 S.Ct. 3034. For ease of discussion, we refer to this standard as the "educational benefit" standard. *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 951 n. 10 (9<sup>th</sup> Cir. 2010).

*Id.* at 1130.

A procedural violation denies a child a FAPE only when it "result[s] in the loss of educational opportunity or seriously infringe[s] the parents' opportunity to participate in the IEP formation process." *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 938 (9<sup>th</sup> Cir 2007) (citations omitted).

Applying the above standards, the Parents have failed to prove that the Student was denied a FAPE during the 2009-2010 school year.

Mr. Page testified that the Student made meaningful progress toward the Student's IEP goals, including gains in reading, comprehension, writing, math, social communication, and social behavior. He believed that the Student received a FAPE.

Ms. Patterson testified that the Student had a very successful school year, that the Student was positive and independent, would eat lunch with peers, would initiate and engage staff and peers in conversation and would transition appropriately from activity to activity.

Ms. Switzer believed that aside from the pig racing incident in December 2009, the Student did well in class and improved behaviorally during the 2009-2010 school year.

The Parents have raised numerous claims that the IEPs covering the 2009-2010 school year were either substantially or procedurally deficient. These claims include that the IEPs lacked adequate present levels because they did not contain sufficient baseline data, and that the information in the present levels of academic achievement and functional performance did not align numerically with the criteria used in the annual goals and objectives.

The court addressed similar claims by the parents in *K.E. v. Independent School District No. 15*, 647 F.3d 795 (8<sup>th</sup> Cir 2011). The parents in *K.E.* alleged that the IEPs were deficient in both academic and behavioral areas by not setting forth in sufficient detail the present levels and goals, and by not implementing portions of the IEPs. The court rejected the parents' allegations, noting that while the student had failed to meet some of her IEP goals and failed to demonstrate growth commensurate with her peers, there was evidence to show that the student received educational benefit. The court concluded that where IEPs were sufficient to confer some meaningful educational benefit to the student, they were sufficient under the IDEA. *Id.* at 809-10. The court noted that while the student's FBA and behavior intervention plan (BIP) were deficient in some respects, the deficiencies were overridden by the reality that the student was able to make at least some progress during the periods at issue. *Id.* at 810.

Mr. Page reviewed the present levels information for the Student's IEPs during the 2009-2010 school year and believed they reflected meaningful progress toward the Student's IEP academic and behavioral goals. He noted that while not all the present level areas had numerical levels, he and other staff relied on work samples and what the Student was working on in class to measure progress. Regarding behavioral and nonacademic areas that did not contain baseline data, Mr. Page testified that staff discussed and relied on both the positive and negative behaviors for the Student. Based on those discussions, he and staff were able to continue working on reducing the Student's level of frustration and threatening behaviors. Mr. Page observed that the Student would go for long periods without a behavioral incident. When a behavioral incident occurred, the Student was able to recoup and continue with his/her day and classroom routine.

In *Ashland School District v. Parents of Student R.J.*, 585 F Supp2d 1208 (D Or 2008), *aff'd* 588 F3d 1004 (9<sup>th</sup> Cir 2009), the court rejected the parents contention that the IDEA requires numerical baseline data in the present levels, annual goals and progress notes, particularly in the area of behavior. The court noted that the requirements for present levels of performance under the IDEA was simply a statement of "how the child's disability affects the child's involvement and progress in the general education curriculum." 585 F Supp2d at 1228. The court noted that this requirement did not require school districts to "quantify [a student's] behaviors to three decimal places \* \* \*." *Id.*

Mr. Page testified regarding the criteria for the social communication behavioral goal that he used the scale of "rarely" to "often" to work to get the Student to improve his/her behaviors. Ms. O'Kelley agreed that it was appropriate to use the "rarely" to "often" scale for the social communication behavioral goal. She testified that this type of scale is a subjective rating and is based on teacher observations over time and provides information to a parent on how the child is progressing based on a teacher's judgment.

The Parents failed to present persuasive evidence that they made objections known to the District about the present levels, the baseline data being used, the goals, or the rating scales being used on the Student's IEPs during the 2009-2010 school year.

