

specialist for SCESD; Kathleen Stauff, M.A., teaching - special education; program administrator, SCESD; and James Collins, M.S., special education, ALS teacher, SCESD,

Parents called the following witnesses: Nhu DeBastiani, M.S., psychology, Board Certified Behavioral Analyst (BCBA)behavioral consultant; Katherine Calouri, M.A., Ph.D., developmental psychology, co-founder of Project PACE (Parent and Child Enrichment); Amy Impson, M.S., psychology – emphasis in applied behavior analysis; Carol Tucker, M.A. speech pathology, speech language pathologist for Coos Bay Public Schools, private speech language practitioner ending August 2011; and Juli Scott, instructional assistant for Student;

ISSUES

(1) Whether District failed to provide Student with a free appropriate education (FAPE) as required from June 1, 2011 to June 8, 2011, based on the allegations set out in the hearing request, in violation of the Individuals with Disabilities Education Improvement Act (IDEIA 2004) and its implementing Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OARs).¹

(2) Whether District failed to provide an appropriate placement for the Student from June 1, 2011 to June 8, 2008, based on the allegations set out in the hearing request, in violation of the IDEIA and its implementing laws and rules.

(3) Whether District failed to evaluate Student in all areas of suspected disability during the 2011-2012 academic year, based on the allegations set out in the hearing request, in violation of the IDEIA and its implementing laws and rules.

(4) Whether District failed to provide Student a FAPE during the 2011-2012 academic year, based on the allegations set out in the hearing request, in violation of the IDEIA and its implementing laws and rules.

(5) Whether District failed to provide an appropriate placement for Student during the 2011-2012 academic year, based on the allegations set out in the hearing request, in violation of the IDEIA and its implementing laws and rules.

EVIDENTIARY RULINGS

Exhibits marked D1 through D213, D215-D217, offered by the District, were entered into evidence without objection. D214, a recording of a resolution session held on October 11, 2011,

¹The Notice of Hearing, first issued March 8, 2012, incorrectly stated the period at issue for issues (1) and (2) as June 1, 2011 to June 11, 2008. The dates in the Order refer back to and correct those dates from June 1, 2011 to **June 8, 2011** (October 3, 2010 Parents' Due Process Request, at 4 and 9 of 11.) Aside from that typographical error, at prehearing, the parties agreed that the issues for hearing were accurately and completely stated in Parent's due process request in the paragraph headings as set out in this statement of the issues. Parents' request for hearing included 7 pages of specific details, related to each issue statement, alleging specific deficits and the factual allegations sufficient for notice to District on each general allegation. The request for hearing is a pleading document and is hereby incorporated by reference into this Order.

was supplemented by a transcript of the recording, marked D214A. D214 and D214A were then entered into the record without objection.

Exhibits S1 through S3 and S6 through S41, S43 through S53, S55 through S78, S80 through S116 and S120 through S169, offered by Parents, were entered into evidence without objection. Prior to submitting exhibits, Parents withdrew what had been marked S42, S54, and S79. At hearing, Parents withdrew what had been submitted as S117 through S119. District objected to Exhibits S4, a copy of Student's IEP, dated July 7, 2007, and S5, copy of a December 17, 2007 evaluation report by Terre J. Glahn, Ph.D. Ruling on admissibility was reserved pending testimony and proper foundation.

Following testimony regarding the foundation and relevance of Exhibit S4, Parents offered S4 for the limited purpose of relevance to Parent's disagreement with the placement in the 2007 IEP and Wetherell's characterization of the IEP process in 2007. S4 was admitted, over the objection of District, subject to the limited purpose for which it was offered. S5 was admitted, relevant to the reliability of Collin's testimony regarding the success of the 2007 placement.

The following witnesses were offered and qualified as experts in the areas noted:

Georgeann Harty is an expert on autism in the educational setting;
Nhu DeBastiani is an expert in Applied Behavior Analysis (ABA);
Dr. Calouri is an expert in the field of autism;
Amy Impson is an expert in the science of behavior, with a focus on ABA; and
Kelly Gill is an expert in educational autism.

FINDINGS OF FACT

Relevant background facts

(1) Parents and Student have resided within the boundaries of the District during all times relevant to this due process complaint. (Test. of Parent, Tr. 2859-2863, 3195-3196.) Student qualifies for special education services in category of Autism Spectrum Disorder under IDEA.² (Ex. D15 at 6; D105 at 5.)

(2) As of June 9, 2011, the effective date of Student's most recent IEP, Student's chronological age was approximately 13 years and nine months. Student's developmental age was, and is, approximately two years of age. (Test. of Parent, Tr. 2856.)

(3) Student communicates primarily using American Sign Language (ASL) with many modified signs. (Test. of Parent, Tr. 2856, Scott, Tr. 272-276, Tucker, Tr. 2547; Exs. D72 at 12, D102 at 6.)

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

Student's history with District related to knowledge of Student's needs

(4) In 2001 or 2002, Student attended Head Start three hours a day in the morning with District through SCESD and Early Intervention. Student's father worked with Student in the afternoon. (Test. of Parent, Tr. 2859-2860.)

(5) Sometime during 2002, Parent attended a workshop given by Vince Carbonne regarding the use of applied behavior analysis (ABA) through board certified behavior analysts (BCBAs). Parent concluded from what he learned that the use of ABA, as presented at the workshop, would be beneficial for Student. (Test. of Parent, Tr. at 2856-2859.)

(6) After the workshop, Parent called Carbonne and requested a consultant visit at the home with Student. As a result, Nhu DeBastiani (fna Quach³) who was working with Carbonne at the time, began consulting with the family. (Test. of DeBastiani, Tr. 1064.)

(7) Nhu DeBastiani, M.S., B.C.A., is a BCBA who designs complete educational and behavioral programs for students who are working towards inclusion in school and classroom environments. (Test. of DeBastiani, Tr. 1042, 1054-1055.) DeBastiani's expertise is in ABA and she specializes in the field of verbal behavior as it applies to children with autism. (*Id.*, Tr. 1060-1062.)

(8) Following DeBastiani's recommendation, Parent purchased an Assessment of Basic Language and Learning Skills (ABLLS). DeBastiani trained Parent on the ABLLS assessment and Parent administered the assessment to Student in 2002. Based in part on the ABLLS data, Parent and DeBastiani developed a program for Student. Parent began to implement ABA techniques with Student at home while Student continued to attend school. (Test. of DeBastiani, Tr. 1064-65, 1069, Parent, Tr. at 2856-2859.)

(9) As part of her early work with Student, DeBastiani observed Student in his/her then-current District placement. Student was in a classroom, in Gold Beach. Student had a one-on-one aide and did not interact with the other schoolchildren. Student followed the directions of the aide but he/she did not copy or imitate the other children. The only time Student initiated an interaction with another student was if the student had something Student wanted. Student, with the facilitation of the aide, approached the student to try get what he/she wanted from the other student. Student did not approach students to play or interact socially. (Test. of DeBastiani, Tr. 1069-1071.)

(10) Impson is DeBastiani's consultant. Because Impson is a BCBA, she has the academic background to work with DeBastiani. DeBastiani has trained Impson on DeBastiani's hands-on practical or clinical procedures. After Impson began work with DeBastiani, the two would alternate working with Student in Student's home. (Test. of DeBastiani, Tr. 1113.)

(11) For the 2004-2005 school year, Student repeated kindergarten, in part, because of the widening disparity in development between Student and typically developing peers. (Test. of Parent; Tr. 2860-2861.)

³Ms. DeBastiani's maiden name was Quach. (Test. of Davis, Tr. 487.)

(12) In April of 2005, Student head-butted his/her instructional aide at school, cracking the aide's sternum. (Test. of Hardy, Tr. 961, 962, Collins, Tr. 2291, and Parent, Tr. 2861) Following the incident, Parents took Student out of school. (Test. of Parent, Tr. 2861.) Student did not attend school for the 2005-2006 school year. Parent worked with Student at home. Parent hired Juli Scott, as an instructional aide, to work part-time with Student, beginning late in 2005. Parent then worked half of the day with Student and Scott worked the other half, according to their scheduling needs. (*Id.*, 2861, 2862.)

District's provision of education and related services prior to Student leaving school in 2007

(13) On July 17, 2007, District developed an individualized Education Plan (IEP) intended to serve Student until July 11, 2008 that provided for the following: specially designed instruction (SDI) in communication, functional academics, reading functional academics-math, school routines, community instruction, social interactions, school behavior, and fine motor; related services of occupational therapy (OT), augmentative communication (aug. com.), speech language, transportation, and transportation aide; and accommodations of sensory diet, visuals, behavior plan, and adult assistance in a 95% self-contained placement. (Ex. S4)

(14) Among those signing the 2007 IEP (who were also involved in Student's 2011 IEP) were Jeff Davis, as the District representative, Tenneal Wetherell, as the special education teacher/provider, Rorry Keane, SLP/Aug. Com., Hege Bakken, OTR/C, and Georgeann Harty, listed under "other[s]." (Ex. S44 at 1.)

(15) Jeff Davis is Superintendent of the Curry County School District. He has a bachelor's degree in health education, a master's degree, and holds a Continuing Administrator's certificate through the Oregon's Teacher Standards and Practices Commission (TSPC). Davis's continuing education has included special education training on a yearly basis. (Test. of Davis, Tr. 454; Ex. D197 at 5.)

(16) Davis participates in IEP meetings as the District representative, and, in that role, makes decisions when a team cannot reach consensus. District employs three licensed special education teachers or case managers. At all times relevant to the current matter, and up to the end of the 2011-2012 school year, District contracted with South Coast Educational Service District (SCESD) to operate the Adaptive Life Skills (ALS) classrooms throughout the District. District also contracted with SCESD to provide behavior specialists, school psychology services outside those provided through the ALS classrooms, and for speech language therapy if it was provided outside of aug. com. services. (Test. of Davis, Tr. 455-457.)

(17) Georgeann Harty holds a masters of arts in severe and profound disabilities. She is currently employed by the Corvallis School District as an autism specialist. (Test. of Harty, Tr. 804; Ex. D213.) From 2006-2011, Harty worked as an autism specialist for SCESD. (Ex. D213 at 1.)

(18) Harty met Student in 2007 in her role as a provider of special services. Harty helped with planning Student's return to a classroom placement beginning fall 2007. (Test. of Harty, Tr. 933.) Student started with a half-day program. Student did not increase the time at school past a half day in 2007. In Harty's opinion, Student's transition to school in 2007 was successful. (*Id.*, at 942-43.)

(19) Harty was not involved with Student again until the 2010-2011 school year when she was asked to do an observation of Student in March 2011. (Test. of Harty, Tr. 825.) In the time between working with Student in 2007 and March of 2011, Harty had seen Student approximately two times out in community. (Test. of Harty, Tr. 824.)

(20) Harty has dual bachelor's degrees in special education K-12 and general education K-8. She taught in special education classrooms for eight years in Arizona before completing her master's degree. In the past, Harty has also worked as a behavior and integration specialist. (Test. of Harty, Tr. 805-06.)

(21) Harty began her employment with SCESD as an autism specialist. Her training in Oregon included seven in-person trainings in autism, taught in Salem, during her first year of teaching. Oregon's TSPC does not currently certify autism as a special area of certification within special education. The specialized training is required to qualify as a regional autism specialist. Harty has trained others in working with students who have autism. (Test. of Harty, Tr. 809; Ex. D213 at 4.)

(22) Harty's training has included multiple approaches to teaching students with autism, including ABA. Harty's ABA training includes multiple ways of teaching, for example discrete-trial teaching, pivotal response, and back-chaining. Harty does not use her ABA skills, with the exception of pivotal response, very often in her current position. (Test. of Harty, Tr. 814.) Harty is certified to administer an educational eligibility assessment tool for autism, the Autism Diagnostic Observation Schedule. (Test. of Harty, Tr. 815-816, 818; Ex. D213 at 29.)

(23) Harty has had some formal classes in ASL but she has not retained much of the language due to non-use. Harty is most familiar with "classroom" signs, those used in the class repeatedly, for example, the signs for "sit down," "be quiet," "yes," "no," "help," or "what do you want." (Test. of Harty, Tr. 816-817.)

(24) Rorry Keane, M.A., SLP, began working for, and has been continuously employed by, SCESD since 1977. Keane met Student when Student attended the ALS classroom approximately seven years ago and she participated in the 2007 IEP. Keane is licensed in Oregon by the TSPC and is also licensed by the American Speech & Hearing Association. She attends continuing education classes, which may be in any related area to SLP. (Test. of Keane, Tr. 639-641.)

(25) In the early 1980's Keane also participated in Oregon's first state wide in-service for augmentative alternative communication. Augmentative Communication Specialist is a job title within a school district or an ESD, it does not denote a certification or educational degree. Because of her experience and training, Keane is qualified for SCESD's position as augmentative communication specialist. (Test. of Keane, Tr. 642-643.)

(26) In her position, Keane works only with students assigned to the ALS classrooms. She evaluates students for eligibility and makes decisions on which devices, if any, will assist the student with communication needs. Keane participates in IEP meetings for students and sometimes assists in drafting portions of IEPs related to SLP or augmentative communication. (Test. of Keane, Tr. 645-46.)

(27) Hege Bakken, OT, completed her education in occupational therapy and became certified as an OT in Norway in 1990. Bakken is licensed as an OT in Oregon and is registered with the National Board of Occupational Therapy, the U.S. National Board, and is a member of the Oregon Occupational Therapy Association. Bakken has known Student since he/she was in preschool, and provided OT services at times. Bakken evaluated Student in 2006. Bakken has not seen Student within the last three or four years. (Test. of Bakken, Tr. 761-62; 764, 766; Ex. D215.) .

(28) Bakken has worked as an OT for SCESD for 14 years. (Test. of Bakken, Tr. 763; Ex. D197 at 38-41.) Except for students who are in early intervention programs, Bakken provides services to Students only at Life Skills classrooms or resource rooms. She also consults with regular education teachers who have students with OT services on IEPs in their classrooms. (Test. of Bakken, Tr. 756-57, 758.)

(29) District convened an IEP meeting for Student on July 7, 2007. The team developed an IEP and, among other things, determined placement to be the ALS class. (Ex. S4.) In fall 2007, Student returned to school, attending the ALS classroom in Gold Beach. (Test. of Parent, Tr. 2862.)

(30) Parent transported Student to school in the family vehicle. Student stayed for three hours and returned home via a District school bus. Student was willing to go to school at the start of the school year. Student began the school year attending three hours with a goal of increasing the number of hours according to Student's success. Student was never successful in the 2007 placement to increase his/her attendance beyond three hours. (Test. of Parent, Tr. 2863-64.)

(31) Prior to the start of the school year, Student had been willing to leave home and had increased community excursions from the home environment. After the 2007-2008 school year started, Student began to resist leaving home. Student's incidents of resistance to leaving increased in frequency and in severity. Student began to have unexplained meltdowns, where he/she would sit on the floor crying without Parents having observed any particular cause for the behavior. Student increasingly engaged in self-injurious behavior, hitting others, and breaking things. Student's success in the home instructional setting decreased, accompanied by a decrease in acquisition of new material and decreased response rates. (Test. of Parent, Tr. 2864-67.)

(32) James Collins was Student's teacher in the ALS classroom in 2007. (Test. of Collins, Tr. at 2285, Parent, Tr. 2867.) Collins had not attended Student's July 7, 2007 IEP meeting. (Ex. S4 at 1.) Collins holds a master's of arts degree in special education for grades K through 12, in addition to two bachelors' degrees, one in art and one in anthropology. Collins currently holds an Initial II Teaching license in Oregon.⁴ (Test. of Collins, Tr. at 2285.)

⁴ When he began work with Student in September 2007, Collins was certified to teach under a Restricted Transitional Teaching license with an endorsement in special education, beginning August 22, 2007. Collins was licensed to begin teaching prior to completing all coursework necessary for the Initial I license because he held two undergraduate degrees and was working on his master's degree. Collins was licensed as an Initial I Teaching license effective September 25, 2008. After he gained an additional three years teaching experience and completed additional continuing education, Collins became licensed as an Initial II teacher effective October 2, 2011. (Test. of Collins, Tr. 2288-2289, 2562, 2563; Ex. D197 at 3.)

(33) Prior to becoming a special education teacher, Collins worked for SCESD as an instructional assistant (IA) for nine years. As an IA, Collins worked solely with special education students in grades K through 12 and in a variety of placements, from special education students placed in regular education classrooms to students whose placement was entirely self-contained classrooms. While working as an IA, Collins completed his master's degree. (Test. of Collins, Tr. 2285-2287.)

(34) Collins is not fluent in American Sign Language (ASL) but can understand different signs and uses signing often. (Test. of Collins, Tr. 2287.) Collins has also worked with students who used modified signs. He has learned the meaning of those students' modified signs from context or from another person familiar with a particular student's modifications. (*Id.*, Tr. 2287, 2288).

(35) Collins did not know Student's signs when Student started school in fall 2007. After school started, Collins learned some of Student's signs from Parent's descriptions. Collins did not always understand Student's signs or communication. Collins did not consider it problematic when he did not understand Student. Based on his experience with students with autism, Collins believed a teacher learns the student's individual language needs as part of getting to know the student. (Test. of Collins, Tr. 2293, 2294.)

(36) During the approximately three months of 2007 that Student was in Collins's class, Collins did not observe what he would characterize as aggressive behavior from Student towards himself/herself or other students. Student would sometimes run at Collins in a way that Collins believed others might interpret as aggressive but Collins did not. When Collins observed Student running at him, Collins raised his hands in a "high five" manner and Student would respond by clapping hands with Collins. (Test. of Collins, Tr. at 2291-2292.)

(37) Collins believed he was able to communicate with Parents regarding Student's needs while Student was in his class in 2007. (Test. of Collins, Tr. at 2293.) Collins believed Student's placement in 2007 was successful. (*Id.* at 2290, 2303.)

(38) While Student was attending school in December 2007, Parents requested that Terre J. Glahn, Ph.D., perform an independent educational evaluation (IEE) of Student. District later paid for the IEE. (Test. of Parent, Tr. 2864.) Dr. Glahn observed Student in Collins's ALS classroom for one and a half hours on December 7, 2007. Dr. Glahn also reviewed Student's IEP, data collection sheets supplied by Parent, and two days of recorded classroom activity. She briefly spoke to Collins and to two IA's. Dr. Glahn talked to Student and Parents, and to Student's in-home instructors. Dr. Glahn reported her findings and made recommendations in a report dated December 17, 2007, based on her observations, the reviewed material, and her discussions regarding Student. (Ex. S5.)

(39) Dr. Glahn compared the IEP goals in effect with the instruction observed in the classroom. According to the IEP, Student most effectively communicated with sign language and the IEP focused on the use of signing across content areas. Student's goals were focused on increasing Student's use of expressive vocabulary using word approximation and signs. (Ex. S5 at 2.) Signing is best acquired if instructor pairs the verbal request with the simultaneous pairing of the signed word. (Ex. S5 at 2.) Collins did not interact with Student due to other assignments but Collins explained Student's program to Dr. Glahn. IA's worked with Student. Dr. Glahn observed that the IAs used simultaneous verbal requests paired with the signed word

approximately a 20 percent level. Instructor demonstration occurred at a very low rate and without predictability. (*Id.*)

(40) Dr. Glahn observed other discrepancies between the signing goals set out in the IEP and the implementation in the classroom. When Student responded correctly to a request, instructor feedback and reinforcement was very limited and low in affect. When Student's combined expressive pairing with a sign or word approximation (another goal listed on Student's IEP), which he/she did but rarely, Student's utterances were ignored. According to Dr. Glahn, both signing and verbal approximations need to be consistently taught through defined prompting strategies and relevant shaping procedures. Dr. Glahn did not observe direct feedback to be an integral part of the instructional format. (Ex. S5 at 3.)

(41) Dr. Glahn found that "the most successful form of communication (e.g. sign) was demonstrated or required throughout most of the sessions." In addition she wrote, "[u]nfortunately, most of [Student's] spontaneous attempts at communication were neither acknowledged nor refined via relevant feedback." (Ex. S5 at 4.)

(42) Among other things, Dr. Glahn concluded that, based on her observation of the instruction in the classroom, materials used in the instructional areas were appropriate but the instructional strategies were not. Additionally, Student predominantly received social attention during minor acts of aggression and/or distractibility. Dr. Glahn opined that Student was under-challenged, Student spent more time on breaks than in situations to learn, and Student was not using the signs Student knew. The instructors were not using signs to teach Student and Student's verbal attempts were predominantly ignored, apparently based on the instructors belief this was the best for instruction. (Ex. S5 at 5, 6.)

(43) Dr. Glahn noted that Student would benefit from moving about in the classroom and being more involved in experiential learning activities. Dr. Glahn was told that Student was separated from the group because of Student's agitated and aggressive incidents. While observing, Dr. Glahn saw Student participate when allowed and Student showed very little agitation. (Ex. S5 at 6.)

(44) Parents withdrew Student from school in approximately the second week of December 2007 because they believed Student was not in a successful program. Parents believed Student's goals and objectives were not being worked on. Student's behavior had significantly deteriorated. Student had been cooperative with attending school at the beginning of the school year. By December, Student was exhibiting self-injurious behavior, anxiety, increased problematic behavior when leaving the home environment and a decrease in Student's instructional response and skill acquisition. (Test. of Parent, Tr. at 2863-2866.)

(45) In January 2008, Parents filed a due process complaint alleging that District was in violation of the IDEA in relation to its obligation to provide FAPE to Student. (Ex. S6.) Parents and District resolved the complaint through a settlement agreement signed in late April 2008 (Agreement). (*Id.*, Test. of Parent, Tr. 2867-2868 and Davis, Tr. 457-458.)

(46) The Agreement, beginning June 1, 2008 and ending May 31, 2010, provided for Student's education by a private program consultant (consultant), as defined in the Agreement, in a private location that would meet Student's unique needs. (Ex. S6 at 1.) Among other provisions, the consultant was required to assist District and Parents during the final six months

of the Agreement “to develop an appropriate transition plan⁵ to allow Student to be served in an appropriate placement at the start of the 2011-12 school year.” (*Id.*, at 3.)