The Parents contended that the District sent the Student home excessively for behavioral reasons during the 2009-2010 school year. The 2009-2010 school year sign-out book showed that the Parents signed out the Student five times for reasons not related to behavior. The Parents failed to present persuasive evidence that the District sent the Student home excessively for behavioral reasons during the school year.

The Parents contended that the IEP team did not adequately address ESY services at the end of the 2009-2010 school year. Mr. Page testified that the Student did not qualify for ESY services because the Student was not demonstrating undue regression. In fact, Mr. Page believed the Student was demonstrating progress in each of his/her IEP goal areas. The Parents participated in the IEP meeting and failed to present persuasive evidence that they objected to the ESY determination.

To the extent that the IEPs applicable to the 2009-2010 school year were deficient procedurally in other areas, the Parents failed to prove that the Student did not receive at least some educational benefit during the school year.

In sum, the Parents failed to establish by a preponderance of the evidence that the Student did not receive a FAPE during the 2009-2010 school year.

*2010-2011 school year*

The Student returned to Mr. Page's AA class in September 2010 for the 2010-2011 school year. The Student started the year by attending Ms. Krieg's regular education third grade class and went to recess with the rest of third grade students.

Ms. Patterson testified that from September 2010 through December 2010, the Student continued the success he/she had enjoyed the previous year and did well in the classroom and had positive experiences in his/her partner class.

Mr. Page believed that the Student made good progress in the areas of math, reading, writing, and social behavior until the spring of 2011. He testified that during the 2010-2011 school year, prior to March 2011, even when the Student had behavioral incidents, the Student was able to adjust and could continue with his/her day and classroom routine.

Ms. Krieg observed that the Student did well in her partner class and was well liked by other students. She did not observe any behavioral problems until February 2011.

Beginning in late February or early March 2011, and continuing to the end of the school year, a series of things occurred that led to a loss of educational opportunity for the Student and that seriously infringed upon the Parents' opportunity to participate in the IEP process.

Ms. Krieg was scheduled to attend the Student's December 7, 2010 IEP meeting. She did not attend. The Mother excused Ms. Krieg's attendance, provided that she would provide written input. However, Ms. Krieg did not do so. The Student had been attending Ms. Krieg's partner class. She would have had information about the Student that would have assisted the IEP team. Her failure to attend or provide written input infringed upon the Parents' opportunity to participate in the IEP process.

Ms. Krieg observed that the Student was disruptive in her class in February 2011. On March 1, 2011, the Student hit Mr. Page. On March 10, and on March 31, the Student acted out verbally or physically. On March 31, Mr. Page explained to the Mother in an email that the Student's behavior had changed and showed "a tone of controlled deviousness and defiance that was not there before." Exhibit P41 at 1.

The Student continued during April 2011 to act out verbally and physically at school. The District in early April started tracking the Student's behavior on the red-yellow-green rating scale. However, the District did not inform the Parents about the steps they had undertaken. Had the Parents known what the District was doing, they could have provided valuable information and assistance to the District to determine the cause of the Student's behavior.

On April 6, 2011, Ms. Patterson emailed Ms. Menne, Dr. Welch and Mr. Page asking for help because the Student was "becoming increasingly violent, unpredictable, and harder to redirect." Exhibit P42.

On April 20, 2011, Ms. Rentschler emailed Mr. Page a list of recommendations for a behavior plan for the Student.

On April 22, 2011, Ms. O’Kelley told Mr. Page that in her opinion a behavior plan based on a “thorough needs assessment” was needed. Exhibit P46.

On May 3, 2011, Ms. Ziolko observed the Student in the classroom and noted that the staff was resistant to making changes to respond to the Student’s behavior.

During March and April 2011, the District had ample evidence that the Student needed a reevaluation and that the IEP team needed to take steps to address the Student’s behavior and educational needs.

The Student’s inappropriate verbal and physical behavior continued until May 23, 2011, when he/she hit Mr. Page again.

Between late February or early March and late May 2011, the Student’s behavior worsened and his/her educational opportunities suffered.

The IDEA and Oregon law contemplate a reevaluation of an IEP-eligible student, when, among other reasons, the public agency determines that the child’s educational or related services needs warrant a reevaluation. 20 USC § 1414; OAR 581-015-2105(4)(a)(A).

Once a school district’s duty to reevaluate is triggered, the district must conduct an evaluation planning meeting. OAR 581-015-2115. At an evaluation planning meeting, the district must review specific information, including information and evaluations provided by the parents, observations by teachers and related service providers, and existing evaluation data. OAR 581-015-2115(1)(a) and (b). After reviewing specific data and “input from the child’s parents,” the district must “identify what additional data, if any, including are needed to determine \* \* \* [w]hether the child \* \* \* continues to be \* \* \* a child with a disability[.]” OAR 581-015-2115(1)(b)(A). The reevaluation planning team must determine “[the present levels of academic achievement and related developmental needs of the child; \* \* \* [w]hether the child \* \* \* continues to need \* \* \* special education and related services; and \* \* \* [w]hether the child needs any additions or modifications to special education and related services \* \* \* [t]o enable the child to meet the measurable annual goals in the child’s IEP and \* \* \* [t]o participate, as appropriate, in the general education curriculum \* \* \* [.]” OAR 581-015-2115(1).

Although the IEP team and “other qualified professionals, as appropriate” may conduct a reevaluation planning without a meeting, the district must invite the parents if it “holds a meeting \* \* \* [.]” OAR 581-015-2115(1) and (2). If the IEP team determines that “no additional data are needed to determine whether the child is or continues to be a child with a disability, and to determine the child’s educational and developmental needs,” the district must provide written notice of that determination and the parents’ right to request an evaluation. OAR 581-015-2115(4).

If the IEP team determines that it needs additional data “to determine whether the child is or continues to be a child with a disability” or “to determine the child’s educational and developmental needs,” the district must then satisfy two additional procedural requirements

“[b]efore conducting any evaluation or reevaluation[.]” OAR 581-015-2110. First, the district “must provide [written] notice to the parent \* \* \* that describes any evaluation procedures the agency proposes to conduct as a result of the evaluation planning process.” OAR 581-015-2110(2)(a). Second, the district “must obtain informed written consent for evaluation.” OAR 581-015-2110(2)(b).

After satisfying the notice and consent procedural requirements under OAR 581-015-2110(2), the district must conduct an evaluation in accordance with specified criteria. OAR 581-015-2110(3) to (5). The child must be “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[.]” OAR 581-015-2110(4)(d). The evaluation must be “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[.]” OAR 581-015-2110(4)(e). The evaluation must include “assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.” OAR 581-015-2110(4)(f). The team conducting an evaluation must “[d]raw upon information from a variety of sources” and “[e]nsure that information obtained from all these sources is documented and carefully considered.” OAR 581-015-2125(1) and (2).

After completing the reevaluation under OAR 581-015-2110, the “team,” which must include the parent, “must prepare an evaluation report and written statement of eligibility.” OAR 581-015-2120(2). The evaluation report must “describe and explain the results of the evaluation conducted.” OAR 581-015-2120(2)(a). The written eligibility statement must include several determinations. OAR 581-015-2120(2)(b).

Under IDEA regulations, “evaluation” means, “procedures used to determine whether a child is disabled, and the nature and extent of the special education and related services that the child needs.” OAR 581-015-2000(10). An FBA is an evaluation if it is used to determine the nature and extent of special education and related services that the child needs. *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007). “Parental consent, consistent with 34 CFR § 300.300(a) and (b), is required for an FBA conducted as an individual evaluation or reevaluation. If the FBA is conducted for individual evaluative purposes to develop or modify a behavioral intervention plan (or behavior support plan) for a particular child, under 34 CFR § 300.502, a parent who disagrees with the child’s FBA would have the right to request an IEE at public expense.” *Id.* at 704. In *Letter to Christiansen*, OSEP determined that an FBA conducted to modify a BSP, included as part of a child’s IEP, is a reevaluation requiring parental consent. *Id.* at 705.