(47) Under the Agreement, Student was educated in a home and community based program. From the beginning of the Agreement and throughout the time the Agreement was in effect, Nhu DeBastiani was the consultant performing the educational services for Student. (Test. of Parent, Tr. 2869; Ex. S6.)

(48) As part of the Agreement, Parent submitted yearly summaries to account for expenditure of the funds provided for Student’s program as required. District did not question Parent about the summaries or compliance with the Agreement during the time the Agreement was in effect. (Test. of Parent; Tr. 3180-81; Ex. S164.)

(49) DeBastiani designed and implemented Student’s program during the term of the Agreement. DeBastiani monitored Student’s program through reviewing data sent by the home therapists, through telephone calls, e-mails, and through monthly visits. If a portion of the training was not working for Student to make progress, DeBastiani would look at the information and rewrite the plan. The goals would change and build on what Student was achieving. For example, Student started learning to sign for things that were present. The team would find new things Student liked and he/she would learn to sign and/or use verbal approximations for those things when they were present. Then, the team would work on getting Student to sign for things that he/she liked that were not present. (Test. of DeBastiani, Tr. 1111-1114, 1118-19; Ex. S160.)

(50) Per the Agreement, DeBastiani wrote the progress reports and the goals for Student’s 2008-2009, 2009-2010, and 2010-2011 IEPs. For 2010-2011 IEP, the last IEP under the Agreement, DeBastiani wrote a behavior intervention plan, a progress report and goals for Student’s IEP. (Test. of DeBastiani, Tr. 1094-1129; Test. of Parent, Tr. 2883; Ex. S160.) DeBastiani provided these documents to District. (Test. of DeBastiani, Tr. 1130.)

(51) Wetherell, Davis and Parent participated in telephone IEP meetings for Student’s 2008, 2009, and 2010 IEPs. Wetherell was responsible for reformatting DeBastiani’s information into the format required for an IEP. Wetherell, along with Kathleen Stauff, acting as case managers, took paperwork submitted by DeBastiani on Student’s PLEPs and goals and re-wrote the information into the format required for the IEP. The IEPs were then provided to District. (Test. of Wetherell, Tr. 42, 235, 251 Exs. S10, S12.)

(52) As with the prior IEPs, the progress and goals DeBastiani wrote were incorporated into Student’s 2010-2011 IEP without changes or additions from the District. (Test. of Parent, Tr. 2882-2884; Ex. S10.)

(53) During the period the Agreement was in effect, District did not request additional information on Student’s progress. (Test. of Parent, Tr. 2886.) Neither District nor SCESD

⁵District and Parents throughout this contested case referred to the requirement for a “transition plan.” The use of the term is misleading. OAR 581-015-2000(38) defines “transition services” as they relate to “a coordinated set of activities for a student with a disability that * * * is * * * to facilitate the student’s movement from school to post school activities, including postsecondary education, vocational education[.] In addition, OAR 581-015-2200(2) addresses the content of the IEP for transition services.

provided input for Student's education or program for the 2008, 2009, and 2010 IEPs. (*Id.* at 2890.)

(54) The May 18, 2010 IEP meeting, similar to the previous two IEP meetings, took approximately 10 minutes to complete over the telephone. (Test. of Parent, Tr. 2889; Ex. S11.)

2009-2010 background including preparation for end of Agreement and development of 2010 IEP

(55) Under the 2009 and 2010 IEPs, developed pursuant to the terms of the Agreement, Student was educated in a "private program for 100 [percent] of the school day." (Test. of Wetherell, Tr. 286-288, 293; Ex. S10 at 18, D15 at 19.)

(56) Student developed an additional health issue during the 2009-2010 school year. Around late September 2009, Student began to have periodic partial and tonic-clonic seizures. (Test. of Parent, Tr. 2887; Ex. S61.)

Most recent evaluation data available prior to planning for the April IEP meetings

OT Evaluation and Services

(57) On December 14, 2009, Synnove Abrahamson, MA. OTR/L, evaluated Student at Parent's request. Parent requested a home-based assessment of Student's functional status to see if occupational therapy services would help Student support and advance his/her functional performance. (Test. of Parent 2890; Ex. S13 at 1-4.)

(58) Abrahamson issued a report of her findings of Student's current functional levels and her recommendations for Student. (Ex. S13) Abrahamson noted Student's medical history including what she noted the most concerning, the recent development of seizure activity. Abrahamson noted Parents had an appointment with a neurologist and were following up on whether medication would be required. (*Id.* at 2)

(59) Abrahamson noted Student had good ability to manipulate scissors and other tools, and was able to crudely cut a series of shapes but completion of the task required moderate encouragement to complete. Student used utensils during meals independently but was not able to cut his/her food with a knife. (Ex. S13 at 2.)

(60) Student was not able to independently hand write any letters, despite good attempts at teaching by others. Student had not displayed much interest in this in the past. Student was able to copy simple shapes but held the pencil with an awkward grasp. Student was unable to copy any letters. The home-school program had begun to teach keyboarding to learn letters and Student was having some success. (Ex. S13 at 2.)

(61) Abrahamson evaluated Student in the area of sensory motor skills (sensory processing, body/spatial awareness, motor planning, bilateral motor coordination, posture and balance). Sensory motor skills are evaluated by how a student takes in, processes and reacts (motor response) to the variety of stimuli (external and internal) in their daily environment. Student, by history and during the evaluation, did not show motivation to participate in sensory motor activities. Student showed resistance to performing sensory motor tasks which

Abrahamson opined may have been related to Parent's report of Student's auditory sensitivities and which needed to be further assessed. (Ex. S13 at 3.)

(62) Student demonstrated distractibility which resulted in Student's difficulty in attending to tasks independently. Student was increasingly distractible when given a task not of Student's choosing and/or non-preferred tasks. Student required moderate cueing and encouragement to remain on task. Per Parent report, Student had poor self-coping skills, at times expressing frustration by using self-injurious behavior or lashing out at his/her environment and other people. (Ex. S13 at 3.)

(63) Among other things, Abrahamson suggested creating a sensory diet that could be incorporated into Student's daily routine and behavior plan to ultimately enhance Student's skills and behaviors. (Ex. S13 at 4.)

(64) Abrahamson provided further assessment and OT services Student through June 15, 2010. Abrahamson completed a more detailed assessment of Student's sensory needs and developed a home sensory-diet program. Student demonstrated definite differences in hearing and social participation. As is typical of students with autism, Student had many challenges in social participation. Student did not play cooperatively, or interact appropriately with Parents or significant adults. Student did not take part in appropriate mealtime interactions or family outings. Student's definite differences in hearing resulted in maladaptive responses to ordinary household sounds and loud noises, and difficulty with auditory filtering. Student also demonstrated some problems with touch, especially with brushing his/her teeth, and planning and ideas. (Ex. S13 at 6-9.)

(65) Among the recommendations made by Abrahamson, the most successful was strenuous daily activity in the form of a hike. In a June 15, 2010 progress report, Abrahamson also suggested using a video recorder to record Student doing some of Student's own activities for Student to watch. These were suggested to reinforce Student in doing "heavy work" activities because Student really enjoyed watching videos. (Ex. S13 at 9.)

(66) As of June 2010, Parent discontinued OT services because the services were expensive and Student was responding best to sustained physical exertion to help bring his/her sensory system under control. (Test. of Parent, Tr. 2892-93.) OT services were paid through the District. (*Id.*, Tr. 2893.)

Speech Language Pathology Evaluation and Services

(67) Carol Tucker, M.A., CCC (Certificate of Clinical Competence)-SLP (Speech Language Pathology) first saw Student for an evaluation on February 10, 2010. Test. of Tucker, Tr. at 2525, 2537.) Student had a diagnosis of Childhood Apraxia of Speech (CAS). (Ex. D98 at 3.)

(68) Tucker currently works with students in the Coos Bay Public Schools, grades K through 12. Tucker holds a bachelor's degree in speech and language pathology and Audiology, and a master's of arts in speech pathology. She is currently licensed in Oregon by the Board of Examiners of Speech Language Pathology and Audiology and holds her CCC from the American Speech and Hearing Association. (Test. of Tucker, Tr. 2524-2526; Ex. S165.)

(69) Tucker began work with Coos Bay in 2005, recently returning to a full-time position. Tucker had been working three days a week for Coos Bay and two days a week in private practice. Previously, Tucker worked in early intervention, ages birth to five, in Corvallis in addition to private practice. (Test. of Tucker, Tr. 2524-2526; Ex. S165.)

(70) Tucker sees students with a wide variety of needs, including students with autism. As part of her job duties, Tucker evaluates and assesses students in her area of specialty and she designs IEP goals and objectives for students for whom she provides services. Tucker also provides direct services to individuals and in small groups. (Test. of Tucker, Tr. 2526-2529.)

(71) Tucker provided services to Student beginning after the 2010 evaluation through to the time she closed her private practice in August 2011. (Test. of Tucker, Tr. 2532.) In preparation for Student's April IEP meetings, on or about March 19, 2011 Tucker updated Student's language goals and progress reports. Tucker sent the updates to DeBastiani. DeBastiani included the updated language information from Tucker in the 2010-2011 Progress Report and IEP Goals. (*Id.*, at 2530-2532; Ex. S36 at 1-3.) The goals and progress reports were updated again in June due to Student's rapid progress. (Test. of Tucker, Tr. 2533-2534; Ex. D98 at 5.)

Evaluation results listed in the May 18, 2010 IEP

(72) The 2010-2011 IEP, under the heading, "The results of the initial or most recent evaluations," stated the following:

[Student] was given the Vineland Adaptive Behavior Scales on 5/3/2006.
[Results omitted]

[Student] was also evaluated using the Behavior Assessment Scale for Children (BASC) on 5/3/06[.] [Results omitted]

The Universal Non-Verbal Intelligence test was also given on 5/8/06. [Comment omitted.]

[Student] was also given a functional life skills assessment in April of 2005.
[Results omitted.]

A Functional Communication Profile was given on 5/15/06. [Results omitted.]

[Student] was also given the sensory profile on 5/8/06 * * * an independent OT evaluation on 4/3/07[.] [Summary statement of results omitted.]

[Student] was also given an Autism Evaluation on 5/26/06 that indicated that Student continues to qualify under the eligibility of Autism Spectrum Disorder. [Sub-scores omitted.] The Childhood Autism Rating Scale was also given. [Student] received a score of 40 which places [Student] in the severely autistic range on this instrument.

(Ex. D15 at 8.)

Preparation for 2011 IEP meeting

(73) On November 9, 2010, DeBastiani contacted Davis to request observation of Student's placement for the upcoming 2010-2011 school year. Under the Agreement, DeBastiani was required to assist the District and Parents, during the final six months of the Agreement, to develop an appropriate transition plan with an appropriate IEP to allow Student to be served in an appropriate placement for the start of the 2011-2012 school year. (Test. of DeBastiani, Tr. 2383-2387.)

(74) DeBastiani wanted to visit or to have Impson visit the school as part of her obligation to assist District and Parents "to develop an appropriate transition plan with an appropriate IEP to allow [Student] to be served in an appropriate placement at the start of the 2011-12 school year." (Ex. D20 at 1.)

(75) On or about November 23, 2010, Parents requested that the District continue the placement as set out in the Agreement. (Test. of Davis, Tr. 465, 466; Ex. D22 at 2.) Davis consulted with District counsel before informing Parent that the District was declining to fund the current placement. (Test. of Davis, Tr. 465, 466.)

(76) In response to DeBastiani's request to observe the District's program, Davis emailed DeBastiani with possible dates for classroom observation. After some scheduling changes, Davis and DeBastiani set an observation visit for December 14, 2010, from 8:30 a.m. to 12:30 p.m. DeBastiani planned to have Impson attend because DeBastiani had a scheduling conflict. (Ex. D20.)

(77) At some point, Davis contacted District counsel regarding DeBastiani's request to observe District's current program. By letter dated November 17, 2010, District counsel, with Davis's input, subsequently denied DeBastiani's request through a letter to Parents' counsel. (Test. of Davis, Tr. 464-467, 1757; Ex. D21.)

(78) The District's letter stated that DeBastiani could not visit the District to observe placements because District wanted to start Student's return to District through another process. District proposed to start by "(1) understanding what [Student's] current program looks like; (2) understanding what [Student's] current level of function is; and (3) determining whether there are additional assessments that need to be done prior to the development of a new IEP for [Student]." (Ex. D21 at 1.)

(79) In the November 17th letter, District requested "all of the documents, information and data on [Student's] education and present levels in [his/her] current setting." District also requested that Parents provide "all of the progress reports, data and all information in written or video format regarding [Student's] education to the District no later than December 13, 2010." (Ex. D21 at 1-2.) Additionally, District outlined a schedule for preparing for the upcoming IEP. District proposed to review the data to see how [Student] was doing and to then plan for "some select District staff" to observe [Student's] current educational program in January at Student's home. The staff could become familiar with Student's current needs and look at the components of [Student's] educational program and the methodology in use. (Ex. D21 at 2.) District asked Parents to provide potential dates, working directly with Wetherell and Davis, to schedule observations for January 2011. (Ex. D21 at 2.)

(80) The District also proposed the following:

The third step in the process would be to see if additional assessments are necessary in order to plan for [Student's] needs for the next school year. The District would like to set a time for an evaluation meeting in January to consider any current evaluations that might be needed to assist in developing a new IEP and placement considerations. Ideally, that planning meeting would happen in January 2011, after the District receives the data relating to [Student's] program and has made some observations of the program in the home.

(Ex. D21 at 2.)

(81) As set out in the November 17th letter, District proposed to allow DeBastiani to observe the District's special education programs after the first three steps were completed. District planned to complete any additional assessments for February and/or April and then to schedule the IEP meeting for April 2011. (Ex. D21 at 1-2.)

(82) In a separate email dated November 17, 2010, Davis told DeBastiani that District was postponing her observation of District classrooms. Davis asked DeBastiani, among other things, if she or her college Impson could "please list the kinds of proposals or ideas about particular needs [Student] has that could be addressed in the classroom, for example any assistive technology devices or sensory needs, would you please list and explain those as well." Among other things, Davis stated that it was the District's "hope that we can make this transition back into the public school setting a positive one for [Student] and develop a program that will meet the goals that will be developed in [his/her] IEP." (Ex. D23 at 1.) (Emphasis added.)

(83) Davis did not follow up regarding the home observations that District requested in the November 17, 2010 letter from District's counsel to Parents' counsel. Tenneal Wetherell was designated by the District as the individual responsible for completing those observations. (Test. of Davis, Tr. 1757.)

(84) Tenneal Wetherell, M.A., special education, is currently the director of the ALS program, as well as the curriculum and nursing departments for South Coast Education Service District (SCESD). In addition, she became the acting superintendent of SCESD as of November 1, 2011. Wetherell holds a continuing education teaching license for Western Oregon University, has completed a initial education teaching administrator program and is currently completing a continuing administrator program, from the University of Oregon. (Test. of Wetherell; Tr. at 32-33.)

(85) Wetherell also completed a one year training program from the Oregon Department of Education (ODE) as an autism specialist. The ODE autism specialist program was designed to provide the minimum level of training in order to qualify to provide services to students with autism. (Test. of Wetherell, Tr. at 32-34.)

(86) During her master's program, Wetherell worked as a graduate assistant with Joel Arick, Ph.D. Arick developed the STAR Program. (Test. of Wetherell, Tr. at 34-35.) When asked, Wetherell could not recall what the acronym STAR stood for but agreed that it probably stood for "Strategies for Teaching based on Autism Research." (*Id.* at 256.) Following graduation from the master's program, Wetherell worked as a resource room teacher in the

Beaverton School District before beginning work for SCESD for the 2005-2006 school year as an autism specialist. (*Id.*, Tr. at 34-35.)

(87) As SCESD's autism specialist, Wetherell was assigned to a caseload of students with autism who were located in schools throughout the SCESD service area. She has performed evaluations, visited classrooms and provided support to teachers, families, and students to enable students to access their education. (Test. of Wetherell, Tr. at 35.)

(88) The ALS program provides services to students with moderate to severe developmental disabilities, including autism, physical, and medical disabilities that result in communication disorders, and other conditions which require a function academic approach to education for students. Instruction in the ALS program is provided in cluster sites in cities on the southern-Oregon coast. The number and location of the sites changes frequently based on the student population. (Test. of Wetherell, Tr. at 35-36.)

(89) After one year as the assistant director of the ALS program, Wetherell became the acting or interim director of the ALS program, in addition to becoming the director of the curriculum and nursing departments at SCESD. (Test. of Wetherell, Tr. at 36, 273.) As a result of her changed roles, Wetherell assumed many more responsibilities over various programs throughout the SCESD service area. Her duties include, but are not limited to, running the nursing program, with the help of another administrator. The nursing program employs ten nurses who provide direct services to students, in addition to nursing within the ALS programs. (Test. of Wetherell, Tr. at 36-37.)

(90) Wetherell is also responsible, when a district contracts with her office, for providing school curriculum improvement workshops for entire school districts in areas requested by that district. She has provided training in regular education as well as special education. Wetherell had been employed in her current position for over three years as of spring 2012. (Test. of Wetherell, Tr. at 337-38.)

(91) District contracted with SCESD to operate the ALS program for District schools through the 2012 school year. Within the ALS program contract, SCESD provides teaching and instructional assistants, nursing services, augmentative, communication, and speech services, and feeding evaluations. SCESD⁶ also provides training in the Oregon Intervention System (OIS). (Test. of Wetherell, Tr. 38-39.)

(92) OIS is a training program for staff to help them understand how to successfully interact with students who are struggling with their behaviors. A large element of the program involves protective physical interventions through graduated intervention, also referred to as restraints. The system teaches various techniques to be used in the particular situation at hand, from restraining a student from darting out in the street by using a "shirt belt" maneuver, to using protective maneuvers if a student is attempting to strike someone. SCESD is responsible for providing training on OIS to staff but Wetherell is not a trainer. (Test. of Wetherell, Tr. 39-40.)

⁶ As noted in District's Closing Statement (page 2, footnote 1), although not a party, SCESD was at all relevant times the contract provider for special education services for the District. Therefore, contracted SCESD employees acted on behalf of District in connection with their activities in this case.

(93) In early Fall 2010, at the time the Agreement required District and DeBastiani to begin preparation for Student's 2011-2012 IEP, Wetherell was working as the director of student learning and was responsible for the ALS program as well as supporting Superintendent Davis in his job duties. (Test. of Wetherell, Tr. 38-39.)

(94) District counsel provided Parents' counsel on November 23, 2010 suggested dates for the IEP meetings, April 4 and 5, 2011. (Ex. D22 at 1.) After Parents' counsel responded, District counsel corrected the dates to April 5 and 6, 2011.

(95) Impson was available for District to observe educational programming in the home beginning in January 2011. Parent contacted District in January 2011 about scheduling observations of Student. (Test. of Parent, Tr. 2998, Test. of Impson, Tr. 1391.)

(96) District did not contact Parents after the November 23, 2010 letter to schedule an evaluation meeting or to evaluate Student in January. (Test. of Parent, Tr. 2999.)

(97) On January 28, 2011, counsel for the District denied Parents' request that a third day be added to the IEP meetings planned for April 2011 based, in part, on District staff's belief that Parent did not want an IEP meeting and wanted to continue the same home program for another year. Also, in the District's experience, IEPs did not typically require more than two days. (Ex. D27 at 1.) Counsel for Parents replied, reiterating that the reason for requesting the additional day was based Parents' experience where a prior IEP required two days to complete the prior IEP, and during that IEP, the parties had not had legal counsel present. (*Id.*)

(98) On February 13, 2011, District counsel again denied Parents' request that a third day be scheduled for the April IEP meeting because "District * * * stands by its original answer sent to you on January 28th that it still believes that two full days will be sufficient." (Ex. S19 at 1.)

(99) On February 14, 2011, Parents' counsel acknowledged receipt of District's denial of the request for a third day. Parents' counsel reiterated the request. Parents' counsel added that additional time would be necessary because Parents' behavioral consultant would be attending and, for planning purposes, the distance to Gold Beach was considerable. Parents' counsel also had other cases that would be, or already had been, scheduled for the month of April. (Ex. S19 at 1.)

Evaluations prepared by, or at the request of, Parent and/or Student's home program providers

(100) After Parent received the November 17, 2010 letter from District's counsel, Parent, Impson, and DeBastiani began to prepare for the IEP meeting. Parent understood that the meeting would occur sometime before the end of May 2011. (Test. of Parent, Tr. 2996-97.)

(101) In response to District's November 17, 2010 request for "all documents, information and data" on Student's education and present levels, Parent and Impson gathered and summarized data relevant to Student's present levels of performance on the goals and objectives under Student's current IEP. (Test. of Parent, Tr. 3183-84, Test. of Impson, Tr. 1389-90.) Parent gave the information, organized and marked as Packets A through E, to counsel. Counsel for Parent mailed the packets to District on March 16, 2011. (Test. of Parent, Tr. 3183-84; Exs.

S167, D23.) Parent summarized the data to make it more understandable. The District did not request Parent to explain the data. (Test. of Parent, Tr. 3186.)

(102) Based on the District's November 17th letter, Parents expected that in January District would schedule a visit by District staff at the home to observe Student. Also, based on the letter, Parent expected District to set an evaluation meeting in January 2010 to plan for Student's needs. No one from District contacted Parent in January to visit the home for an observation or to schedule an evaluation planning meeting. (Test. of Parent, Tr. 2997-98; Ex. S16 at 2.)

The Assessment of Basic Language and Learning Skills (ABLIS)

(103) In November 2008, DeBastiani trained Parent on how to administer an administered the ABLIS to Student. Parent administered the test to Student at that time. In January 2011 Scott, also trained by DeBastiani and Impson, administered the ABLIS to Student. The January 2011 test was administered to provide data on Student's progress, from 2008 to 2011, in those areas measured by the test, in order to provide baseline data for the upcoming IEP meetings. (Test. of Parent, Tr. 3000-03; Ex. S18.)