The District had ample evidence by April 2011 that the Student’s physical aggression and other behavioral problems warranted a reevaluation under the IDEA.

The District did not have an FBA completed on the Student until on or about May 26, 2011. The District did not obtain the Parents’ consent to conduct the FBA. The Parents did not even know that an FBA had been completed until later. Had the Parents known about the FBA, they could have provided valuable information about the Student’s behavior at home, the Student’s depression and statements about self-harm.

The District's failure to conduct a reevaluation and an FBA in accordance with the IDEA denied the Parents the opportunity to participate in the IEP process and denied the Student a FAPE.

Sometime during the winter of 2010-2011, Mr. Page stopped sending the Student to music class. The Parents were unaware of that change during the rest of the school year. The June 2, 2011 report card for the Student stated that the Student was "developing and improving" in music throughout the school year. That statement was simply incorrect. The Student had not been attending music since the middle of the school year. Sometime during the spring of 2011, Mr. Page stopped sending the Student to PE class. In late April 2011, he stopped sending the Student to Ms. Krieg's class for lunch. These changes to the Student's IEP were made without input from the Parents, and in the case of the music class and PE were made without the Parents' knowledge.

The Parents informed the District no later than May 30, 2011 that the Student was saying things like, "I want to die," and "nobody likes me." The Mother was under the impression that Ms. Poarch was working with the Student one-on-one in Mr. Page's classroom, not in a separate room next to the classroom. The Parents believed that being separated from the classroom damaged the Student's self esteem and contributed to his/her depression.

The meeting the District had with the Parents on May 31, 2011 was not an IEP meeting. Had the District convened an IEP meeting earlier in the spring, when the Student's behavior had begun to deteriorate significantly, the Parents could have received proper notice of the meeting and been able to participate in a meaningful way. Assessments and evaluations could have been completed on the Student with input from the Parents. The IEP team could then have properly addressed the Student's situation and taken the appropriate steps to ensure that the procedures under the IDEA were followed.

The District cites *G.R., supra.*, to support its position that the steps the District took in April and May 2011 to collect information on the Student's behavioral issues demonstrate that the District did not violate the IDEA and that the District provided a FAPE to the Student. In *G.R.*, the parents raised concerns about the student's behavioral issues in an October 23, 2007 IEP meeting and requested a behavioral evaluation. The school district waited approximately four months from the date of the October 23, 2007 IEP meeting before collecting enough information to convene an IEP meeting in February 2008. The district court held that the school district's response and the nature of its response were reasonable given the lack of an established pattern of behavior until later in the school year. *Id.* at 1135.

However, in *G.R.*, the school district eventually did convene an IEP meeting. In the Student's case, the District never convened an IEP meeting. The IEP is a "central feature" of the IDEA "and the primary mechanism by which [the law] work[s] to ensure a FAPE." *Greater Albany Sch. Dist.*, 49 IDELR 56 at 257 (SEA OR 2007) (citing *Rowley*, 458 US at 181).

The District's failure to convene an IEP meeting seriously infringed upon the Parents' opportunity to participate in the IEP process and denied the Student a FAPE.

In sum, the events from late February or early March 2011 until the end of the school year demonstrated that the Student had lost educational opportunity and that the Parents'

opportunity to participate in the IEP process had been seriously impaired. As a result, the Student was denied a FAPE.

*Placement at Victory and remedies*

The Parents gave the District notice on June 5, 2011 that they intended to place the Student in a private school for the 2011-2012 school year at public expense.

To receive reimbursement for a private placement under the IDEA, a parent must show that the public placement violated the IDEA and that the private placement was proper under the IDEA. *C.B. v. Garden Grove Unified Sch. Dist.*, 635 F3d 1155, 1159 (9<sup>th</sup> Cir 2011). The Parents have demonstrated that the District's placement in the 2010-2011 school year was not proper under the IDEA. Qualifying for reimbursement of a private placement under the IDEA requires that a parent show that the placement provides educational instruction specially designed to meet the unique needs of a child with a disability, and provides the supports necessary for the child to benefit from instruction. *Id.* at 1159-60.