(104) In order to understand exactly what progress is indicated on the ABLIS chart, an individual must have the test manual. Because the manual is copyrighted, the home consultants did not send a copy of the manual to the District. However, the consultants gave the District Student's ABLIS data. (Test. of Impson, Tr. 1406-07.) Parent and the providers summarized the ABLIS results and other data from tracking forms they regularly maintained on Student. The data was summarized to provide information that would demonstrate Student's progress to the District in an understandable form. The summaries were sent to District. (Test. of Parent, Tr. 2996-2997.)

(105) The ABLIS data is recorded in a graph and represents whether skills in certain areas had been met. (Test. of Impson, Tr. 1401-1403; Ex. S18.) The ABLIS data measured Student's specific skills including the following:

- cooperation and reinforcer effectiveness (how compliant is the student, how well he/she has responded to instruction, are there a variety of reinforcers used and if so, is the student able to use the reinforcer on an intermittent reinforcement schedule, are the reinforcers tangible, e.g. cookies, toys, or intangible, e.g. social such as praise or high-fives);
- visual performance (puzzles, matching to sample, tangrams, shape sorters, ring stackers);
- receptive language; motor imitation (e.g. instructor says "do this" and touches her head, does student take his/her hands and touch his/her head);
- vocal imitation (instructor makes a noise or says a word, will the student make the sound or say the word);
- requests or "mands";

- labeling or “tacting” (instructors indicates water bottle and asks “what is this’ and student says “water”);
- function labeling; intraverbals (answering questions or responding to statements or fill-ins about items that are not present); and
- spontaneous vocalization (how many and what type of vocalizations occur throughout the day).

(Test. of Impson, 1395-1399; Ex. S18.)

(106) The ABLLS form is completed following the instruction manual. The data sheet indicates if the criteria for performing the task has been met, has not been met or is not occurring. (Test. of Impson, Tr. 1398-1399.) Comparing the data from 2008 and 2011 shows where Student has, or has not, made progress on each of the measured skills. (*Id.*, Tr. 1402-1403.)

(107) According to the ABLLS data, Student made progress in cooperation and reinforcer effectiveness. Student’s visual performance had not changed very much. Student had achieved some receptive language goals partially and had fully achieved some of the more advanced receptive language skills. Student made progress in motor and vocal imitation skills, and in labeling. Student had made some progress in spontaneous vocalization but as of the January 2011 evaluation, he/she was not making significant progress on combining more than two word signs with vocalizations. Student was using some three-sign combinations such as “black Play-Doh” or “monkey eating banana” but those phrases use very simple signs. Student also made some improvement in play and leisure activities. (Test. of Impson, Tr. 1400-1406.)

(108) The ABLLS tracked additional data for Student in the areas of classroom skills, letter recognition, math, and spelling. Student made significant improvements in dressing, eating, grooming, gross motor skills (e.g. kicking a ball being able to push himself/herself on a swing). Overall Student made “a lot” of progress in 19 of 25 areas assessed. (Test. of Impson, Tr. 1412-1413.)

(109) Parent provided the ABLLS results to the District sometime prior to the April 5, 2011 IEP meeting. (Test. of Parent, Tr. 3004.)

The Verbal Behavior Milestone Assessment and Placement Program (VB-MAPP)

(110) On April 4, 2011, Impson administered the VB-MAPP to Student. The VB-MAPP is another tool to measure current level of functioning, similar to the ABLLS. The results are used to guide development of Student’s program and goals, by measuring Student’s current level of skill and to see what needs to be taught next and to incorporate those into Student’s next IEP goals. (Test. of Impson, Tr. 1443-1444, 1448; Ex. S43.)

(111) The VB-MAPP assessed Student’s progress in specified goal areas. Student met or made progress on Level 1 goals for “manding” or requesting, listener or receptive skills, visual performance matching to sample, and actual vocalizations. Student did not meet any criteria for Level 1 for spontaneous vocalization (spontaneous vocalizes 15 whole words or phrases with appropriate intonation). Level 2 goals for Student included listener responding by feature,

function, or class (LRFFC), where Student responds to a question by selecting or touching, but vocalization is not required. Level 2 also tests a student's intraverbal skills (talking about an object or answering questions about an object that is not present). Level 3 on the VB-MAPP assesses a student's linguistics skills, e.g. syntax and grammar, and articulation. (Test. of Impson, Tr. 1444-1449; Ex. S43.)

(112) The results of the VB-MAPP showed Student's present level on the tasks tested and provided a guide on where to set Student's next goals. (Test. of Impson, Tr. 1444-1449; Ex. S43.)

(113) Impson administered the April 4th VB-MAPP to prepare for Student's upcoming IEP meeting. She wanted to ensure that appropriate goals were developed for Student and that the team had as much assessment data as possible. District did not request Impson to do the assessment. (Test. of Impson, Tr. 1449.) Impson and DeBastiani incorporated Student's assessment results into another report, the Instructional Support Requirements (ISRs) developed and provided to the IEP team. (*Id.*; Ex. S44.)

(114) DeBastiani prepared for the IEP based on her knowledge of Student. DeBastiani has worked with Student for approximately ten years. When considering social skills and behavior, DeBastiani knows that Student does not approach individuals his/her own age unless the individual has something Student wants. In one instance, Student jumped in a pool with other individuals but after jumping in, Student did not interact with others. (Test. of DeBastiani, Tr. 1070-1071.) Student will follow directions of one of his/her instructors to approach another, for example, go and sit next to someone, but the behavior only occurs because it is paired with a strong reinforcer (e.g. a chocolate chip cookie) and only because [Student] would get the reinforcer for engaging in the activity. (*Id.*, Tr. 1073, 1074-1075.)

(115) Parent's observations of Student reflect those of DeBastiani. Student does not desire or show interest in interacting with same-age individuals or others for social reasons alone. Student interacts with others because Student associates that person with a desired tangible outcome or object. (Test. of Parent, Tr. 3195-3198.)

(116) Student is not motivated to interact with others for the sake of the interaction itself. (Test. of DeBastiani, Tr. 1070.) Student's ability to be aware or connected with other people is much lower than what DeBastiani has experienced with other student's on the autism spectrum. Student has difficulty discriminating between people. DeBastiani and Student's aides have worked with Student to differentiate and to name individuals, using pictures of people Student knows. Initially, Student was unable to identify different people at all but now Student can recognize and identify his/her family members. (Test. of DeBastiani, Tr.1079.) Student sees his/her grandparents on a regular basis. Student does not know who they are and does not understand the concept of a "grandparent." (Test. of Parent, Tr. 3193-3194.)

(117) Student, as may be characteristic of someone on the autism spectrum, lacks joint attention, the ability to get another person to experience the same thing as Student is experiencing. DeBastiani recalls only one such instance in her years with Student, when Student pointed out the window at an eagle. (Test. of DeBastiani, Tr. 1077.)

ISRs including “pairing”

(118) Impson and DeBastiani also responded to Davis’s request for ideas or proposals for Student’s particular needs for the classroom with a list of instructional strategies and supports in an Instructional Support Requirements (ISRs) report dated April 4, 2011. The ISR was generated to provide to the District for consideration at the IEP meeting. (Test. of Impson, Tr. 1392, 1394; Ex. S44.)

(119) Impson and DeBastiani developed the list of ISRs based on all of the teaching methods they had used that had worked for Student. The list included appropriate teaching strategies that had been successful with Student and the data to show that it had been successful. The list is similar to one that Impson and DeBastiani use whenever a new staff person has been trained to work with Student. The list included additional items they believed would be necessary to have Student transition successfully to a classroom setting with staff that were not ABA trained and who had no experience with Student. (Test. of Impson, Tr. 1393-1394; Ex. S44.)

(120) The ISRs included, among other things, a 16-item list of learning styles and teaching procedures that had been used with and worked for Student. Impson, and those working with Student in the home program, use all of the styles and procedures mixed together. In the past, Student learned to predict what would come next and stopped paying attention. This method of mixing style and procedures is used to prevent Student from ceasing to pay attention and to continue to follow what is being done. (Test. of Impson, Tr. 1452-1454.)

(121) Mixing styles and procedures also prevents Student from becoming bored or frustrated, while allowing for high repetition to maintain acquisition of targets that Student has mastered. Also mixing easy and difficult work at a rapid pace decreases Student’s behavior problems. Staff aim for Student to respond with correct responses at a rate of 80 percent or above to maintain good instructional control and frequent reinforcement contact. If Student makes a lot of errors, his/her reinforcement level decreases, problem behaviors increase, and his/her skill acquisition rate goes down. (Test. of Impson, Tr. 1454.)

(122) Understanding and properly using reinforcers is vital in Student’s program. As understood in the home program, within the study of applied behavior analysis, a reinforcer is not necessarily a reward. A reward is something given after an individual engages in a certain response. A reinforcer is something that measurably increases the behavior under certain stimulus conditions. (Test. of Impson, Tr. 1453.)

“Pairing” necessary for instructional purposes

(123) The ISRs for Student include pairing. Pairing is vital for working with Student. (Test. of DeBastiani, Tr. 1088-1087, Test. of Impson, Tr. 1455-1456.)

(124) Pairing for Student in reference to an individual, may begin whenever any new person comes into Student’s life as a neutral stimulus (having no reinforcing or aversive properties). Pairing, as used in compliance training, teaches a learner to associate or “pair,” a person with positive reinforcement e.g. to associate the paired individual with something the learner enjoys. By pairing the new person with a previously established positive reinforcing stimulus, it is hoped the new person will become a conditioned reinforcer for Student.

Successful pairing results in the learner, in this case, Student, learning that Student can enjoy the company of someone and trust them. (Test. of DeBastiani, Tr. 1086-1087.)

(125) An instructor must be paired with Student before placing demands on Student. To begin, Student must perceive the new person as neutral and then paired with positive reinforcement. (Test. of DeBastiani; Tr. 1086-1088.)

(126) During pairing, when Student shows a willingness to stay with the new person, DeBastiani will observe to see if Student will seek the individual out on Student's own initiative. When or if Student does so, the individual has successfully paired with Student. Only then will DeBastiani start slowly allowing the newly paired individual to place instructional demands on Student. Pairing a new instructor with Student includes training the instructor to continue and keep Student engaged, how to shift from one thing to another, and how to read Student's body language. If Student is forced to do unfamiliar things too much, Student becomes resistant and aggressive towards the instructor. (Test. of DeBastiani, Tr. 1086-1088.)

(127) In DeBastiani's experience, Student's pairing process takes much longer than with other learners. Most of DeBastiani's students have paired within the first day, or within the first hour, of working with them. Student takes much longer, months in most cases. (Test. of DeBastiani, Tr. 1087-88, Test. of Impson, Tr. 1456-1457.)

(128) It is vital that Student associate the new person as an improving set of conditions. If the person is not appropriately paired and is neutral to Student, the person will have no value to Student and will have difficulty establishing instructional control with Student. Worse, if the person has aversive qualities, Student will react, withdraw, and will engage in problem behavior and self-injury while with that person. (Test. of Impson, Tr. 1455-1456.)

(129) Before DeBastiani and Impson realized how long pairing took with Student, they placed a new aide in an instructional role after a couple of weeks of beginning to pair with Student. The pairing "failed miserably." (Test. of Impson, Tr. 1456-1457.)

(130) Mitch Longwill, a male instructional aide in the private program, paired successfully with Student after approximately four weeks. Pairing with Longwill was the quickest Student has paired with anyone. The newest individual working with Student has been pairing with Student for a few months and is not yet ready to assume an instructional role. (Test. of Impson, Tr. 2787-2788.)

(131) To be well-paired with Student, an individual must be able to communicate fluently with Student. The individual must know all of Student's signs. Additionally, Student must associate the person as a positive reinforcer before Student will reach out and try to communicate with that person. (Test. of Impson, Tr. 1456-1457.)

(132) Pairing also requires the new individual learning to read Student's body language and to shift activities when Student loses interest. If Student is forced to do unfamiliar things too much, he/she becomes aggressive towards the person and resistant to working with that person. Student may start avoidance or escape behavior or try to push the person away. Student has hit people in the past or run towards people to try to hit them. (Test. of DeBastiani, Tr. 1088-1089.)

(133) Using pairing has resulted in Student's improved behavior. The incidents of Student engaging in aggressive or avoidance behavior have decreased over time. (Test. of DeBastiani, Tr. at 1089-1091.)

(134) An individual must be paired with Student in order to establish instructional control. Instructional control means teaching the learner to follow directions to do something that the learner already knows how to do, and to do it within three to five seconds of being asked to do the task. (DeBastiani, Tr. at 1090-1091.) Children with autism typically do not perform or learn a task just because an instructor asks them to do so. Instructional control and compliance training are used to teach students with autism to follow through or perform a task when they are asked to do so. (*Id.*, at 1094.)

(135) Reading Student's behavior is essential to adjusting to teaching Student. Student's ability to learn is affected by many factors and varies frequently. Student may engage in undesirable behavior even when well-paired with an instructor. When working with Scott, Student hurt Scott's thumb, chased her with sticks, and threw rocks at her. Scott has had to pull her car over to keep both she and Student safe when Student was engaging in undesirable behavior. As part of the BIP, Scott wears an avoidance alarm. She has had to grab it in the past but she has never had to use with Student. (Test. of Scott, Tr. 2769-2770.)

(136) Each of the learning styles and teaching procedures, listed in the April 4, 2011 ISR, is carried out in the home program consistently by each teacher and by Parent. The procedures require consistency so that student is taught and prompted in exactly the same manner to avoid confusing Student. The techniques listed are based on research developed in applied behavior analysis that show how to achieve the highest rate of skill acquisition and lowest rates of problem behavior. Student has been in instructional settings where these techniques were not used and Student did not perform well. (Test. of Impson, Tr. 1461-1462.)

(137) The listed teaching techniques can be taught to school staff and they can be implemented in the school environment. (Test. of Impson, Tr. 1462-1463.)

(138) The ISRs also included, among other things, a list of techniques for social support and educational success. Impson and DeBastiani consider the items listed as necessary for Student to be successful in the educational setting. One consideration is Student's lack of interest in appropriate play activities. Much of Student's play is self-stimulatory behavior and a trained instructor would need to know how to teach Student to play appropriately, e.g. initiate an interaction with a peer (with the understanding that Impson does not consider recess in the school setting an appropriate setting for Student.) (Test. of Impson, Tr. 1464-1465.)

(139) The list of ISRs included provisions for collecting data and communicating with Parents on Student's school day. Impson and DeBastiani also made recommendations for training staff to work with Student. In Impson's opinion, the recommendations for time necessary and specific skills to be taught are all necessary to successfully teach Student because all of them have been necessary in the past for Student to acquire skills and reduce problem behavior. In Impson's opinion, instructors in districts who train staff in behavioral strategies, but who are not BCBA's, are not qualified to recommend behavior management strategies for Student. (Test. of Impson, Tr. 1467-1468.)

(140) In Impson's experience and based on Student's history, Student should never be left alone with anyone who is unable to communicate with Student. The potential for aggression is extremely high. Impson is aware that, when Student was approximately half of his/her current size, Student broke the sternum of an IA by running at and head-butting the IA in the chest. (Test. of Impson, Tr. 1468-1469.)

(141) The ISR was given to District personnel, either right before or at the first IEP meeting. (Test. of Impson. Tr. 1470.) In Impson's opinion based on her professional training and experience and her experience with Student, the list of instructional supports included in the ISR must be used as a whole. Using only part of items listed in the ISR will result in Student decreasing skill acquisition and increasing the probability that Student will increase aggressive or self-injurious behavior. (Test. of Impson, Tr. 1470-1471.)

Behavior intervention plan

(142) DeBastiani wrote a BIP for Student dated March 17, 2009 after she assessed Student's behaviors. DeBastiani first observed Student on video clips and then during in-person observation of Student at home. She then created ABC data forms to track the behaviors she had observed and taught staff and Parents how to track behavior and complete the forms. The "ABC" data sheets track what happened prior to a behavior (the antecedent or "A"), the behavior itself (behavior or "B") and then what happened after the behavior (consequence or "C"), to determine what Student might be seeking. (Test. of DeBastiani, Tr. 1094-1100; Ex. S160, 1-6.)

(143) Through assessing Student's behaviors, DeBastiani determined what was reinforcing for Student. DeBastiani then incorporated Student's known reinforcers to develop new activities for Student that were rewarding and that kept him/her engaged, while working with Student. (Test. of DeBastiani, Tr. 1094-1102.) The plan was updated continually based on the transfer of data on behavior between the home providers and DeBastiani. The BIP was successful on reducing Student's problem behaviors such that the providers and family no longer felt that Student was a danger to himself/herself or others. (*Id.*, at 1102-03.)

(144) Reduction of a behavior does not mean that Student will not engage in the problem behavior again. Student has a learning history that tripping, throwing, aggressive approaches, hitting, or similar actions will give him something he/she wants. Currently he/she has been taught those behaviors do not get him what he/she wants. However, Student may again exhibit those behaviors if critical parts of the plan, e.g. reinforcers, preventatives, are not in place. (Test. of DeBastiani, Tr. 1104-1105.)

(145) The BIP does not work without using all parts of the plan. Telling Student he/she cannot do something is not sufficient, Student must be told another behavior to do instead. For example, Student might be throwing or kicking because he/she wants a cookie or a toy. Student is taught to ask for a cookie or a toy instead, through the use of reinforcers and preventative strategies. Data is collected and preventative strategies are developed for evidence of where the plan is effective and, if a part of it is not, where it needs to be changed. (Test. of DeBastiani, Tr. 1107-1108.)

(146) In Impson's opinion, the preventative strategies are the most important part of the BIP. Impson and DeBastiani also train those working with Student how to teach replacement behaviors, which is also a preventative strategy. (Test. of Impson, Tr. 1417.)

(147) The 2009 plan included the statement “Do not physically restrain Student” within the crisis management part of the plan. If Student becomes physically restrained, as with autism students in general, Student has a greater tendency to fight back. Parent was very concerned at the time the plan was developed because of Student’s previous aggressive history and because, based on the height of family members on both sides, Student was likely to grow to be very tall. Parent was very worried that Student would learn to fight aggression with aggression, and that, in the future, Student would be too big to restrain. (Test. of DeBastiani, Tr. 1108-1109.)

(148) With typically developing children, social behavior with others is sufficient to teach correct behaviors. However, for Student, a tangible item is necessary to provide reinforcement to learn the correct behavior. DeBastiani and the home providers regularly expose Student to new activities to find new reinforcers to maintain Student’s engagement with positive behavior. (Test. of DeBastiani, Tr. 1110-1111.)

(149) The 2009 BIP has been changed over time based on changes in Student’s behavior. Impson helped draft a behavior plan, dated March 28, 2011, that was provided to the IEP team at the April IEP meetings. The March 28, 2011 BIP was the one in use with Student at that time. The plan was based on analysis of the current ABC data sheets for Student. (Test. of Impson, Tr. 1415-1416; Exs. S32, S34) Impson continued training Parents, Scott, and anyone else working with Student in the implementation of the BIP, including collection of data, how to respond or to implement the reactive strategies, and how to use the preventative strategies that are written in the BIP. (*Id.*, Tr. 1417.)

(150) The BIP could be implemented in a classroom setting if the individuals implementing are trained and they use the correct supports. Some parts would not relate to the classroom setting and some parts, e.g. the crisis management alarm system used for attack behavior that does not cease when Student is told to stop, would have to be reconsidered if other students were sensitive to noise. (Test. of Impson, Tr. 1417, 1420.)

(151) The BIP is necessary for Student to access his/her education. If a BIP is not in effect, Student’s behavior becomes uncontrollable. Student can, and has, become very aggressive and self-injurious. (Test. of Impson, Tr. 1420-1421.) Removing aspects of the current plan would increase the probability that Student would engage in the problem behavior that the deleted part of the plan was designed to decrease. Student’s problem behavior, in part because of his/her size, is very serious and potentially very damaging to Student and to others. (*Id.*, Tr. 1421.)

2010-2011 IEP with updated progress report by Impson and DeBastiani

(152) On March 28, 2011, at District’s request, Impson and DeBastiani generated a report, which included Student’s progress for the 2010-2011 school year and goals for the upcoming IEP meeting. An earlier copy of the report, generated on March 20, 2011 (S-38, misdated as May 29, 2011), was updated by a revised report of March 29, 2011. Student’s functional communication goal on the first version had been too difficult for Student, so it was broken down to reflect a simpler goal with a higher frequency of repetition. (Test. of Impson, Tr. 1425-1428; Ex. S36.)

(153) Copies of both reports were given to District in preparation for the IEP meetings. The most recent report was discussed at the IEP meeting. (Test. of Impson, Tr. 1422-1423, 1428-1429; Ex. S-36.)

Outline of the red/yellow card system

(154) The home program providers developed and utilize a program to address Student's less serious behaviors. The system, summarized as the Red/Yellow Card System, developed shortly before the 2011 IEP meetings, was designed to reduce the recurrence of a list of objectionable behaviors, e.g. lifting his/her body off of a chair with his/her hands and slamming his/her body back down, or slamming his/her body in the chair, or back and forth in the car. (Test. of Impson, Tr. 1471-1474; Ex. S47.) The behaviors were not really considered self-injury. The system was implemented at home and Parent reports that the behaviors have decreased. (Test. of Impson, Tr. 1473.)

(155) Impson provided the outline for the Red/Yellow Card System (S47) to the District for the April IEP meetings. (Test. of Impson, Tr. 1473.)

(156) In Impson's opinion, District would not be able to recreate the home program with the knowledge and materials that she understood District planned to use. The cards themselves were a mixture of ones ordered as a set and other cards created by home program staff or Parents. The home program's use of the video was not focused on which video is used, the reinforcer is allowing Student to watch one of the family's video. The video, cards and all the home program materials are used in conjunction with the training and knowledge of behavior analysis and the teaching strategies used in the home program creation and implementation. (Test. of Impson, Tr. 1440-1442.)

Evaluation by Katherine Calouri, Ph.D., developmental psychologist

(157) About the last week of February 2011, Parent contacted Dr. Calouri and requested her to travel to Student's home, observe Student and then to offer her observations or suggestions for Student's home program. On March 9, 2011, Dr. Calouri observed Student in the home program. (Test. of Calouri, Tr. 1163-1164.) Parent informed Dr. Calouri that there had been discussion and consideration of when and if Student could be returned to a school-based program. Parent asked for Dr. Calouri to give an opinion of the home-based program as well as her opinion of whether Student could be successful in a traditional classroom environment and what might be needed to make that environment successful. (*Id.*, Tr. 1166, Test. of Parent, Tr. 3007)

(158) Katherine Calouri, Ph.D., has a master's degree and a doctorate in psychology, specifically developmental psychology and learning and behavior. Dr. Calouri graduated *cum laude* with a bachelor's degree in psychology. (Test. of Calouri, Tr. 1144; Ex. S3.) In the 20 years since graduating, Dr. Calouri has, at least once per quarter, attended autism conferences, as either a participant or a presenter. She focuses in the area of social and emotional development in children with autism as well as working with parents and professionals to help children with ASD (autism spectrum disorder) to regulate their emotions and to develop strategies to handle difficult behavior. (Test. of Calouri, Tr. 1144-1146.)

(159) Among other things, Dr. Calouri worked as classroom teacher after getting her bachelor's degree. She taught in a special education classroom with an emergency teaching certificate for the Oregon Regional Program for Autism. In that role, Dr. Calouri taught as the classroom teacher for small class of four to seven students, all with severe autism. She created the curriculum, and wrote the IEPs for each student. Dr. Calouri was responsible for implementing the IEPs, including tracking and reporting each student's progress on goals and objectives. Dr. Calouri also trained the IAs assigned to her class. She had one or two IAs assigned all times to her class during the three school years she taught as a classroom teacher. (Test. of Calouri, Tr. 1146-1148.)

(160) While she was a graduate student, Dr. Calouri worked as a research assistant and as a teaching assistant for Dr. O. Ivar Lovaas at the University of California, Los Angeles (UCLA). (Test. of Calouri, Tr. 1146; Ex. S3.) Dr. Lovaas directed the clinic for children with autism and Calouri worked as a clinic supervisor. Her job duties included, with the help of graduate students, training a new set of 100 undergraduate students every quarter to provide home-based therapy to kids with autism. Calouri and the graduate students she supervised created the curriculum and lessons plans for each child with ASD who was participating in the research study. (Test. of Calouri, Tr. 1148-1149.)

(161) Calouri supervised the graduate students who provided behavior therapy services in-home and in-school to the ASD children, with the exception for the very young children who received mostly in-home therapy. The children receiving services, who were approximately three years of age, did not have language skills. The clinic program taught language cognitive skills, behavior management, and social skills. Dr. Lovaas was the overall supervisor for the clinic. The graduate students wrote a very specific curriculum for each student, along with the tracking methods for data collection. The individual program would follow a typical developmental sequence for the skill being taught, for example, breaking down how a typical child learns different language skills, and then creating a lesson based on those typical developmental sequences. (Test. of Calouri, Tr. 1149-1150.)

(162) After graduating from the doctorate program, Dr. Calouri relocated to Portland, Oregon and co-founded Project PACE, Inc. in 1992. PACE provides behavioral services to children with autism. PACE originally used ABA as its primary methodology. Dr. Calouri modeled PACE after the UCLA clinic. PACE employees worked with children in the home, school, and community environments. Dr. Calouri supervised up to 30 employees at a time. She performed the initial evaluation of the client and interviewed the family for input on what goals the family might have. Calouri developed goals for the client which, based on her experience at UCLA, she believed were achievable. She then wrote the curriculum designed to meet those goals. (Test. of Calouri, Tr. 1151-1152, 1154.)

(163) Dr. Calouri closely monitored the administration of each client's program. She would direct modifications and teach new strategies to adapt the client's program to address any areas that were not going well. Dr. Calouri typically wrote goals for each client similar to an IEP process, monitor progress on those goals, and review and rewrite the goals on a quarterly basis. (Test. of Calouri, Tr. 1153-1155.)

(164) In 2002 or 2003, Dr. Calouri added another methodology, RDI (Relationship Development Intervention), to her program to better address the social/emotional development of

the students and families. Two of Dr. Calouri's co-workers, a speech pathologist and another therapist, completed the RDI training and became certified RDI consultants. Dr. Calouri completed approximately 99 percent of the certification program but chose to discontinue her studies. RDI focuses on the social development and the role of parents, helping parents to be more successful with their own children, within their daily lives as opposed to focusing on the therapist alone taking on that role. (Test. of Calouri, Tr. 1157)

(165) Dr. Calouri, and PACE staff, currently work in a center based program. (Test. of Calouri, Tr. 1159.) Dr. Calouri, over the last four or five years, has worked with a student within a school program, to observe a program and to collaborate with that program to generate strategies that are effective for the student in that program. (*Id.*, Tr. 1161-1162.)

(166) For Student's evaluation, Dr. Calouri asked to see a typical day for Student and as much of the current programming as possible, including at home and in the community. Scott was asked to carry out, as much as possible, a typical day as if Dr. Calouri was not there. Dr. Calouri also asked for time to talk to Scott and Parent about Student's program. Dr. Calouri spent five hours evaluating Student and the program. When Dr. Calouri arrived, Student was still asleep. After approximately 20 minutes, Student awoke and began the day. Dr. Calouri observed Student's morning activities while talking with Parent. Scott arrived relatively early and Dr. Calouri observed as Scott began her day with Student in the downstairs area. Scott worked with Student in structured academic time, including learning categorization skills and letters of the alphabet, and communication skills, e.g. vocabulary and labeling, expressive labeling certain vocabulary both through sign and through verbal approximation. (Test. of Calouri, Tr. 1165-1168.)

(167) Later, Dr. Calouri accompanied Scott and observed as Scott took Student out in the community. Scott signed to Student as she was talking. In the community, Student worked on communication goals in different environments. They visited a bookstore with a café, a thrift store, and a drugstore to make a purchase. In each environment, Scott worked with Student while Student made requests appropriate to that environment. Scott also worked with Student on behavior management. Student maintained appropriate behavior, without any self-injurious or aggressive behaviors, throughout the day. (Test. of Calouri, Tr. 1169-1171).

(168) Dr. Calouri wrote the report, dated March 11, 2011, based on her observations of Student and the home program as implemented in the home environment and in the community. (Test. of Calouri, Tr. 1171; Ex. D39.) In Dr. Calouri's opinion, Scott is an extraordinarily talented educator who clearly knows Student well. Scott told her about many times in the past when Student had been aggressive towards her. Scott reported that those struggles do not happen anymore. Scott was very aware, while traveling to and from the community and while out in the community, of the environment and what might trigger Student. Scott was very supportive of Student and was able to keep him regulated even in a difficult environment. Scott also made Dr. Calouri aware that Student might be aggressive towards Dr. Calouri and took steps to keep everyone safe and comfortable. (*Id.*, Tr. 1172-1173.)

(169) In Dr. Calouri's report, she supported the plan to gradually and systematically add new people into Student's educational experience so that Student learned to respond to others as well as he/she did to Scott. Dr. Calouri noted Longwill, a new therapist, was being trained at that time. Dr. Calouri stressed the systematic addition of new team members and recommended that

Longwill, Scott, and Student spend significant time together to allow Longwill to learn the strategies that Scott had mastered to maintain Student's success. (Ex. D39 at 1.)

(170) Dr. Calouri opined that, because of Student's history of aggression and as a "fragile" child, Student must work with individuals who are well trained and well prepared to handle Student. Student must experience an individual as understanding Student, who is able to keep Student safe and will expect Student to use appropriate behavior. Student can be easily distracted, and Student will then sometimes act inappropriately. (Test. of Calouri, Tr. 1173-1174; Ex. D39 at 1-2.)

(171) Student must be able to communicate and know that he/she is understood. Having learned over 300 signs, typically used with word approximations, Student was beginning to combine two and three signs into short phrases at the time of Dr. Calouri's evaluation. Dr. Calouri found Student's progress impressive given his/her speech challenges and she commended the educational team for their carefully constructed curriculum. (Test. of Calouri, Tr. 1174-1175; Ex. D39 at 2.) Dr. Calouri is not trained in, and knows very little, sign language. After spending several hours with Student and Scott, Dr. Calouri was able to say a few things to Student but was not able to understand most of what Student was saying. (Test. of Calouri, Tr. 1175-1176.)

(172) Among other things, Dr. Calouri recommends that Student be kept safe both physically, e.g. being out in the community where he/she would not understand something like crossing the street, but more so, mentally. She recommends Student be kept safe and successful by being free of "distressors" that result in Student being self-injurious or aggressive. Being kept in a successful interaction with the world so that Student does not need to exhibit aggressive or self-injurious behaviors to communicate that he/she is distressed. (Test. of Calouri, Tr. 1177-1178.)

(173) Dr. Calouri recommends that Student's program include more opportunities for interaction with peers, though she acknowledges the difficulty of finding appropriate peers for Student. Dr. Calouri would not define Student's peers as someone in the same age group unless that person had the skills and the trusting relationship with Student that individuals in Parents' program have. Dr. Calouri agrees with Parents' approach to use trusting relationships with adults as a basis for social interactions. (Test. of Calouri, Tr. 1180-1181.)

(174) Dr. Calouri also recommends that Student's program build on his/her base of communication and cognitive skills to focus on functional academics, meaning how Student can use the skills mastered and apply them beyond the instructional room. Student could work on using known signs and verbal approximations to comment on his/her environment, not just to make requests, or to create a shopping list and then shop for the items on the list. The focus would be to generalize Student's skills within daily living. Generalization can be very difficult for children on the autism spectrum. (Test. of Calouri, Tr. 1184-1185; Ex. D39 at 2.)

(175) Dr. Calouri recommended that Student's functional living skills be included in the educational curriculum, to add to Student's quality of life and for teaching competence and confidence. For example, she recommended that Student learn to make a simple snack or a meal, completing each task associated with preparation and clean up. Learning such skills increases Student's ability to live more independently as well as provides opportunities to build self-confidence. (Test. of Calouri, Tr. 1185-1186; Ex. D39 at 2-3.)

(176) Regarding an appropriate learning environment for Student, Dr. Calouri opined that transition Student to a classroom environment would be traumatizing to Student. Dr. Calouri based her opinion in part on her observation of Student very successfully learning in a quiet room, with one-on-one instruction with few distractions. She also considered Student's past failures in a traditional classroom setting with multiple students and adults present. (Test. of Calouri, Tr. 1190-1193; Ex. D39 at 4.)

(177) Dr. Calouri has had experience with children with profiles similar to Student's who were unsuccessful in the school learning environment and who were later returned to that environment. Those students repeated the typical behaviors as they had when previously in those environments. Based on Parents' statements, Student was extremely unsuccessful and exhibited aggressive and self-injurious behavior in the traditional classroom environment. (Test. of Calouri, Tr. 1190-1193; Ex. D39 at 4.) Calouri would like to see Student systematically engage with larger numbers of people but does not believe Student would be successful if placed in a learning environment with too many variables. Even more than one adult and one child would be too much. (Test. of Calouri, Tr. 1195-1196.)

(178) Dr. Calouri also recommended that new adults and peers be introduced to Student gradually and carefully. In Dr. Calouri's opinion, only those adults extremely familiar with Student's strengths and challenges should direct the selection and introduction of new members to Student's educational team. (Ex. D39 at 4.) If someone is introduced to work with Student and that person is not able to communicate with Student, and to interpret and guide Student's emotional regulation, Student could become very confused and very frustrated very quickly. In Dr. Calouri's professional opinion, it would be easy for Student, if not understood, to reduce his/her use of signs and to increase the use of aggressive or injurious behavior because Student would have no other means of communicating. If Student became aggressive, he/she could lose his/her communication skills very quickly. (Test. of Calouri, Tr. 1196-1197; Ex. D39 at 4.)

Speech and Language IEP progress report for 2011 IEP

(179) Following her initial visit in February 2010, Tucker provided SLP services to Student. She continued to provide services in spring 2011. For the 2011-2012 IEP meetings, Tucker wrote an updated progress report. The March 19, 2011 report included goals based on her current work and Student's present levels of performance. The goals were provided to Parent in order to be included in Student's upcoming IEP meetings for the IEP team to consider. (Test. of Tucker, Tr. 2530, 2531; Ex. S36 at 5.)

(180) As of March 19, 2011, Tucker's long term goals, and associate short term goals, for Student were as follows:

Long Term Goal #1 (9-12 mos.)

- I. [Student] will consistently link early developing vowels and consonants (excluding nasals) in two and three word phrases with 80% accuracy with SLP cues. Consonants include B, P, T, D, H, and W. Complexity level of target word varied, commensurate with Kaufman Speech Praxis Level One words.

Short Term Goals:

- a. [Student] will say the target words with max visual, verbal and tactile cues for each syllable or phoneme as needed with 89% accuracy.
- b. [Student] will say the target words with max visual and verbal cues as needed with 80% accuracy.
- c. [Student] will say the target words in 2 word phrases given verbal model and mod[erate] visual cues with 80% accuracy.
- d. [Student] will say the target words in 2-3 word phrases given delayed or no verbal model and min. visual cues.

Long Term Goal #2 (9-12) months

- II. [Student] will expand [Student's] improved articulation skills to his/her home environment by demonstrating an improved skill (slowing rate of speech when asked, improved articulation of target words, improved articulation of non-target words), as noted by family member [or] assistant 2/wk for 2 consecutive weeks.

Short Term Goals:

- a. When [Student] is in a calm state, he/she will slow his/her rushed speech to a typical or slower than typical rate in an effort to improve his/her clarity with 60% accuracy.
- b. Given target words chosen by SLP, family, or assistant, [Student] will use the words outside the therapy setting with good intelligibility with 60% accuracy.
- c. [Student] will produce non-target words consisting of targeted phonemes (B,P,T,D,H,W and vowels) intelligibly, as noted by SLP, family, or assistant given verbal model only 2x/wk x2 wks.

(Ex. S36 at 5.)

(181) At the time Tucker wrote the March 19th goals, she intended that Student should be working on them at that time. Tucker continued working on the goals as written in her on-going therapy with Student through the end of August 2011. (Test. of Tucker, Tr. 2531-2533.)

(182) When she began, Tucker worked with Student one hour at a time, always with another person present and who was fully engaged during the session. The additional person was either Parent, Scott, or Longwill. The additional person was required because, especially in the beginning, Student was volatile. (Test. of Tucker, Tr. 2540.)

(183) Student needed to learn that he/she could take a break from Tucker. Tucker observed that Student could be aggressive at times, even if he/she was trying not to be. Even when Student used self-calming techniques, he/she sometimes made aggressive outbursts. The

assistants or Parent could read Student better than Tucker and were able to intervene before Student's stress increased, enabling Student to calm down. Tucker would work with materials with Student, interspersed with reinforcers provided by the assistant or Parent. Tucker never worked with Student on her own. (Test. of Tucker, Tr. 2539-2540.)

(184) Every week, the family planned the reinforcer to be provided for Student's participation in therapy with Tucker. Tucker did not participate in the reinforcing activity but heard about it when Student needed additional reinforcement to participate in therapy. (Test. of Tucker, Tr. 2542.)

Evaluations and/or observations by District for the April 2011 IEP meetings

(185) Wetherell first contacted Parent on February 14, 2011 about scheduling a visit to the home to observe Student and the home program. (Test. of Parent, Tr. 3004-3005; Ex. D29) Parent responded later on the same day stating he was available the following two days, February 15 and 16th, adding that the consultants would be present during that time. (*Id.*)

(186) When Parent had not received a response from Wetherell by February 27th, Parent sent another email to Wetherell. Parent asked Wetherell if she had dates in mind that she would like to come and observe as he had not heard back from her. (Test. of Parent, Tr. 3004; Ex. D29 at 2.)

(187) Wetherell responded on March 4th, stating she was coordinating with "the specialists" to come up and that she would get back to Parent. (Ex. D29 at 3.) On March 8, 2011, Wetherell emailed Parent, proposing a visit for March 15, 2011. (Exs. D29 at 4, D41 at 1.)

(188) Wetherell proposed bringing Georgeann Harty, autism specialist, and Steve Baker, a teacher on special assignment, with her for the visit. Wetherell wrote "we will just observe [Student] and talk with you about [Student's] present level of performance as well as get an idea of what other information we might need." (S22.) Parent responded the same day to confirm the visit for March 15, 2011 at 1:30 p.m. (Ex. D41 at 1.)

(189) On March 15, 2011, Wetherell, Baker, Harty, and Kathleen Stauff visited Student's home. (Test. of Wetherell, Tr. 50, Harty, Tr. 825, Stauff, Tr. 2217.) Harty, who had not seen Student for the last three or four years, understood that they were visiting to observe Student's programming and to see some of his/her present levels of performance "where [he/she] was at, what [he/she] was doing." (Test. of Harty, Tr. 825.) District had hired Harty as a consultant to assist with Student's transition process in returning to the school placement. Harty visited Student's home and later attended Student's IEP meetings to facilitate that process. (Test. of Harty, Tr. 849.) Harty took notes while on the home visit. (*Id.*, at 826; Ex. D44.)

Stauff's education and experience

(190) Kathleen Stauff, M.A., teaching special education, works for SCESD as a program administrator for ALS, school improvement, nursing, and maintenance departments. She has held her current position since 2009. From 2005-2008, Stauff worked as an ALS teacher, and from 2008-2009, Stauff worked as an educational consultant for SCESD. (Ex. D217.) Stauff holds an Initial II Teacher License, with endorsements in multiple areas-self contained, and special education. Stauff also holds an Initial Administrator's License. (Test. of Stauff, Tr.

2077-2078; Ex. D197, at 34-37.) Under the Initial Administrator license, Stauff can act as an administrator while she is taking required additional classes and completing the work experience necessary for getting her continuing administrator's license. (Test. of Stauff, Tr. 2078-2079.)

(191) Stauff has taken what she describes as "normal back-to-school" workshops and additional classes for her administrator's license. Outside of her student teaching in 2001-2002, Stauff has worked as an instructional assistant with SCESD beginning February 2003, part-time her first year, then full-time, until 2005 when she started teaching. (Test. of Stauff, Tr. 2080-2082.)

(192) For the 2008-2009 school year, Stauff worked as an educational consultant. (Test. of Stauff, Tr. 2082-2083; Ex. D217 at 1.) As a consultant, Stauff provided support for teachers in the classroom, helped with IEP development if needed, helped with data collection sheets and data collections, helped with problem-solving if a teacher needed assistance teaching a goal. Specific to special education, Stauff attended one training by the Oregon Department of Education in 2007 or 2008. Stauff qualified for her position with SCESD based on her experience and training. (Test. of Stauff, Tr. 2085.)

(193) Stauff is also trained in OIS, as is required once every two years. Stauff's duties include meeting with the behavior specialists to review any classroom behaviors that might be problematic. If a student has a BIP, Stauff and the specialist review any data collected, and make revisions to the BIP as necessary. All SCESD teachers and IAs are required to attend the two-day training every two years and to attend the monthly review meetings. (Test. of Stauff, Tr. 2145-2146.) SCESD has an employee who is qualified by the State to train other employees in OIS. (*Id.*, Tr. 2149.)

(194) Wetherell and Stauff administer the ALS program, with some assistance from another staff member. (Test. of Stauff, Tr. 2087, 2195.) Stauff trains teachers in the general education curriculum among other things. Regarding special education, Stauff trains teachers on using a particular program, the Edmark system of sight-word reading. Stauff has been trained in the STAR program but she is not qualified to train others in that program. (*Id.*, Tr. 2088-2089.) Stauff trains staff on the alternative to the Oregon Assessment of Knowledge and Skills. She does not train on any other assessments. (*Id.*, Tr. 2196.)

(195) Stauff does not write behavior plans nor does she train staff on writing behavior plans. To the extent that OIS is part of a plan, Stauff trains staff on the OIS component. (Test. of Stauff, Tr. 2196-2197.)

(196) Stauff performs general administrative duties for the ALS classrooms, e.g. ordering classroom supplies, holding monthly staff meetings, among other things. She does not coordinate between the ALS staff and other related service providers. Stauff does not write IEPs very often, though she is trained on the legal requirements and she has written IEPs in the past. (Test. of Stauff, Tr. 2092-2094.)

(197) As of April 2012, the ALS classroom at Gold Beach High School had five students with two IAs and a teacher. The Riley Creek ALS classroom had three students, two IAs who were there all of the time, a third IA that moved between the Gold Beach and Riley Creek ALS programs as needed, and the teacher. The oldest student at Riley Creek is in 7th Grade and is a new student who spends time in the general education population. The ALS program in the

Brookings school consists of one room at each of the three schools, elementary, middle, and high school. None of the student in the ALS classroom in Brookings has a one-on-one IA. (Test. of Stauff, Tr. 2098-2100.)

(198) Stauff became involved with Student on March 15, 2011 when she went on a visit to Student's home with Wetherell. (Test. of Stauff, Tr. 2101.) Stauff was not included in the District's list of visitors sent to Parent ahead of time. Wetherell invited Stauff to become involved because, with her changing and increasing workload, Wetherell needed assistance. (Id., Tr. 2102.) Wetherell wanted to ensure that someone other than she had a good knowledge of Student and this IEP process. (Test. of Wetherell, Tr. 64-65.) Stauff had not met either Student or Parents before the home visit. (Test. of Stauff, Tr. 2103.)

(199) Stauff understood the March 15th visit was intended to observe Student for a period of time, to ask some questions, and to begin to get an idea of what Student was doing, in order to begin to draft an IEP. (Test. of Stauff, Tr. 2103.)

The March 15, 2011 home visit

(200) Wetherell and Harty were the most familiar with Student and asked most of the questions. (Test. of Stauff, Tr. 2104.) Wetherell, Harty, and Parent talked about Student's progress and program. (Test. of Stauff, Tr. 2104.) Initially, they went to the room downstairs where Parent told them Student did intensive learning work. Student was not home when the group arrived but came home while they were downstairs. (Test. of Harty, Tr. 830-831.)

(201) Parent talked to the group about Student's behaviors while they were on the visit. Parent told them that Student had shown aggression in the past where he/she would act aggressively towards someone but then would stop. Parent said that Student now shows aggression towards others but, instead of stopping, Student would, at times, continue to act aggressively towards the person, in an "attack" mode. (Id., Tr. 826; Ex. D44 at 2.)