The Parents placed the Student at Victory starting in September 2011. The Student has continued at Victory since then, except for June 2012, when by agreement between the Parents and Victory, the Student was removed from school for medical reasons.

The Parents established that the program at Victory meets the Student's educational needs for a child with autism. The Student was and is doing well at Victory and has received educational benefit.

The Parents have met their burden and established by a preponderance of the evidence that they are entitled to reimbursement for private tuition at Victory from September 2011 through August 2012 in the amount of \$17,000 (\$1,700 per month for 10 months).

Prospective placement in a private placement at public expense is part of the appropriate relief in a case where the private placement desired by the parents is proper and the IEP calling for a placement in a public school is inappropriate under the IDEA. *Burlington Sch. Comm. v. Mass. Dept. of Educ.*, 471 US 359, 370 (1985). When a school district has failed to provide a FAPE or failed to propose an IEP that would provide a FAPE, and parents have placed a student in a proper private placement, continuation of that private placement at public expense is also appropriate as compensatory education. *Draper v. Atlanta Indep. Sch. Sys.*, 518 F3d 1275, 1279-80 (11<sup>th</sup> Cir 2008).

The Student's December 2010 IEP expired in December 2011. The District has not offered the Student an IEP that provides a FAPE. Until the District does so, the Parents are entitled to be reimbursed for the private placement at Victory in the amount of \$1,700 per month.

The Parents also seek reimbursement for expenses they paid private tutors to provide educational services to the Student from August 15, 2009 through December 2011. See Exhibit P115. The Mother testified that she and the Father incurred those educational expenses to supplement the education the Student received from the District.

The Parents failed to prove by a preponderance of the evidence that the District did not provide a FAPE to the Student during the 2009-2010 school year and during the 2010-2011 school year until the spring of 2011.

The Parents gave notice to the District on June 5, 2011 that they intended to place the Student in a private school at public expense. Prior to June 5, 2011, the District was not on notice of the Parents' position with respect to the education the Student was receiving from the District. Under the circumstances, it would be inappropriate for the Parents to receive reimbursement for supplemental educational services they provided to the Student since August 15, 2009. Therefore, reimbursement for educational expenses for the private tutors is denied.

The Parents request that the District be ordered to provide training to its staff regarding IEP team meetings and related matters. The Parents failed to present evidence as to how much time would be appropriate for such training and what the nature of that training would entail. In the absence of such evidence, it would be inappropriate to order this request by the Parents.

The Parents also request the following: That an IEP evaluation planning meeting be convened to determine which assessments are needed to accurately determine the Student's educational needs and conduct those evaluations; that an IEP meeting be convened to develop an appropriate IEP and BIP that address all of the Student's educational needs; and that a placement meeting be convened to determine an appropriate placement for the Student.

Because the District failed to provide a FAPE to the Student in the 2010-2011 school year, and because the last IEP (December 2010) has expired, the Parents' requests for an IEP evaluation meeting, an IEP meeting, and a placement meeting are appropriate and therefore are granted.

## ORDER

### **IT IS ORDERED THAT:**

- (1) Within 14 days of the date this Final Order is issued, the District convene an IEP evaluation planning meeting to determine which assessments are needed to accurately determine the Student's educational needs and conduct those evaluations as soon as reasonably possible.
- (2) Once the evaluations are completed, the District promptly convene an IEP meeting to develop an appropriate IEP and BIP that addresses all of the Student's educational needs.
- (3) The District then promptly convene a placement meeting to determine an appropriate placement for the Student.
- (4) The District reimburse the Parents for tuition costs at Victory from September 2011 through August 2012 in the amount of \$17,000.
- (5) The District continue to reimburse the Parents for tuition at Victory for the 2012-2013 school year in the amount of \$1,700 per month until the District provides the Student with a FAPE.

/s/ Ken L. Betterton  
Senior 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 4th day of October, 2012 with copies mailed to:

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