(202) Based on Wetherell's email, Parent had not been expecting Stauff for the visit. Parent talked with the group about Student before Student arrived back home and Parent expected them to observe Student after he/she returned to the home. (Test. of Parent, Tr. 3006-3007.)

(203) While downstairs in the instructional area, Parent and the group talked about, among other things, Student's mode of communication, Student's behaviors, the length of time during which Student was most able to maintain attention for intensive teaching, Student's generalization of skills using outings into the community on a daily basis. (Test. of Harty, Tr. 826-931; Ex. D44.)

(204) Harty saw Student, while in the kitchen, get up and down, moving his/her body in an up-and-down motion, eating noodles with his/her hand and "kind of flinging them about." (Test. of Harty, Tr. 836.) In general, Student seemed to be agitated or upset. (Id., Test. of Parent, Tr. 3036.)

(205) Shortly after Student returned, the District personnel left. Stauff believed that they left because Student would not be doing any academic "things" because he/she had just returned

from an outing and was going to be making something to eat. (Test. of Stauff, Tr. 2104-2105, 2108-09.)

(206) District personnel were at the home approximately 45 minutes before Student returned to the house. (Test. of Stauff, Tr. 2104)

(207) Stauff did not have background information on Student before she went on the visit and did not interact with Student while she was there. Stauff mostly observed during the visit and did not take notes. (Test. of Stauff, Tr. 2105-2106.) No one in the group interacted directly with Student during the visit. (Test. of Harty, Tr. 832.)

(208) Student did not act mean toward the group; Student did not “regard” them much. (Test. of Harty, Tr. 960.) Harty observed Student for approximately two minutes as the group was preparing to leave. Harty had the impression that the group should leave. (*Id.*, Tr. 831, 944.)

(209) Parent felt that the discussion with District personnel ceased abruptly without winding down. Student was in the kitchen with Scott while the District group and Parent were still downstairs. Parent could hear Student slamming up and down on the chair. The District personnel appeared nervous to Parent. Parent did not ask them to leave and believed that they left abruptly. (Test. of Parent, Tr. 3028-3009.)

(210) At the time Stauff left the home, along with the other District staff, she did not feel as though she had enough information on Student’s PLEPs, or other necessary information to write an IEP. (Test. of Stauff, Tr. 2227.)

(211) In Parent’s opinion, District staff had the ideal conditions for observing Student if they had not left. Because Student has autism, engaging him when “things are going badly” helps to understand him fully. (Test. of Parent; Tr. 3036.)

(212) During the home visit and the discussion about Student’s educational program, Wetherell asked Parent some questions Parent did not answer immediately. Parent believed he could provide the answers more accurately in a written form and asked Wetherell to send him a list of questions she would like answered. (Test. of Parent, Tr. 3029-3030.)

(213) On March 18th, Wetherell sent Parent a list of questions by email. Wetherell communicated that she did not feel that the March 15th visit had gone as expected. Wetherell stated her observations of what had occurred during the visit. Among other things, Wetherell stated “Since [Student] is educated in the home environment it is imperative that we observe [Student] in that setting. It is also important to observe [Student] during [his/her] instructional time so that we can obtain an understanding of how the instructional setting is organized and delivered.” (Test. of Wetherell, Tr. 117, Exs D46, S27.)

(214) Attached to Wetherell’s email was a consent form for a functional academic assessment. (Test. of Parent; Tr. 3030-3031.) Parent signed the consent form on March 22nd and returned it to Wetherell. District never asked Parent’s consent for any other evaluations. If District had asked for consent for additional evaluations Parent would have given it. (Test. of Parent, Tr. 3031-3032; Ex. S28.)

(215) Wetherell is not trained in OIS. Stacey Evoniuk provides OIS training for districts served by SCESD. (Test. of Wetherell, Tr. at 269-271.)

(216) Wetherell began working with Student during 2007, in her role as SCESD acting administrator, when District was involved in a settlement regarding a prior due process complaint filed on behalf of Student. (Test. of Wetherell, Tr. at 41, 42.)

(217) On March 21st, Parent responded to Wetherell's email. Parent estimated that the word list and list of activities Wetherell had requested would be ready in a couple of days. He informed her that the program consultants were working on the schedule, behavior plan, and present level updates. Parent wrote that he would have an estimate on the possible completion date after talking to the consultants the following Tuesday. (Ex. S29.)

(218) Parent also responded to other matters Wetherell had addressed in her email. Regarding observation of Student's instructional time, Parent reviewed the history of his and the consultant's attempts, beginning in early December, to schedule a time for the consultant to be available to answer questions. Parent reviewed their attempts, in January and February 2011, to schedule an observation of the home program while the consultant was present. Parent restated his belief that it would be the most informative if the consultant were present during the visit and offered April 4th as the next date the consultant would be available, as well as an alternative date. (Ex. S29 at 1, 2.)

(219) Parent explained that it was helpful for managing Student's behavior if Wetherell would let him know how many people would be visiting. Parent did not limit the number of people. He explained some of the behaviors Student might exhibit and said that they had strategies to deal with it. Wetherell had proposed Student come to SCESD offices on March 28th for the functional behavior assessment. Parent agreed to the date but asked for later time as Student had an appointment set earlier in the day. Parent also suggested alternate dates if needed. (Ex. S29.)

(220) Parent offered to make a video of Student's signs if needed. Parent requested more information how the video would be paid for. The District never responded to that request. (Test. of Parent, Tr. 3032-3033.)

(221) Wetherell visited the home for a second time, along with Stauff, on April 4, 2011 when Parent had indicated a program consultant would be available. (Ex. D49.) Wetherell also scheduled the functional evaluation for Student for April 28, 2011 at the Gold Beach SCESD office. (Ex. D49.)

(222) Prior to or at the April 5, 2011 IEP meeting, Parent supplied the additional information requested by Wetherell, including a May 2011 summary of Student's progress on his/her functional communication goal, language goals one and two, functional academics, social interaction goal, adaptive skills goal, community instruction goal and behavior goal. Parent also provided a list of Student's preferred activities and places in the community and a list of Student's known signs. (Test. of Wetherell, Tr. 117-118; Ex. D94.)

(223) Wetherell responded to Parent's March 21st email and confirmed the evaluation date for March 28th as the date that still worked the best for her. Wetherell also confirmed she would be available for another home visit on April 4, 2011, to "see how [Student] and [his/her]

instructional staff interact with each other, what successful redirection and behavior management looks like for [Student] and how [he/she] transitions between different activities.” (Ex. S29 at 1.) Wetherell planned to be available the entire day and to bring Stauff with her on the visit. Wetherell requested 1 to 2 hours for the visit and asked Parent to let her know what time Parent would like them to be there. (*Id.*)

(224) On April 4, 2011, Wetherell and Stauff visited Student at Student’s home. Impson was present during the visit. Impson was working with Scott and Longwill. Wetherell and Stauff visited for approximately one hour. They observed as Student worked in the instructional room for 20-to-30 minutes on ITT (intensive training trials) with Scott. Impson worked with Scott a little and then answered questions from Wetherell and Stauff to explain what the home program staff were doing while working with Student. Impson did not take notes during the visit but District staff did. (Test. of Impson, Tr. 1429-1431.)

(225) During the visit, Impson explained more about the specific teaching techniques Scott was using while Wetherell and Stauff observed. Then Student and Scott moved upstairs. Wetherell asked most of the questions. She asked mostly about what reinforcers and materials Parent and home staff used in the home program, e.g. where did home staff get the cards used with Student, what were the cards for, etc. (Test. of Impson, Tr. 1431-1433.) Wetherell talked about recreating the home program at school by setting a table with a television and a VCR so that Student could watch videos and getting the red and yellow cards. Impson concluded from Wetherell and Stauff’s questions and discussion that they believed if they had those items, District could successfully recreate the home program. (*Id.*, at Tr. 1441.)

(226) After a more few questions and observing, Wetherell and Stauff left. Impson answered all of the questions she was asked. She did not, nor did any one else to her knowledge, ask Wetherell and Stauff to leave. (Test. of Impson, Tr. 1431-1433.)

District reevaluation of Student in preparation for April 2011 IEP meetings

(227) On March 28, 2011, Stauff was present with Wetherell when Parent brought Student to the SCESD offices for the scheduled assessment. Wetherell, Stauff, and Parent reviewed and signed the assessment plan for administering a functional academic assessment. (Test. of Stauff, Tr. 2113; Ex. D56.) District also completed a “Staffing Report” for the assessment meeting. (Ex. D57.) Stauff completed the handwritten information on both forms. (Test. of Stauff, Tr. 2113.)

(228) The preprinted “Student Assessment Plan for Special Education.” includes a parenthetical “(Please complete all sections)” instruction under the title. The form then provides check-boxes to indicate, among other things, if the assessment is for an initial referral, a re-evaluation (including a due date for a re-evaluation, or a revised assessment plan (also requiring a due date). (Ex. D56 at 1.) None of the boxes on the March 8, 2011 form for Student were checked. (*Id.*)

(229) The assessment plan included Student’s diagnosis as autism. Check-boxes were provided to indicate specific areas of concern as follows: intelligence; behavioral/emotional/social; academic achievement; functional skills; autism; medical/health; vision; hearing; sensorimotor skills (gross or fine); speech/language/communication; transition; and other. The box for “functional skills” was marked. (D56 at 1.) Under “Interventions

Attempted,” Stauff wrote “Child has been in a home placement.” On the preprinted part of the form entitled “Screening instruments Administered and Results (Include Standard Scores), Stauff wrote “Child has been in a home placement.” (*Id.*)

(230) In the preprinted area entitled “Other Relevant Information (Statewide Assessment, Grades, Retention, Number of Schools Attended, Attached Work Samples, Behavior Referrals, Student Attitude/Motivation, etc.), Stauff wrote “Child has been in a home placement.” (Ex. D56 at 1.)

(231) In the preprinted area entitled “Health and Developmental History (Including medical issues and medication use; may include “Physician’s Statement), Stauff wrote “Child has developed a seizure disorder.” (Ex. D56 at 1.) The assessment plan provides for District to indicate specific information on which areas Student may be assessed and what specific evaluation instrument will be used. Instructions for completing the assessment direct the person completing the form to “circle those which may be used in part or whole” and to indicate which agency will complete each evaluation area. (*Id.*)

(232) Stauff indicated that the assessment planned was a “functional skills assessment” and that it [might] include an “Independent Functional Life Skills Assessment” and under “Other,” Stauff wrote “Functional Academic Assessment.” (Ex. D56 at 2.) No other areas were marked as areas where Student was to be assessed. (*Id.*)

(233) Following the portions above, the assessment form included, among others, the following statement:

The above information will be used to assist the eligibility team to determine the student’s education needs and, if necessary, eligibility for special education and individualized planning [.]

(Ex. D56 at 3.) The form was signed by Davis, as well as Parent, Stauff and Wetherell although Davis was not present. (*Id.*)

(234) The preprinted portions of the Staffing Report included areas to complete Student’s name, birth date, current date, present placement, and to fill in the current special education services received. The form also included check-off areas to note if parents’ rights were reviewed and the purpose of the meeting, whether it was for placement, IEP, transition, ESY, or other, and an area to record what occurred under the preprinted heading, “Minutes of Meeting: (include review of goals, needs of student, academic performance, etc.)” (Ex. D57 at 1.)

(235) Student’s name, date of birth, the current date and placement as “home program” were completed by hand. The area for current services was blank. Nothing indicated parent’s rights were reviewed. None of the boxes available to indicate the purpose of the meeting were checked. The minutes portion was completed by hand as follows:

[Parent], Kathleen, and Tenneal met to review the assessment plan.

(Test. of Stauff, Tr. 2114; Ex. D56 at 3.)

(236) Following completion of the assessment form, Wetherell conducted a functional academic assessment of Student. The assessment took between 20 to 30 minutes. (Test. of Wetherell; Tr. 57-58.) Wetherell asked Student to sit down across from her at a table. (Test. of Stauff, Tr. 2114-2115.) Wetherell had planned a variety of tasks for the assessment. The chair Wetherell provided for Student was a rolling chair. Wetherell had items she planned to use in the assessment out on the table when Student arrived. (Test. of Wetherell; Tr. 57-58.)

(237) Parent and Stauff observed while Wetherell tested Student and both took notes. Wetherell did not. (Test. of Parent, Tr. 3038-3039; Ex. S33; Test. of Stauff, Tr. 2117, 2119.) Stauff observed Student get up and “go see what was around the corner * * * [he/she] wasn’t upset * * * wasn’t running away * * * [he/she] just got up to see what else was going on.” (Test. of Stauff, Tr. 2120.) Stauff did not observe any distinctive behaviors or self-injurious behaviors. Stauff thought Student was “just fine.” (*Id.* at 2120-2121.)

(238) During the test, Student wriggled in the chair and grabbed the instructional items on the table. (Test. of Wetherell, Tr. 57.) Student did not stop grabbing items until Parent told Wetherell to “tell [him/her] “Don’t do that.” Student then stopped the behavior. (Test. of Parent, Tr. 3045.) Student looked toward Parent when Parent spoke. Student has learned over time with Parent that telling Student “Don’t do that” is the first step in stopping undesired behavior. (*Id.*) Wetherell used signs and verbalizations that she believed Student understood. Wetherell felt that she understood Student in the context of the assessment and what Student did during the assessment. (Test. of Wetherell, Tr. 317-320.)

(239) Approximately four minutes after starting the evaluation, Student got up and left the room. (Ex. S33 at 1.) Student went into an OT’s office and found a “fidget” (a gel ball with a harder inside, designed for keeping one’s hands occupied). (Test. of Wetherell; Tr. 317.) Wetherell did not attempt to stop Student, but followed, when he/she left because Student left “with conviction.” Wetherell had not worked with Student in a long time and did not have a specific plan “set aside” for Student’s behaviors. (*Id.*, Tr. 327.) Wetherell signed and spoke to Student. She also placed her body and one arm to block those doors she did not want to Student to enter and pointed with other arm down the hallway to direct Student where to go to return to the instructional room. Wetherell assumed that Student understood her signs, along with her facial cues, body language, and speech because he/she returned to the room. (*Id.*, Tr. 59, 318.)

(240) Student brought the fidget back when he/she returned to the room and bit a hole in it. (Test. of Parent; Tr. 3029.) Student’s finding the fidget and bringing it back was a reinforcer. (*Id.*, Tr. 3043.) Student left the room at least two additional times. Student engaged in self-injurious behavior by banging his/her head on the back of the chair early on, and again later, in the session. In the middle of the session, Student banged his/her head on the table. (*Id.*, Tr. 3042; Ex. S33)

(241) Prior to the March 2011 evaluation, Wetherell had last evaluated Student at least four years before. (Test. of Wetherell, Tr. 319.) Wetherell did not set up the instructional setting well because she did not know Student “exceedingly well.” (Test. of Wetherell; Tr. 58.) Instructional control is important for a learning environment. Wetherell did not have instructional control of the testing environment. (*Id.* at 329.)

(242) Stauff observed the assessment. Wetherell communicated with Student through vocal commands to see if he/she would follow through with what she asked of him. (Test. of

Stauff, Tr. 2114-2115.) She recalled that Student made some vocal responses but she did not see Student sign if Student did so. Stauff saw Student use some signs for letters but she did not see more because she was taking notes and was not watching all of the time. Stauff knows very little sign language. (Test. of Stauff, Tr. 2123-2124.)

(243) Wetherell wrote the Functional Assessment report following the March 28th assessment. (Test. of Stauff, Tr. 2118; Ex. D59.) The District did not perform any other assessments or evaluations of Student prior to the IEP meetings in April and June 2011. (Test. of Stauff, Tr. 2125.)

(244) Wetherell included the following results in the written report of her evaluation:

Functional Assessment:

When presented with visual pictures and a variety of requests that included verbal requests to “point to, show me,” signed requests of “what’s this and where is” [Student] was able to:

- Identify star, rectangle, circle and diamond
- Identify the colors, green, red, yellow, blue, purple, orange, black, and brown (sign and vocal approximations)
- When presented capital letters with 3-6 cards at a time, [Student] was able to identify the letter asked for 18 out of 18 times
- When presented with capital letters [he/she] was able to sign 20 out of 20 letters paired with vocal approximations
- When presented with lower case letters [he/she] was able to identify 18 of 18 letters we showed [him/her]. For this task [he/she] needed one or more prompts as well as verbal and signed cues. Lower case letters seemed more difficult for [him/her]. [He/she] seemed to use the letters “f” and “z” as a response when [he/she] was unsure of the request.

When presented with number tasks in the same manner as above [Student]:

- Was able to identify the numbers 3, 4, 8, 10 independently. 6 with a prompt
- Was not able count with one to one correspondence
- Was not able to match the number of items on a card

Other Tasks:

- When asked “where is” verbally [he/she] was able to point to Dad, Door and TV.

- When shown the sign and paired with “what’s this” [he/she] was able to receptively indicate (*sic*) that [he/she] understood chair, sit, stop and where.
- When requested both verbally and in sign two step directions like “sit and wait” [he/she] complied.

** [Student’s] responses to the above varied between sign, point to show, verbal approximations or a combination of all three types.**

Behavior during the Assessment:

[Student] sat in a chair during the assessment. [He/She] giggled and laughed throughout the assessment. While [he/she] did attend to the tasks at hand [he/she] also left the learning environment to walk the hallways. The assessor was able to redirect [him/her] back to the learning environment with verbal and signed cues. [He/She] walked into offices, looked into cupboards and got a fidget tool from an occupational therapist.

[He/She] held the fidget tool until it became a distraction. When requested to give it back [he/she] complied. The assessor left it on the table and [he/she] took it back. When the instructional materials were not cleared from the table [he/she] grabbed at them during other tasks.

All of the above data was collected within a 30 minute time frame without tangible reinforcers given at the completion of tasks.

It was a joy to interact with [Student]. I have seen much improvement in [his/her] ability to communicate both verbally and with sign since our last interaction.

(Ex. D59 at 1, 2.)

(245) Wetherell’s report did not include a description of the need to use her body to block Student’s movement to redirect Student to the testing area. Student’s instances of self-injurious behavior were not recorded in the written report. (Test. of Parent, Tr. 3043.) Student left the instructional area without permission and found a reinforcer on his/her own. (*Id.*; Test. of Wetherell, Tr. 327.) Student was out of the room for approximately 5 of the 25 to 30 minutes of assessment time. (*Id.*, Tr. 3039.)

(246) Wetherell did not attempt signing with Student outside of the assessment tasks. (Test. of Wetherell, Tr. 319.) Wetherell’s belief that she understood Student’s signs or that Student understood her attempts at communication were based on her “feeling that [she] understood [Student] within the context of this assessment and what [Student] was doing on that day.” (*Id.* Tr. 320.) Wetherell did not know if Student had understood the concept “where,” she assumed that [he/she] did. Student communicated spontaneously only once during their time together when Student expressed a desire for something to Parent. When Student giggled and laughed during the assessment, Wetherell was aware from Parent’s earlier information that Student was engaging in self-stimulatory behavior. (*Id.*, Tr. 321-326.) Wetherell did not report the giggling and laughing as self-stimulatory behavior in Student’s written assessment. (Ex. D59 at 1, 2.)

(247) After she completed the March 28th functional assessment of Student, Wetherell believed the District had the information needed to write the IEP. Wetherell did not plan to schedule assessments for physical therapy, occupational therapy, or any other purpose. She believed that her information along with all of the data provided by Parent was sufficient. In Wetherell's opinion, no further evaluations were needed. (Test. of Wetherell, Tr. 333-335.)

(248) Prior to or at the April 5 or 6, 2011 IEP meetings, Wetherell received a copy of Student's 2010-2011 IEP, updated as of March 28, 2011, with a current progress report by DeBastiani and Impson. (Test. of Wetherell, Tr. 116-117; Ex. D93.)

(249) Prior to the 2011 IEP meetings, Wetherell did not request or plan to evaluate Student speech language services, occupational therapy services, or behavior or adaptive rating scales. Wetherell did not request those evaluations, in part, because the last speech language assessment took several months to complete and then an IEP that also took several months to complete. In addition, Wetherell was under the impression that the home program was collecting data and evaluating Student continuously and that the home program data could be used for the IEP meetings. (Test. of Wetherell, Tr. 223-224.)

(250) A March 25, 2011 letter from District's counsel to Parents' counsel included a draft IEP for consideration at the upcoming April 5 and 6, 2011 meetings. (Ex. D53 at 5-23.)

April 5 and 6, 2011 IEP Meetings

(251) District sent Parents a letter, dated March 25, 2011, containing, among other things, an IEP Meeting Agenda, which included a list of expected participants and a draft IEP. (Ex. D53.) The following participants were listed:

Tenneal Wetherell, Case Manager, SCESD

Jeff Davis, Superintendent, CCSD

Kathleen Stauff, Program Administrator, SCESD

Rorry Keane, Aug Com/SLP, SCESD

Georgeann Harty, Autism Consultant, SCESD

Mike Bradburry, Reg. Ed. [T]eacher, CCSD

Liv Sundkoyen, OT, SCESD

Janet Jester, Nurse, SCESD

James Collins, Classroom SPED Teacher, SCESD

(Ex. D53 at 4.)

(252) The team discussion started with the draft IEP generated by Wetherell with assistance from Stauff and distributed prior to the meeting. (Test. of Wetherell, Tr. 64-65.) The draft IEP sent to Parents counsel on March 25, 2011 included the same statements as the 2010-

2011 IEP for the results of the initial or most recent evaluations. The most recent tests listed were those from May of 2006. (Exs. D15 at 8; D53 at 8-9.)

(253) Wetherell used the information from the past IEP meetings held by telephone “as a baseline to start because of what [she] knew about the child.” (Test. of Wetherell, Tr. 65.) In response to being asked what other information Wetherell had received in the meantime that she might have used, Wetherell stated:

My thought process behind this draft IEP was to make sure that I had something down on paper to have a good conversation about without supposing or creating – building too much in because I hadn’t spent too much time with the child, so I utilized preexisting information.

To what degree I utilized things that I had obtained through generalized conversations or my observation, I can’t tell you specifically, but for me I remember the point being that we had to have a document to work from and that it needed to be something that I knew to be as true as possible, and that seemed to be this IEP that we created over the phone with the provider’s information regarding the child’s present level of performance.

(Test. of Wetherell, Tr. 69-70.)

(254) Following the list of what must be included in the PLEP portion of the IEP, the draft included the following statement:

[Student] has been participating in a home program for the last two IEP cycles. Present levels and goals were prepared and established by the home program staff. Parents have provided the school district with some data about [his/her] current performance.

(Ex. D53 at 7.)

(255) On the Services Summary page, the draft stated that the anticipated location of the specially designed instruction (SDI) was to be “all school environments,” or “Adaptive Life Skills Classroom,” with the exception of community instruction which was to be delivered in the “community.” The Related Services, OT, Augmentative Communication and Speech Language were to be delivered in the ALS classroom or ALS classroom/speech room. Behavior Plan-Adult Assistance, listed under Supplementary Aids/Services: Modifications; Accommodations, was to be provided in “All School Environments,” as were the Supports for School Personnel. (Ex. D53 at 7.)

(256) The IEP team convened with the individuals listed on the proposed agenda in attendance. In addition, counsel for both the District and Parents were present. (Ex. D72.)

(257) The team began the discussion with Student’s PLEPs. Keane, the District’s aug. com. specialist, Keane reviewed the 2010-2011 Progress Report and Goals, dated March 28, 2011, prepared by DeBastiani and Impson. Keane also reviewed a report from Parent regarding Student’s present levels of functioning and Parent’s statements regarding Student’s needs for a

successful instructional setting. Keane received a copy of the documents at the meetings, not before. (Test. of Keane, Tr. 649, 650; Exs. D55, D58.)

(258) Keane participated in the IEP team discussion of Student's PLEPs for social/peer interaction. As the aug. com. specialist, it is part of Keane's job to work on a student's social skills and communication within the social skills environment. Keane's students are always with peers, so she works with students in peer groups. Keane defines "peer" as being close in chronological age. Keane believes chronological peer group interaction is the best method to develop necessary social skills. In her professional opinion, Keane believes everyone needs to communicate with people his or her own age and that the best way to learn socialization is to work in a group of peers. (Test. of Keane, Tr. 651-653.)

(259) Keane incorporates peer interaction as a method to meet IEP communication goals. Depending on the communication system, possibly sign language or an augmentative communication device, Keane will incorporate all forms of, or the totality of, the communication used by individuals within the group setting. In Keane's opinion, teaching communication or language skills works better in a group setting. (Test. of Keane, Tr. 654-656.)

(260) Keane saw reports and heard the IEP team discuss Student's PLEPs at the IEP meetings. Keane was not asked to, nor did she, evaluate Student prior to the IEP meetings, she had not requested to meet with Student, and she had not reviewed Student's records. (Test. of Keane, Tr. 711-715.)

(261) Keane did not provide information on Student's PLEP at the IEP meetings because she had not had any experience with Student. (Test. of Keane, Tr. 657, 658-661.) The IEP statement of long term communications goals, with the associated short term goals, incorporated into the final IEP of June 2011 remained the same (with a few small changes), from the first document discussed at the April IEP meetings. (Test. of Keane, Tr. 682, 685; Exs. D48, D55, D102.)

(262) Keane works with students who use sign language. Keane uses Exact Sign Language, which is different from ASL. Many of the signs are similar but ASL is in and of itself, another language, the language of the deaf. Signing exact English is used for children who hear but do not talk so the signs are in the exact order that the words would be if the individual were speaking English. Keane has worked with students who use modified signs but it requires that the conversation partner understand the modified signs of the individual signing. (Test. of Keane, Tr. 678-679.) If working with a student who communicates primarily with sign language, Keane would not be able to understand a sign that had been modified by that particular student without the presence and assistance of a person who knows that student's modified signs. (Test. of Keane, Tr. 710.)

(263) Michael Bradbury was the regular education teacher identified to attend Student's April and June IEP meetings. Bradbury has a bachelor's degree from Le Moyne College in Syracuse New York. He majored in psychology with a minor in special education. In his undergraduate program, Bradbury received some experience with students with autism related to the use of augmentative communication and typing facilitated communication. (Test. of Bradbury, Tr. 777-778.)

(264) After approximately 10 years, Bradbury moved to Missoula, Montana to take a position as a special education teacher. He worked with students in grades K-2 in self-contained classrooms. Bradbury's students included those with a wide variety of disabilities. As part of his job responsibilities, Bradbury drafted IEPs and attended IEP meetings. Bradbury's class included three students with autism, one of whom had severe autism. Bradbury taught himself ABA principles which was the program recommended to him to use for behavioral management. He worked in that position for one and a half years prior to coming to Gold Beach three years ago. (Test. of Bradbury, Tr. 778-780.)

(265) Bradbury attended Student's IEP meeting on April 5th but was excused by the IEP team from attending on April 6th. Bradbury was present during the June 7th IEP meeting but was excused from the June 8th meeting. While Bradbury was present, he felt that the IEP team had been collaborative on the process for stating Student's PLEPs and creating goals for the IEP school year. However, he felt that there was an underlying tension in the IEP team whenever placement was discussed for Student. (Test. of Bradbury, Tr. 788-789, 793-794.)

(266) During the IEP meetings, Bradbury did not contribute to the substantive discussions and "hardly said a word." (Test. of Bradbury, Tr. 794.)

(267) Janet Jester, RN, is the nurse consultant for SCESD and has been for 10 years. Her primary job is to develop medical protocols and train staff in regards to students with medical needs in classrooms served by SCESD. (Test. of Jester, Tr. 558.) Prior to Student's IEP meetings, Wetherell informed RN Jester that she would be attending to address the medical section of Student's IEP. (Test. of Jester, Tr. 620.)

(268) When she is referred to a student to prepare for an IEP, it is Jester's normal practice to assess the student prior to the meeting. Jester first calls the parent(s) and reviews whatever health issue the student has with the parent(s). Jester also visits the student if the student is attending school. Jester then develops the medical protocol and train staff. (Test. of Jester, Tr. 620-621.)

(269) Before Student's IEP meeting, Jester asked Wetherell if she were going to be seeing Student for evaluation or assessment. Wetherell told Jester that she was unsure. Jester did not ask for further information prior to the IEP meetings the April 5th IEP meeting and Wetherell did not clarify if Jester would be seeing Student. (Test. of Jester, Tr. 620-621.) Jester attended the IEP meeting for the full day of April 4th and the first half of April 5th. She participated in the team discussion of Student's medical needs. (*Id.*, Tr. 564, 613-614; Ex. D103.)

(270) At Parents' counsel's request, the team agreed to document Student as being in eighth grade. Then the IEP team began to discuss the portion of the IEP that addresses the list of special factors affecting Student. Of those factors, the team agreed that Student needed Assistive Technology, that Student had communication needs, and that Student "exhibits behavior that impedes his/her learning or the learning of others." (Ex. D72 at 1, D102 at 4.)

(271) Next, the team discussed the paragraph explaining how Student's disability affected involvement and progress. The last part of the paragraph had been drafted to state that "[a]dditionally, the nature and severity of these struggles causes behaviors that require specially designed instruction in a 1:1 or small group setting." (Ex. D53 at 7.) Parent told the IEP team that Student could not currently be in a small group setting. Impson added that Student was

doing very well and [his/her] behavior was under control but a small thing, like Parent coughing, could set Student off. The other members of the team agreed to change the last part of the paragraph to read:

Additionally, the nature and severity of these struggles causes behaviors that require specially designed instruction in a 1:1 setting. It will take a systematic approach to transition [Student] into a small group setting.

(Exs. D72 at 2, D102 at 5.) Parent did not agree to the addition of the last sentence. (Ex. D72. at 2.)

(272) Parent's list of concerns was added to the IEP. Parent and Impson provided progress reports and proposed goals and objectives on Student's functional communication, language, functional academics, in reading and math, social interactions, behavior, and adaptive skills. The team reviewed these and developed updated PLEP statements from the information. (Test. of Wetherell, Ex. D102.)

(273) The IEP team reviewed Wetherell's functional assessment and incorporated information from the report into Student's present levels. (Ex. D72 at 5.)

(274) The team discussed, for a lengthy time, the definition of a "peer" for Student. The team was unable to agree to a definition but substituted the word "youth." The team then agreed to add a statement regarding Parent's concern regarding the definition or identification of what is a "peer" for Student to the PLEPs. (Ex. D72 at 6.)

(275) After a lunch break, the team began discussing Student's present level of behaviors. The team added a list of Student's present behaviors and a statement that his/her behaviors are currently being managed in an extensive behavior program, including a written behavior plan. Parent's description of Student's aggression towards others was also added. The team also added PLEPs in the areas of sensory, community, medical, and adaptive skills. (Ex. D72 at 7.)

(276) The statement that Student's primary mode of communication is sign language was added to the communication PLEP. (Ex. D72 at 7.)

(277) Information from Parent's document regarding settings for social interaction was added to the Social Interaction sections. (Ex. D72 at 7.)

(278) RN Jester asked questions regarding Student's current medical condition, including specific information on Student's history of *gran mal* seizures, how those seizures manifest in appearance and what Parents currently did when Student had seizures. Parent provided the name of the medication Student was currently taking and noted that medication changes were issues for Student. (Ex. D72 at 7, 8.)

(279) In response to RN Jester's questions, Parent described Student's seizure behavior and clarified that Student did not wear a protective helmet. Parent told the team that Student was taking Keppra and that Student's seizures lasted from one to two minutes. The IEP team added a statement about Student's issues with medication changes to the medical section of the IEP. (Ex. D72 at 8.)

(280) Liv Sundkoyen, OT, participated in Student's IEP team meetings of April 5 and 6, 2011. (Test. of Sundkoyen, Tr. 725, 727.) Prior to the IEP meetings, Sundkoyen had worked very briefly with Student, approximately four years previous. (*Id.*, at 726.) During the time Student was last in school, for approximately one month, Sundkoyen observed Student and consulted with Student's teacher at the time, James Collins. (Test. of Sundkoyen, Tr. 749-750.)

(281) Sundkoyen, was educated and registered in Norway as an OT. She subsequently became certified in the United States under the American Occupational Therapy Certification Examination. Sundkoyen also holds a masters of science in special education - early intervention. (Test. of Sundkoyen, Tr. 720-722; Ex. D197 at 38.)

(282) Sundkoyen has worked for SCESD since 1989. She has taken multiple continuing education courses in a variety of areas over time. Sundkoyen is one of seven OTs working for SCESD. She works primarily with younger students with a variety of issues, including students with fine motor skill difficulties, students needing assistive technology, students who have feeding problems, and students with orthopedic impairments. Sundkoyen works with students who have autism in the area of sensory processing. (Test. of Sundkoyen, Tr. 724-725; Ex. D197 at 38-41.) Except for students who are in early intervention programs, Sundkoyen provides services to Students only at Life Skills classrooms or resource rooms. She provides consultation services to teachers in regular education classrooms who students have OT services provided through an IEP. (Test. of Sundkoyen, Tr. 756-757, 758.)

(283) To prepare for the April 2011 IEP, Sundkoyen talked with Hege Bakken, the District OT who had worked with Student previously. Bakken and Sundkoyen did not exchange substantive information about Student related to OT because Student had not been attending school for a long period of time. (Test. of Sundkoyen, Tr. 748-749.) Sundkoyen did not assess Student, nor did anyone ask her if she needed to do an assessment in order to prepare for the IEP. (*Id.*)

(284) At the April 5th meeting, Sundkoyen, along with the IEP team, reviewed a letter from Synnove Abrahamson, OT, who had been working most recently with Student. (Test. of Sundkoyen, Tr. 736-737; Ex. S13.) Parents reported that direct consult services with OT had resulted in attempts at new interventions that did not work out, with the exception of daily walks for strenuous workouts. Parent still believed that professional consultations with OT were important in the event things changed for Student. (Test. of Parent, Tr. 3192-3193.) Parent reported that Parent and Student did 15 minutes of exercise at a targeted heart rate as recommended by Abrahamson. Sundkoyen suggested the exercise recommendation be added to Student's sensory diet. (Ex. D75 at 5.) The recommendation was included in the services summary page in the final IEP. (Ex. D105 at 2.)

(285) The sensory information in the draft IEP at the end of the April 6th meeting was based primarily on information provided by Parent. (Test. of Sundkoyen; Exs. D77, S53.)

(286) Parents provided information about Student's sensitivities to noise, motion, odor, crowds and other environmental factors that would be useful in creating a "sensory diet" for Student. Parents also provided information about concerns they had for Student's conduct to be considered by the team. The concerns were included on the Student's IEP as follows:

[Student] experiences seizures

Aggression towards others

Self-injurious behavior

Throwing and breaking things

Placing objects in ears

Picking on sores and scabs

Rubbing body skin until raw/bleeding

Restricts appendages ie [*sic*] ties things around finger to cut off circulation

OCD [obsessive compulsive disorder] behaviors

Self-stimulatory and other antisocial behaviors

Eating non-food items

Dietary [c]oncerns

Sleep [p]roblems

Bathroom and cleanliness concerns

Varying and unpredictable response to the environment

Unable to express pain, confusion, fear

Safety concerns including lack of awareness of dangerous situations

Inconsistent sensory sensitivities, both hypo and hyper sensitive

Successful instructional setting: quiet, warm, free of distraction and excessive motion, well trained aides that have experience with [Student], *1:1 instruction with a trusted adult*, opportunities for self-initiated growth, confidence and competence, dignity and self-esteem are a priority. A warm, safe space that [Student] can retreat to where [he/she] can make noise and not have expectation placed on [him/her] of maintaining socially medicated behavior. This helps give [him/her] an opportunity to regulate [his/her] own behavior and preserves the learning environment.

[Student's] parents would be thrilled if [Student] could run up the steps to the school and join typically developing friend in a game of football. The parents also believe that [Student] is among the most fragile of children. Given [his/her] history of SIB and aggression there is a tendency not to view [Student] in that manner. With all of [his/her] sensitivities and neurologic dysfunction the world is many times a confusing and fearful place for [Student.] [Student's] emotions are fragile, [his/her] confidence is fragile, [his/her] competence is fragile, [his/her]

attempts at self-initiate (*sic*) growth are fragile, [his/her] self esteem is fragile. These all must be guarded and encouraged if [he/she] is to succeed.

Identification of a peer group is difficult.

(Ex. D102 at 5, 6.) (Emphasis added.)

(287) The team discussed Student's current involvement with the community. (D72 at 9.) A PLEP on "Community" was added to the IEP which read in relevant part:

[Student] takes at least once daily trips to a variety of locations within the community. [His/her] trips to the community are purposeful and are used for obtaining generalization of skills. *[Student] requires a trusted adult and instructional control for safety while in the community setting.* * * * Currently [Student] has a baseline of 0 for objective 1 and 2, 70-80% for objective 3 for Community Instruction goal.

(Ex. D102 at 10.) (Emphasis added.)

(288) The IEP team added a statement on Student's present social interaction levels that read in relevant parts:

* * * Parent and [Student's] home and community program staff reports that when the opportunities are available [Student rarely approaches youth in an unfamiliar setting * * * [Student's sensitivities, behaviors, and communication needs make it challenging to find suitable peers. * * * [Student] is able to follow an unfamiliar adult's (someone who is not a family member or a home/community program staff) request to engage in a preferred activity 80% of opportunities across 5 consecutive daily sessions * * * * *.

In structured settings with trained adults, [Student] is able to play simplified games with high level of reinforcement. Playing the game for the sake of time spent with another person, eludes him/her. Seeking and interpreting non-verbal information from others and the environment to regulate his/her own actions is a slowly emerging skill. *This has been done with well-trained people that [Student] trusts.*

(Ex. D102 at 8.) (Emphasis added.)

(289) Impson and Parent provided the team with copies of VB-MAPP data from Impson's assessment on April 5th. The home providers had not compiled a written report because it was not needed for the home program and Impson would be present at the IEP meeting to explain results. On April 6th, Gill informed the team that without a written report or explanation, the VB-MAPP data would require too much time for Impson to explain, and that District was not requesting a report which would cost District additional money. Parents agreed to provide a copy, at no cost to District, of any reports regarding the VB-MAPP results if they were generated in the future for the home program. (Ex. D75 at 2.)

(290) At the April 6, 2011 IEP meeting, Wetherell distributed copies of the home program's BIP, dated March 28, 2011, the ISRs, dated April 4, 2011, and the report from Dr. Calouri dated March 9, 2011. (Ex. D75 at 7.)

(291) The IEP was not completed by the end of the April 6, 2011 IEP meeting. The team agreed to put June 6, 7, and 8, 2011 on hold for two additional days to complete the IEP. (Ex. D75 at 7.)

June 1, 2011 to June 8, 2011 lack of an IEP

(292) The IEP in place for the 2010-2011 school year had been developed under the terms of the Agreement. (Test. of Wetherell, Tr. 42; Ex. D15.)⁷ The 2011 IEP was developed and completed on May 18, 2010 and was in effect for the following 365 days. (Ex. D15.) IEP meetings were held on April 5 and 6, 2011 but review of the existing IEP and development of a new IEP was not completed at that time nor was it complete as of May 17, 2011, when the prior IEP expired. When the IEP was not complete at the end of April 6, 2011, the parties discussed scheduling additional time. Early June 2011 was the first available time to continue due to scheduling conflicts. (Ex. D83.) In one response, District indicated that it had not believed that the additional time would be necessary because "two days is still an extremely long time for an IEP Meeting. (Ex. D82 at 1.)

(293) May 31, 2011 was the last day the Agreement was in effect. District ceased to provide educational services to Student as of June 1, 2011. From June 1, 2011 until June 8, 2011, District did not have an IEP in effect to provide educational services to Student. District had classes on four and half days during the period June 1 through June 8, 2011.

June 7 and June 8, 2011 IEP meetings and June 8, 2011 IEP

(294) IEP meetings were continued on June 7 and June 8, 2011. (Ex. D99.)

(295) On the June 8th IEP, Student's functional communication PLEP was as follows:

[Student's] primary form of communication is sign language. Parents and home and community program staff report that [Student] is able to make 2-word requests when an item is missing. At times, [Student] can appropriately request others to terminate a non-preferred activity (e.g. stop, move, off, change.) Parents report [Student] has between 350-400 signs in various stages of independence. [Student] uses a variety of types of sign language (ASL, exact sign, signs from Internet sites and signs that [Student] has modified. It is reported that [Student] is best understood by people who have experience with [Student's] particular signs and vocalizations. Parents report that [Student] is difficult to understand when speaking verbally and that [Student] sees a speech language pathologist 6 hours a month for articulation therapy. [Student] is currently using about 5 pre-taught 3 word phrases to request approximately 5 times per day.

⁷ When Davis was initially asked if there was "anything in the [Agreement] about a transition process for Student, Davis answered that there was not. (Test. of Davis, Tr. 460.) After reviewing DeBastiani's e-mail with the provision requiring her assistance with transition, Davis acknowledged that the provision was part of the agreement.

[He/she] is currently using pre-taught 2-word phrases to request approximately 20 times per day. [He/she] will use colors and the adjective “hot” when appropriate but uses no other adjectives.

(296)Keane also attended the IEP meeting of June 7, 2011. Keane had reviewed additional information on Student provided by Tucker. Keane, along with the IEP team agreed with the communication goals for Student discussed at the April meetings and included on the final IEP. (Test. of Keane, Tr. 683, 685, 689.)

(297)Keane recommended SLP services at 20 minutes per day 2 times per week. Keane’s recommendation was based on her experience teaching students for 35 years and the speech goals as written. Keane had never worked with Student and had not evaluated Student prior to the IEP. Keane had no independent information about Student’s baseline status which was included in the PLEP portion of the IEP. (Test. of Keane, Tr. 707, 708.)

(298)Draft IEPs prepared after the April 5th and 6th meetings and prior to the June meetings included Keane’s recommendation for SDI for speech goals #1 and #2 at 20 minutes per day, two times per week. When reviewing the proposed time, Parent stated that Student was currently receiving 90 minutes per week and requested that Student’s IEP include 120 minutes of speech services per week. (Test. of Keane, Tr. 691-92; Exs. S77, D99.)

(299)The team discussed Parent’s request. District team members, including Keane, agreed that the proposed SDI of 20 minutes 2 times per week was sufficient. Parent did not agree. Davis, as the District Representative, made the final decision and SDI for speech services of 20 minutes 2 times per week were included in the Service Summary portion of the final IEP. (Test. of Keane; Ex. D-105 at 1.)

(300)Keane does not provide direct SLP services to IEP students in the District. Another SLP, unidentified at the time the IEP was finalized, would have provided services to Student. Keane would have been responsible for providing the direct augmentative communication services, to be provided at 3 hours per month in the Service Summary of final IEP. (Test. of Keane, Tr. 695, 696; Ex. D-105 at 1.)

(301)Keane’s services include working, sometimes one-on-one but primarily in groups, on a student’s communication. Keane does not work on articulation with students and would not have worked on Speech Goals #1 or #2 as set out in the Service Summary. She would have worked on Language Goals #1 and #2, the Language Generalization Goal, and Social Interactions. (Test. of Keane, Tr. 705-706; Ex. D105 at 1, 2.)

(302) The need for “pairing” with Student was discussed, as part of the Parents’ ISR, on June 7, 2011. Responding to District questions, Parent and Impson explained what pairing meant and how long it had taken in the past. (Ex. D99 at 9-11.) Prior to the discussion at the June 7th IEP meeting, Kelly Gill had not realized how long pairing with Student took. Gill asked Harty during the meeting what Harty would expect to do in working on a transition plan. Some members of the team discussed pairing but the discussion did not include Parent or Impson. (Test. of Parent, Tr. 3191; Ex. D99 at 11.) Parent was not asked and did not agree to teach or pair District staff as part of the IEP. (Test. of Parent, Tr. 3191.)

(303) District personnel had different definitions of pairing than Parent, Impson and DeBastiani. Wetherell defined pairing as a “a family term” regarding ensuring that a staff member was successful in working with Student. (Test. of Wetherell, Tr. 143.) Pairing is not defined or explained in the June 8, 2011 IEP. (Ex. D102.)

(304) Parent requested that the ISRs, given to the team on April 6th, be incorporated into the IEP as a whole. (Test. of Parent, Tr. 3076; Ex. D99 at 4.) The ISRs are all necessary requirements for an appropriate education for Student. (Test. of Parent, Tr. 3076, Test. of Impson, Tr. 1539-1544; D99 at 9-12.) Members of the IEP team discussed some but not all of the ISRs. (Test. of Parent, Tr. 3073, 3076; Ex. D99 9-12.)

(305) Wetherell did not agree with including the ISRs in the IEP. She believed the information set out in the report was already incorporated into the classroom. Wetherell believed that the school would be able to implement the goals and provide an education to Student without incorporating the ISRs. Stauff said that she already did the things listed in the ISRs in her classroom. The team was unable to reach consensus. (Ex. D99 at 4.) Davis, as District representative, denied Parents request to include the ISR in the IEP. He agreed that some of the strategies would be included in a transition plan. (Ex. D99 at 4.)

(306) District planned to address pairing as part of a transition plan to be carried out during the time allotted for ESY. (Test. of Wetherell, Tr. 367.)

(307) When the IEP team reconvened on June 7th, the team started with another draft IEP, updated as of June 5, 2011. The June 5th draft IEP designated the anticipated location for the delivery of services as “all school environments.” The wording had been the same on all of the drafts had since the beginning of the IEP meetings. After Parents objected to the June 5th IEP wording on the basis that it implied placement had been determined to be the school, the draft was changed to reflect that the location of services was “to be determined.” (Exs. S71, D99 at 4, 5.)

(308) Parents requested that Calouri’s report be discussed. District staff reviewed the report and explained that they believed the recommendations would be appropriate in a transition plan but not as part of the IEP. When Parent’s counsel asked if the team had discussed Dr. Calouri’s opinion that placement in the classroom environment would traumatize Student, Gill stated that it had been discussed as part of supports for Student. (Ex. D99 at 5.)

Placement in the June 8, 2011 IEP

(309) The IEP team was unable to reach consensus on placement. Davis made the decision and selected “Instruction in Separate Class with push into community” (ALS classroom). (Test. of Davis, Tr. 551; Exs. D99 at 12-13, D102.) Davis believes District has resources and expertise and has been successful with other students in the ALS program and that there was no reason District could not also be successful with Student. In Davis’s opinion, interaction with children of similar age would occur at school more frequently for Student than in a private program. Davis believes this is healthy and teaches skills on how to relate to one another. (Test. of Davis, Tr. 551-552.)

(310) Student is not interested in being around children his/her own age. Parents and the home program providers have attempted many times in various settings, and have contrived

settings to try to present same-age peers as a positive relationship. Those attempts have not been successful to any significant degree. (Test. of DeBastiani, Tr. 2494-2495.)

(311) At the conclusion of the June IEP meetings, District planned to draft five plans before the beginning of the school year in fall 2011: A transition plan; a behavior plan; a transportation plan, a safety plan; and a substitution plan. (D99 at 14.)

(312) Among other things, after the final IEP meeting on June 8, 2011, the District personnel decided that they would try the STAR curriculum with Student. Stauff purchased some classroom supplies to designate for Student, e.g. bins and crates that could be designated for Student's use. Stauff was on contract with District but was unable to work throughout most of the summer for personal reasons. (Test. of Stauff, Tr. 2186, 2189-2191.)

(313) Wetherell believed Parents' reports from Tucker, SLP, Abrahamson, OT, Dr. Calouri, the information from the written reports of Parents' behavior consultants, as well as Impson's input throughout the four days of IEP meetings was "meaningful insofar as data and information from their perspective." (Test. of Wetherell, Tr. 225.) She did not get "meaningful information regarding what she observed or what [her staff] would observe to transition the child or provide that level of kind of professional information to transition the child into the educational setting." (*Id.*)

(314) When asked about Student's 2011-2012 IEP, Wetherell agreed there was nothing included in it that was against her professional judgment but "with reservation." (Test. of Wetherell, Tr. 247-248.) Wetherell would not have written the IEP that was agreed to for Student after the four days of IEP meetings. Wetherell felt that Parents' and Parents professional team members IEP input, written documents as well as verbal input at the meetings, was presented as "here are our documents and what works for Student." (*Id.*) In response to Parents input, Wetherell felt that she and members of the team from the District, "in response back, tried to make those documents that [Parents' and Parents' professionals] gave [District] workable in the school setting." (Test. of Wetherell, Tr. 247.)

(315) Wetherell would rather have created what she would have called a collaborative document "with the intent to place this child in school in a collaborative, successful way rather than saying, ["]This is what we do at home, here it is.["] (Test. of Wetherell, Tr. 248.)

(316) Parent and Jester set a telephone conference for June 9th for additional medical information about Student. Parent agreed to provide Jester with the information requested by June 29th, if she would generate a seizure protocol. Jester agreed to create a seizure protocol by July 1, 2011. (Test. of Jester, Tr. 587-589.)

Extended School Year (ESY) and summer 2011

(317) The June 8, 2011 IEP included ESY for Student, "services to be provided are described on the Services Summary Page." (Ex. D102 at 28.) The IEP did not include a description of the ESY as of June 8, 2011. District told Parents that drafts of the ESY transition plan and behavior plan would be emailed to Parents by June 14, 2011. (Ex. D99 at 14.) Although there was no data taken to support ESY for Student, District decided to provide it because Student had been in a year-round program for the previous three years. (Test. of Wetherell, Tr. 237-238.)

(318) During the June IEP meetings, the team discussed what goals could be used for ESY and how much time would be needed. Based on Parent and Impson's input, the final IEP included ESY times for reading, math, language and behavior goals in the services summary page. The IEP stated the services would be delivered at "ESY site." ESY was to start on June 18, 200 and end on August 18, 2011. (Exs. D98, D99, and D105.) District had not offered or planned to pay for or to provide additional staffing in the home program for the ESY. (Ex. D99 at 9; Test. of Wetherell, Tr. 227-229.) District had planned to develop a plan for Student to move from the private home placement to the school environment during ESY. (Test. of Wetherell, Tr. 161-162.)

(319) As of June 10, 2011, Harty suggested that District needed a video tape of Student's signs, home visits for observations and pairing, community visits for observations and pairing, more information from Scott and other providers to become more familiar with Student, to learn more about the materials used in the private program, and needed copies of all behavioral data and intervention strategies tried and the data on success and/or failure of those strategies. Harty suggested that observations and pairing occur in the home and community for the first two weeks of ESY and pairing in the third week "with the ESY classroom." (Ex. D108.)

(320) As of June 12, 2011, Wetherell sent Scott a job offer for 2.5 hours per days, 3 days per week from June 28, 2011 to August 18, 2011. Wetherell "planned/hope" to have the work completed in the home. (Ex. D109 at 1.)

(321) On June 14, 2011, Wetherell sent Davis a draft "ESY Transition Plan." The draft included staffing with a 1:1 IA, listing "Julie?" and plans to have IA present for all ESY time. Harty was listed as the teaching consultant. The classroom teacher was to be determined, "depend[ing] on placement, classroom teacher." (Ex. D110, at 1, 2.) Under the heading "Transition," Wetherell proposed, in part, the following:

Learning about [Student], [his/her] learning needs, classroom needs for next school year:

Week 1-3 Georgeann

Week 4-8 w/classroom or ESY teacher (**Need more information and planning/depends on classroom and teacher schedules** [asterisks and open-ended bracket in original])

- **1st week**

Obtain list/understand [Student's signed communication. Video tape of signs provided by private program for school transition?

In the home for observations and pairing

In the community for observations and pairing

Interview Juli and other providers gather information for further familiarity with [Student].

Gather information about current materials used in private program (cards, pictures, list of signs)

- **2nd week**

More observations at home and in community

More pairing

- **3rd week**
Introduction/Pairing with ESY classroom?
* * * * *

(Ex. D110 at 2.)

(322) Student saw Dr. Goin of Oregon Neurology Associates on June 15, 2011. (Test. of Jester, Tr. 624.) Dr. Goin provided Parent with a copy of a Seizure Protocol-Standard and Parent provided a copy to Jester. (Id.; Ex. D138 at 6.) Student's seizure medications were changed after visiting Dr. Goin. Student did not attend ESY because of the medication change and Student's history of difficulty with medication changes. (Ex. D111.)

(323) After learning Student would not be attending ESY, on June 22, 2011 District sent Parents' counsel a letter listing items that would need be completed before the beginning of the school year, including a behavior support plan, a transition plan, a safety plan, a substitute plan, a transportation plan and development of a list of tools, lists of words, visual supports, and other items that Student uses as part of his/her education. District also stated that it had hired Harty as the autism specialist to help develop the list of needed items and to assist with and "begin development of the FBA." (Ex. 112 at 1.) District stated that Harty would need to spend some time in the home to observe Student and to obtain information "vital to build an appropriate educational setting for [Student] to implement the IEP that was created. (*Id.*, at 2.)

(324) On July 13, 2011, Harty asked to observe Student on July 28 and 29, 2011 when she returned from vacation. (Ex. S91.) On July 18, 2011 Parents agreed to Harty's request. (Ex. S92.) Harty, in advance of the visit, asked Parents what Student's schedule would be, when and how long she could observe on the days she would be visiting. Parents provided potential start times for observations and told Harty she could stay for several hours. (Exs. S92, S94.)

(325) On July 27, 2011, Harty told Parents she intended to observe Student's home education program with Student's current provider on the visits planned for the next two days. (Ex. S96 at 1.) Parent attempted to email Harty to tell her that Student would not have table-time, the educational part of the program, because it was no longer provided by the District. Harty did not get the email prior to arriving at the home on July 28, 2011. (Test. of Harty, Tr. 889.; Ex. D119.) Harty was able to observe educational programming because it is included in every part of Student's day. She also saw Student being taught, using signs, and being signed to. Parent did not deny any of Harty's requests while she was visiting. (Test. of Parent, Tr. 3349-3350.)

(326) Parent asked Harty if District had made arrangements to have a video of Student's signs made or had plans to pay for one to be made. Harty agreed to bring it to Wetherell's attention. (Test. of Harty, Tr. 892.) Harty observed Scott interacting with Student, she talked to Parent about the materials the home providers used in intensive programming, and Harty made a list of what pictures were currently being used. Parent explained that Student's rewards varied according to the day. Scott was not available for a long period on July 28th because Harty arrived close to Scott's time to leave. (*Id.*, Tr. 893-896.)

(327) For some time over the two days in July, Parent and Harty discussed Parent's fear about what would happen if Student returned to the school environment. Harty's impression was

that Parent was “terrified.” (Test. of Harty, Tr. 900.) Harty did not interact with Student during her visit. (*Id.*, at 902) Harty visited the next day and accompanied Student and Longwill on a community outing to the grocery store. Harty observed, among other things, the interactions between Longwill and Student, how Parent communicated with Student, both using sign and verbal communications, and how Student communicated. (Test. of Harty, Tr.902-911.)

(328) Student used many verbal approximations that were pretty hard to understand out of context. Parent and Longwill understood Student much better than Harty. Student sucked his/her thumb most of the time during the community outing. Over both days, Harty spent a total of about five hours observing Student. (*Id.* Tr. 904, 907, 944.)

(329) Harty informed Wetherell sometime prior to the July 28th and 29th visits that she had accepted a job in another district and that her availability would become more limited towards the end of August. (Test. of Harty, Tr. 915.)

(330) On August 12, Scott received a copy of the District’s job description intended for her. The District proposed to hire Scott to work as an IA for Student in the ALS program. (Ex. 126.)

(331) As of August 18, 2011, District was not providing educational programming for Student. In a letter dated August 18th, District requested that Parents provide educational programming that District personnel could observe in order to prepare for pairing and the beginning of school in the fall. (Ex. D128 at 1.) District also asked Parents to give the last date educational programming had taken place in the home so that District could develop “regression and recoupment” data to assist with ESY determination for the following year. (*Id.* at 2.)

(332) Attached to the August 18th letter was a “Substitute Plan.” The plan outlined District’s process for what would happen when Student’s teacher or 1:1 IA might be absent. The plan provided, in part, that when Student arrived at school, “the staff member assigned to [Student] will explain to [Student] that (staff member) is absent. [Student’s] routine will stay the same. If the IA is absent, the teacher will be assigned as sub if possible. If the teacher is not available a trained IA that is not assigned directly to [Student] regularly will be assigned.” (Ex. D128.)

(333) On August 22, 2011, Wetherell offered to contract with Scott through SCESD as an IA for Student for fall 2011 to assist with Student’s transition. On August 23, 2011, Scott declined to accept Wetherell’s offer. (Ex. D129.)

(334) Scott declined to take the job offered by Wetherell because, in part, she was not qualified to design instructional programs, to train staff or assist with other children as set out in the duties of the job posting. Scott also did not want to jeopardize her relationship with Student which she believed would occur if she tried to teach Student in the school setting. Scott had not formally declined the earlier similar offer to work as an IA for Student during ESY as it was unnecessary because Student was unable to attend ESY. (Test. of Scott, Tr.2760-2761, 2733, 2737; Ex. D129.)

(335) In a letter of August 22, 2011, Parents, among other things, requested District to clarify what it meant when it used the term “pairing.” District had used the term in draft documents in different contexts but had not defined the term. (Ex. D130.)

(336) District responded by letter on August 23rd, stating that “pairing” [was] the process that the family described as important to introducing new people to [Student] in the educational setting, and as well as an ongoing “continual pairing” process used at home when working with [Student]. (Ex. D131 at 1.)⁸ District’s response included a review of what District understood was expected to occur regarding observations of Student’s instruction and of pairing over the summer. District requested additional dates for staff to come to Student’s home and for Parents to have someone available to demonstrate educational programming and pairing with Student. (*Id.* at 2, 3.)

(337) Attached to District’s letter of August 23rd were documents titled “Transition Plan,” “[Student’s] Behavior Support Plan,” “[Student] Bus Plan,” and “Substitute Plan.” (Ex. D131 at 4-13.)

(338) The transition plan, dated August 8, 2011, included Scott’s name with a question mark as the 1:1 instructional aide though Scott had never indicated that she would take the position and had declined it the previous day. (Ex. D131 at 4; Tr. 2737.) The plan also listed a schedule of events to occur prior to school starting, including, among others, “obtain list/understand [Student’s] signed communication.” The plan included transitioning to occur, for the first week, to observe the home provider, the second week, “pairing w/home provider [and] pairing in the community/gross motor activities,” the third week, “pairing with classroom [and] pairing in the community/gross motor activities,” and the fourth week, “pairing with the classroom.” (Ex. D131 at 4.)

(339) Student’s signs could not be learned and successful pairing with a new person within the one month outlined in the transition plan. Pairing with Student takes three to four months. The home program tried introducing a new instructor within too short a time before the new person placed instructional demands on Student. During that time, Student had a huge increase in problem behaviors, self-injury, and aggression because Student became highly anxious when the new person was around. The home providers learned from that experience that pairing with Student took even longer than they had expected. (Test. of Impson; Tr. 1509-1511.)

(340) District staff and Parent worked on scheduling and agreed to another observation of Student in the home. (Exs. D128, D130, D131, D133, D135.) Collins and an IA visited the home on August 31, 2011. They stayed for approximately one hour. (Test. of Collins, Tr. 2319, Test. of Parent, Tr. 3124.) Student was not home when the staff arrived. Parent and staff talked out in the garage because it was a nice day and then went inside. (Test. of Collins, Tr. 2319-2320.)

(341) While in the house, Collins and Parent discussed, for approximately ten minutes, the contents of a safety backpack for Student and Collins asked about the red/yellow card system and the aggressive behavior management system. Collins asked for some information that Parent had to gather and provide by email the following day. Collins finished asking questions and left. (Test. of Parent, Tr. 3124-3127; Ex. S120 at 18-44.) Student was in the house the entire time. Collins made no attempt to contact Student or to interact with Student. (*Id.*, at 3100.)

(342) On September 1, 2011, Parent visited the ALS classroom proposed as Student’s placement. He also brought another copy of Student’s list of words and handed it directly to

⁸ District’s Ex. D131 is a duplicate of Parent’s Ex. S107.

Collins. Parent was able to visit the instructional and sensory areas of the classroom but did not see other settings. (Test. of Collins, Tr. 2328, Exs. S115, D143 at 4-13.)

(343) On September 2, 2011, Parent completed an ALS student data sheet, a video/picture email release, field trip permission form, and power of attorney for emergency medical treatment, as part of documentation required for Student to start school. (Test. of Parent 3133; Ex. S121.)

(344) On September 2, 2011, Wetherell sent Parent another set of draft plans based on feedback and concerns from Parent on August 31, 2011. Among other things, the bus plan called for Collins and an IA to ride the bus with Student for the beginning of the school year. Collins would cross train the IA for two weeks, unless it was determined a longer period was needed. (Ex. S122 at 3.)

(345) The draft transition plan of September 2, 2011 called for, among other things, Collins to provide the one-on-one instructional time for Student while cross training the IA. The plan included training a substitute IA. The time period set out for training and cross training throughout the draft plans was two weeks, unless a longer time was determined to be necessary. (Ex. S122 at 3, 4.)

(346) The experience with the new instructor also demonstrated the need for an instructor to thoroughly know Student's signs. Student's signs in the home may look different in the community, due to additional stimulation and stress. An instructor must be able to read Student's signs or attempts at signs, to maintain the person's own calm demeanor and to be able to communicate fluidly with Student, to "shape up" Student's signs and teach him/her how to correctly form the sign at the same time providing a positive environment for Student. (Test. of Impson, Tr. 1512-1514.)

(347) In Scott's experience, Student must be introduced to new settings slowly. Scott takes Student into the community as part of her job. Student could not be left alone in a new setting without someone who is paired with Student because Student would not be able to communicate. Student requires weeks to adjust to a new person or environment in order to begin to feel safe. (Test. of Scott, Tr. 2748-2751.)

(348) The August 8th transition plan did not provide for training in Student's instructional and behavior programs. The plan's pairing process paired Student with a location rather than a person, and it did not provide for the pairing process provided by the home program which was necessary for Student. (Test. of DeBastiani, Tr. 2439-2440.)

(349) The District's Behavior Support Plan, dated August 8, 2011, incorporated parts, but not all, of Impson's BIP given to District for the 2011 IEP meetings. The plan would not work as edited and reformulated by the District. (Test. of Impson, Tr. 1521, 1522; Ex. D131 at 5-11.) District included the statement that "[Student] is able to participate in a working relationship with a trusted adult. However, trust must be established systematically and takes a long time to build." (Ex. D131 at 5.) District failed to set out a systematic plan to create that trusting relationship. (Test. of Impson, Tr. 1521.)

(350) The BIP Impson wrote and the home team implements requires that everything be put in place at one time for Student to be successful. District's plan, in part, combined parts of

Impson's plan with things from District's observations of the home program. District's resulting plan lacked reinforcement strategies for teaching Student to accept "no" appropriately. The plan included references to the red/yellow card system and the cost-response board at use in the home program without adequate explanation. (Test. of Impson, Tr. 1523-1525.)

(351) Districts BIP outlined intervention strategies to use if Student engaged in aggressive approaches or attack behavior. The intervention strategies were listed as progressing from "least to most intrusive," as follows:

1. If [Student] engages in aggressive approach, tell [him/her] "no, you need to sit." If [Student] sits immediately begin the sit and count procedures listed in the reactive plan.
2. If [Student] continues to approach, repeat "no, you need to sit." If [he/she] does not comply and continues to approach
 - a. Increase personal space around [Student.]
 - b. If approached by [Student] aggressively, Staff should **evade** and assist others to **evade** and/or use natural barriers within room when possible (i.e. table, couch, desk, etc.)
 - c. If [Student] approaches staff with [his/her] hand or hands raised, staff should stand in **OIS stance position** and calmly and carefully move outside of [Student ['s]] arm reach.
 - d. If [Student] attempts to strike, grab or hit staff, they can utilize the **OIS deflection technique** to move the energy of the attack away from the staff's body and toward [Student's] own centerline. Following the deflection, staff should create space between them – step back from the attack.
 - e. Staff may utilize an **OIS one/two person forward moving** escort to move [Student] away from a dangerous or unhealthy situation. [Student] must be willing to walk forward for this maneuver to occur.
 - f. Staff may utilize an **OIS one person, belt-shirt control** protective physical intervention to move [Student] away from other students, staff or dangerous situations. There is a **ten-second limit** to this maneuver.
 - g. Staff may utilize an **OIS one/two arm support** protective physical intervention with [Student] in situations wherein staff cannot do a room clear (in the community or leaving the room may leave [Student] or others in immediate danger.) **Staff must have height/weight advantage over [Student] to utilize the one/two arm support.**

(Ex. D131 at 9, 10.) (Emphasis in original.)

(352) District's interventions included responses that could actually increase Student's aggressive behavior, e.g. the plan called for staff and others to evade Student if he/she continued to approach aggressively after being told to sit. Evading Student would teach Student that he/she can intimidate or chase people if he/she approaches them aggressively. (Test. of Impson, Tr. 1526-1528.)

(353) The home program providers stand their ground and use the personal alarm in that situation. The personal alarm system used at home was shared with the IEP team but was not adopted. The home team has used the alarm system less than five times over a couple of years. The District's community safety plan could have resulted in Student being put in a situation where Student's behavior could injure Student or others. (Test. of Impson, Tr. 1526-1528.)

(354) District did not ask Parent about physically restraining Student before writing the BIP. Parents' data shows that Student becomes aggressive if physically restrained. Parents had ceased using physical restraint in 2006 because physically restraining Student taught him/her that the biggest person wins. Because of Student's actual and potential size, Parents realized Student would become too large to be physically restrained. Student is never restrained at home. Because the BIP used in the home is implemented consistently, if Student begins to become aggressive or in a self-injurious manner, immediate implementation of the plan results in Student stopping the behavior. (Test. of Parent, Tr. 3111-3112.)

(355) In Impson's opinion, subsequent drafts of District's BIP made some changes but remained inadequate. (Test. of Impson., Tr. 1530-1533.)

(356) If District's bus plan was implemented as written in the September 2, 2011 version, no one would have established a means of communication with Student. The plans would result in Student being put on a bus, which he/she has not ridden, without anyone who could communicate with him/her. A draft plan which substituted Collins as the teacher rather than an IA would not have overcome the lack of communication. Collins was in Student's presence for 30 minutes at the most before the start of school and had no personal interaction with Student during that time. (Test. of Impson, Tr. 1536-1537.)

(357) The home BIP is implemented all of the time and Student's aggressive behaviors have been minimal. The behaviors do occur at very low rates because Student is in a highly controlled environment with many preventative strategies in place. The potential for Student's aggression, which is very scary given Student's height and weight, remains and increases dramatically if Student cannot communicate. (Test. of Impson, Tr. 1543-1544.)

(358) Outside of Harty's and Collins's visits to observe Student in the home program. District did not send any other personnel to observe or work with Student over the summer or any time prior to the beginning of the 2011-2012 school year. (Test. of Wetherell, Tr. 259.)

(359) At the time District presented its final set of plans prior to the start of school year, there was no time for District personnel to learn Student's signs and no one had been paired with Student. When Scott declined to work for District, District had no back-up plan for adequate pairing with anyone else. Based on her review of District plans, Impson, told Parents, that she believed that if Student attended District's school placement as of September 6, 2011 (the first day of school), it would be very unsafe for Student, other students, and District staff. (Test. of Impson, Tr. 1539-1542; Ex. S122.)

OT services planned as planned for the start of the school year

(360) Sundkoyen provided OT services to students in some ALS classrooms but she did not serve the Gold Beach High School ALS classroom . Because District planned to provide services at Gold Beach ALS classroom, Bakken was notified at some point during the summer of 2011 that Student would be assigned to her. (*Id.*, Tr. 764-765.)

(361) In preparation for providing OT services for Student, Bakken reviewed the Sensory Diet prepared by Sundkoyen in June 2011. Bakken also reviewed her prior records for Student and consulted with the teacher in the ALS classroom. (Test. of Bakken, Tr. 767-768.) Bakken worked with the information she had and the ALS teacher to find an environment that would meet Student’s sensory needs to have little interruption, noise or distraction. Bakken found a room to use as a classroom and got permission to put items including a trampoline, a therapy ball, a large floor cushion and a swing. She also assessed other areas of the school to see if Student could utilize the weight room and an empty room, possibly the old gym, where Student could play games and spend time with Bakken. (*Id.*, at 768-769.)

(362) Bakken talked to the ALS teacher about the teacher’s responsibility to ensure that Student was scheduled to have sufficient time between instructional times to take care of sensory needs and his/her need for quiet and breaks. Bakken was at the High School every day of the first week of school in fall 2011 and was available to meet with Student if he/she had come to school. (Test. of Bakken, Tr. 771-772.)

(363) Though mentioned in draft plans, District did not plan for or create a video of Student’s signs. District did not respond to Parent’s request for financial and/or technical assistance in getting Student’s signs recorded for District personnel to learn and to use with Student once Student was in the school setting. (Test. of Stauff, Tr. 2210.)

(364) District planned to have Stauff, Collins, and an IA work with Student on the first day of school to see what Student needed before setting up Student’s academic environment in the school setting. No one who was scheduled to be at school working with Student knew Student’s signs or knew Student. (Test. of Stauff, Tr. 2207-2208.)

(365) When asked if she would be surprised to learn that Collins had not been closer than eight feet from Student and did not greet or say one word to Student during his visit, Wetherell answered that she would not be surprised. Based on her visits to the home environment, which she estimated at three or four times over the last several years, and the four days of IEP meetings in 2011, Wetherell felt the environment and her visits with the family were “uncomfortable and kind of scary.” (Test. of Wetherell, Tr. 215.)

Beginning of 2011 school year

(366) September 6, 2011 was the first academic day of the 2011 school year. (Test. of Wetherell, Tr. 171.) On September 6, 7, and 8, 2011, Parent informed school that Student would not be attending school each of those days. (Ex. D152.)

(367) On September 6, 2011, Parent provided Dr. Calouri with a copy of the District’s draft plans and asked her to review them. (Ex. D153.)

(368) Among her conclusions, Dr. Calouri found that learning to communicate with Student was paramount, that the ALS classroom was not appropriate for Student, and that Parents could not, and should not, send Student to school because there was no one there who could understand Student. (Test. of Calouri, Tr. 1200-1203.) Dr. Calouri was also concerned about the draft BIP because the physical restraints outlined in the plan would cause Student to feel more aggression and distress, as well as increase Student's negative association with school. (*Id.*, Tr. 1206, 1209.) Overall, Dr. Calouri concluded that none of the draft plans would work because no one on District staff was able to communicate in Student's language as a trusted adult. (*Id.*, at 1204, 1206, 1214, 1224-1225, 1226, 1231.)

(369) Dr. Calouri also determined that Student's development age was between twelve and twenty-four months in the domains of vocabulary and social/emotional skills. She also concluded that return to the school would be inappropriate because of Student's history of failure in that environment due to Student's low level of development. (Test. of Calouri, Tr. 1205, 1238.)

(370) As of September 6, 2011, the District had not designated the IA who would train with Collins. (Test. of Collins, Tr. 2621.)

(371) On September 7, 2011, Parents requested an emergency IEP meeting. (Ex. D155 at 2.) On September 8, 2011, Parents and District scheduled an IEP meeting and agreed to excuse the SLP, OT, RN and regular education teacher. (*Id.*, at 1.)

(372) On September 9, 2011, Parent and District met. Parent expressed concerns that the placement and setting were inappropriate, the IEP and associate plans did not appropriately address issues identified in the present levels, and the IEP and associated plans did not meet the unique needs of the Student. (Ex. S125.) After a short discussion, District declined to make any changes to the IEP and plans. Parent hand-delivered a letter notifying District of Parents' intent to provide private educational services to the Student unless and until the District provided an appropriate placement, their expectation that District would pay for the services and their intent to seek full reimbursement. The meeting lasted less than ten minutes. (Test of Parent, Tr. 3144-3145; Ex. S126.)

(373) On September 23, 2011, District provided Parents prior written notice of their refusal to reimburse Parents for private education services. District informed Parents that, in its opinion, the home based education program was considered at the IEP meeting and was not appropriate because it was not the least restrictive environment and did not include any regular opportunities to interact with school age peers (Ex. S130 at 1.)

(374) On September 23, 2011, District told Parents that the home education is not a "private education" under Oregon law and is therefore "not subject to the reimbursement provisions under federal law when a 'free appropriate public education [] is at issue.'" (Ex. S130 at 1.)

CONCLUSIONS OF LAW

(1) District failed to provide Student with a free appropriate education (FAPE) as required from June 1, 2011 to June 8, 2011, based on the allegations set out in the hearing

request, in violation of the IDEA and the requirements as implement in ORS chapter 343 and OAR chapter 581 division 015.

(2) District failed to provide an appropriate placement for the Student from June 1, 2011 to June 8, 2011, based on the allegations set out in the hearing request, in violation of the IDEA and Oregon’s implementing laws and rules.

(3) District failed to comply with procedural requirements regarding evaluation of Student in all areas of suspected disability for the 2011-2012 academic year, based on the allegations set out in the hearing request, in violation of the IDEA and Oregon’s implementing laws and rules. However, the procedural errors during the evaluation process did not result in a substantive denial of FAPE.

(4) District failed to provide Student a FAPE during the 2011-2012 academic year, due to substantive deficiencies in the June 8, 2011 IEP, , based on the allegations set out in the hearing request, in violation of the IDEA and Oregon’s implementing laws and rules.

(5) District failed to provide an appropriate placement for Student during the 2011-2012 academic year, based on procedural and substantive errors, as set out in the hearing request, in violation of the IDEA and Oregon’s implementing laws and rules.

OPINION

Burden of Proof

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Schaffer v. Weast*, 126 S Ct 528 (2005). In this case Parent sought relief and bore the burden of persuasion. The standard of proof applicable to an administrative hearing is preponderance of the evidence. *Cook v. Employment Div.* 47 Or App 437 (1980) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

Federal and state requirements for use of funds under IDEA

Student is eligible for educational services under the IDEA. Parents allege that District has failed, under the specific allegations set out below, to meet its requirement to provide those services as required under IDEA to Student. District is mandated to provide FAPE to eligible students because District receives federal IDEA funds, accessed by the state of Oregon, and paid to the District under the rules regulations governing the use of those funds.

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

Congress, in amending IDEA in 2004 stated the following:

The purposes of this chapter are—

(1)

(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected [.]

20 U.S.C. § 1400(d).

The Supreme Court set out what was required to provide a “free appropriate public education” in the seminal case of *Board of Educ. Of Hendrick Hudson School District v. Rowley*, (1982). Under *Rowley*, a school district has the duty first, to comply with the procedural requirements of the IDEA and, second, to develop an IEP that is reasonably calculated to enable Student to receive educational benefits. *Rowley*, at 207, 208. However, the Ninth Circuit has held that “only those “* * * procedural inadequacies that result in the loss of educational opportunity * * * or seriously infringe on the parent[s]’ opportunity to participate in the IEP formulation process * * * clearly result in the denial of FAPE.” *W.G. v. Bd. Of Trustees of Target Range School D.* 960 F2d 1479, 1484 (9th Cir 1992). The 9th Court of Appeals has determined that IDEA 2004 did not change that standard and that *Rowley* standard remains the law. *See J.L. v. Mercer Island School Dist.*, 592 F. 3rd 938 (9th Cir. 2010)

Child find versus duty to re-evaluate Student according to IDEA

Pursuant to the requirements of the IDEA, under 34 U.S.C. part 300 *et. seq.*, the United States Department of Education promulgated rules for state use of funds used to carry out the provisions of the Act. OAR chapter 581 division 015, promulgated under ORS chapter 343 mirrors, for the most part, the requirements set out in the federal rules. The majority of the opinion below cites to the relevant OAR as the implementing rule for Oregon with which school districts are required to comply.⁹

To begin, Parents argued in closing that District had violated its duties under the “Child Find” provisions of IDEA and the implementing federal regulations as set out in 34 C.F.R. § 300.311(a)(1)¹⁰ which requires that:

⁹ Where more appropriate for purposes of clarity, the federal rule may be cited initially, accompanied by the implementing state rule(s).

¹⁰ OAR 581-015-2080, entitled, “Child Find,” follows federal law and requires that:

(1) The requirements of this rule apply to all children unless they are no longer entitled to a free appropriate public education under OAR 581-015-2040 – 581-015-2050.

(2) School districts must identify, locate and evaluate all resident children with disabilities, regardless of the severity of the disability, who are in need of early intervention, early childhood special education, or special education services[.]

The State must have in effect policies and procedures to ensure that—

(i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated[.]

Parents alleged that District’s evaluation of Student was defective on two points. First, Parents argued District failed to adequately evaluate Student under Child Find. Second, Parents argued District failed to reevaluate Student as required prior to the 2011 IEP. As discussed below, the Child Find requirements do not apply in the current matter.

It was undisputed that District identified, evaluated, and provided special education services to Student under IDEA prior to the events which led to the current request for a due process hearing. Therefore, Student, for purposes of IDEA, has been identified (found) and determined eligible. Child Find, however, is not the same as the duty to reevaluate a student already being served under IDEA.

Contrasted with Child Find, District, in specific circumstances, also has a duty to reevaluate the present levels and needs of a student already receiving services. 34 C.F.R. § 300.303, entitled “Reevaluations[.]” provides that:

(a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§300.304 through 300.311—

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(2) If the child’s parent or teacher requests a reevaluation.

(b) *Limitation.* A reevaluation conducted under paragraph (a) of this section—

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

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

(Emphasis in original.)

The United States Department of Education, in comments on the development of the federal rules following the passage of IDEIA 2004, clarified the difference between the purpose and duties of a District to comply with its Child Find obligation versus the duties and requirements for reevaluations once the student has already been identified and is being provided services under IDEA.

A reevaluation under 34 C.F.R. § 300.303(a) must comply with the rules governing evaluations, 34 C.F.R. §§ 300.304 through 300.11, as limited under subsection (b). “Any evaluation conducted subsequent to an initial evaluation of a child to determine if the child is a child with a disability under the Act, and to determine the nature and extent of the services required, constitutes a reevaluation.” *IDEIA 2004 PL 108-446, Analysis of Comments and Changes*, 71 Fed.Reg. 46640 (Monday, August 14, 2006.) (Emphasis added.) In determining whether a reevaluation is needed, the parent and the public agency must consider the child’s education needs, which may include whether the child is participating in the general education curriculum and being assessed properly. *Id.* Regardless, the standard for an evaluation is the same, 34 C.F.R. § 300.304(c)(4) requires the public agency to ensure that the child is evaluated in all areas related to the suspected disability. *Analysis of Comments*, 71 Fed. Reg. at 46643.

In response to comments suggesting changes to 34 C.F.R. § 300.304(c)(4), such as a suggestion to include “behavior” in the list of areas to be evaluated, or a recommendation that a functional behavior assessment be part of the child’s evaluation whenever any member of the team requests it or raises concerns about the child’s behavior, the Secretary of the U.S. Department of Education (Department) declined to change the rule as proposed. The Department explained that “[the section] requires the public agency to ensure that the child is assessed in all areas related to the suspected disability. * * * Decisions regarding the areas to be assessed are determined by the suspected needs of the child. If a child’s behavior or physical status is of concern, evaluations addressing these areas must be conducted. *Analysis*, 71 Fed. Reg. at 46643.

Because Student was initially evaluated and determined eligible under OAR 581-015-2080(2) prior to the relevant time periods in the current due process complaint, any evaluation or duty to evaluate is governed by the rules regarding reevaluations under OAR 581-015-2105.

Parents argued that District failed to reevaluate student in accord with provisions of OAR 581-015-2110(4)(d)¹¹ and OAR 581-015-2105(4).¹² Specifically, Parents alleged that District was obligated to reevaluate Student and that District failed to conduct that reevaluation under the requirements of IDEA.

¹¹ OAR 581-015-2110 provides that:

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

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

¹² OAR 581-015-2105, entitled “Evaluation and Reevaluation Requirements,” provides in relevant part:

(4) Reevaluation:

(a) The public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with OAR 581-015-2115, subject to subsection (b) and OAR 581-015-2110(2):

Duty to reevaluate Student and to plan that reevaluation

a) When a reevaluation is required under IDEA

Parents met their burden to prove that District was required to reevaluate Student prior to the 2011 IEP meetings. Districts are required to reevaluate students receiving services under IDEA no less than every three years, nor more frequently, with some exceptions, than once a year. OAR 581-015-2105(4)(b).¹³ The reevaluation must occur * * * if the educational or related service needs of the child warrant a reevaluation. OAR 581-015-2105(4)(a)(A). Also, pursuant to 34 CFR § 104.35, prohibiting discrimination on the basis of disability in programs receiving federal financial assistance, District must conduct a reevaluation if it is contemplating a significant change in placement of a person receiving special education or related services. 34 CFR § 104.35(a) and (d).¹⁴

¹³ OAR 581-015-2105, entitled "Evaluation and Reevaluation Requirements[.]" provides in pertinent parts that:

(1) General: A public agency must conduct an evaluation or reevaluation process in accordance with this rule and 581-015-2110 before:

(a) Determining that a child is a child with a disability under OAR 581-015-2130 through 581-015-2180;

(b) Determining that a child continues to have a disability under OAR 581-015-2130 through 581-015-2180[.]

* * * * *

(4) Reevaluation:

(a) The public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with OAR 581-015-2115, subject to subsection (b) and OAR 581-015-2110(2)[regarding notice and consent]:

(A) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(B) If the child's parents or teacher requests a reevaluation.

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

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

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

¹⁴ 34 C.F.R. § 104.35 provides in relevant parts:

(a) Preplacement evaluation. A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

* * * * *

(d) Reevaluation. A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure

District's most recent determination of eligibility consisted of a file review in 2009. Under the rules, a mandatory three year reevaluation to consider ongoing eligibility was not due until 2012. However, District was required to reevaluate Student prior to conducting the 2011 IEP meeting because District had determined that a reevaluation was warranted in November 2010. OAR 581-015-2105(4)(a)(A). In addition, District was, at a minimum, contemplating a significant change in placement, which also triggered the duty to reevaluate Student. 34 C.F.R. § 104.35(a).

b) Duty to plan a reevaluation once a reevaluation is required

Once the duty to evaluate Student was triggered, District was required to plan Student's evaluation in compliance with OAR 581-015-2110 15 and 581-015-2115.¹⁶ OAR 581-015-2115

consistent with the Education for the Handicapped Act is one means of meeting this requirement.

¹⁵ OAR 581-015-2110, entitled "General Evaluation and Reevaluation Procedures," provides, in relevant parts, that:

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

(2) Notice and consent.

(a) Before conducting any evaluation or reevaluation, the public agency must provide notice to the parent in accordance with OAR 581-015-2310 that describes any evaluation procedures the agency proposes to conduct as a result of the evaluation planning process.

(b) Before conducting any evaluation or reevaluation, the public agency must obtain informed written consent for evaluation in accordance with OAR 581-015-2090 and 581-015-2095[.]

(Emphasis added)

¹⁶ OAR 581-015-2115, entitled, "Evaluation Planning[.]" regarding obligations of the IEP team, requires in pertinent part:

(1) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation, *the child's IEP * * * team*, and other qualified professionals, as appropriate, must [take specified action and make determinations.]

(2) Conduct of review. The *team* described in subsection (1) may conduct this review without a meeting. If a public agency holds a meeting for this purpose, parents must be invited to participate in conformance with OAR 581-015-2190[.]

* * * * *

(4) Requirements if additional data are not needed.

(a) *If the child's 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 public agency must notify the child's parents [detailed requirements omitted.]

(Emphasis added.)

requires that Student's IEP team, with proper notice and consent, conduct reviews, make determinations and evaluate the Student in accordance with the rule. The IEP team must include those individuals listed in OAR 581-015-2210.17

The IEP team was not involved in Student's reevaluation planning process. Wetherell, Stauff, and Parent, reviewed the only assessment plan in evidence. The plan, on a partially completed form, was specific to the functional academic assessment. Parent was presented with the plan when Parent and Student arrived for the assessment. Parent, Wetherell and Stauff reviewed and signed the plan just prior to commencing the functional academic assessment. Wetherell conducted the only assessment administered by the District. District failed to conduct an IEP team review and planning process, or to conduct a review and planning process without a meeting but with notice and consent in violation of OAR 581-015-2115 and OAR 581-015-2110(1) and (2).

b) What is required for a reevaluation under IDEA

Regardless of whether District complied with IDEA requirements for *planning* Student's reevaluation, the Parents also allege that District failed to actually carry out a reevaluation of Student in accordance with OAR 581-015-2115 as required by OAR 581-015-2105(4).¹⁸

¹⁷ OAR 581-015-2110, regarding the IEP team, provides in part that:

- (1) School districts must ensure that the IEP Team for each child with a disability includes the following participants:
 - (a) One or both of the child's parents, except as provided in OAR 581-015-2195;
* * * * *
 - (d) At least one special education teacher of the child or, if appropriate, at least one special education provider of the child;
 - (e) A representative of the school district, who may also be another member of the team [.]

¹⁸ OAR 581-015-2115, requires as part of any reevaluation, the child's IEP team and other qualified professions, as appropriate, must:

- (a) Review existing evaluation data on the child[.] including:
 - (A) Evaluations and information provided by the parents of the child;
 - (B) Current classroom-based, local, or state assessments, and classroom-based observations; and
 - (C) Observations by teachers and related services providers; and
- (b) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine:
 - (A) Whether the child is, or continues to be, a child with a disability[.]
* * * * *
 - (B) The present levels of academic achievement and related developmental needs of the child;
 - (C) Whether the child needs, or continues to need * * * special education and related services; and

Nonetheless, although District did not conduct its own reevaluation of Student, at the time of the April 2011 IEP meetings, Student had been sufficiently reevaluated for purposes of writing the 2011 IEP.

In preparation for the 2011 IEP, District conducted some observations of Student, one in March and one in April, 2011, and had completed the March 28 functional academic assessment. Wetherell did not conduct additional assessments because she intended to rely on her data and information from Parent and private program providers.

Parents and Parents' experts had, by the time the IEP meetings began on April 5, 2011, evaluated Student in speech and language (Tucker), behavior (Dr. Calouri, DeBastiani, and Impson), occupational therapy (Abrahamson), functional academics (DeBastiani, Impson and Parent), and unique instructional supports needed for Student to learn (DeBastiani and Impson). Parents provided that information prior to or during the April IEP meetings. Parent also provided a thorough statement of present concerns and related educational and related service needs of Student. Therefore, during the April IEP meetings, District had sufficient information regarding Student's educational and related services needs as contemplated under the law in order to craft an IEP. District's procedural failure to plan Student's reevaluation therefore did not result in a substantive denial of FAPE stemming from a failure to meet the reevaluation requirements.

District's obligation to provide FAPE

Following identification and evaluation requirements, the cornerstone for educating a student under IDEA occurs through developing a procedurally and substantively sufficient IEP which provides an offer of FAPE.

When an IEP must be in place

IDEA requires that "at the beginning of the school year, each local educational agency * * * shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program[.] 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. §300.323(a). OAR 581-015-2220 mirrors the federal requirement, requiring that:

(1) General:

(D) For reevaluation, whether the child needs any additions or modifications to special education and related services[.]

(i) To enable the child to meet the measurable annual goals in the child's IEP * * * and

(ii) To participate, as appropriate, in the general education curriculum[.]
* * * * *

(3) Source of data. The public agency must administer tests and other evaluation materials as may be needed to produce the additional data identified under subsection (1)(b).

(a) At the beginning of each school year, a school district must have in effect an IEP for each child with a disability within the district's jurisdiction.

(b) School districts must provide special education and related services to a child with a disability in accordance with an IEP

Student's 2010-2011 IEP, developed and completed at the May 18, 2010 telephone IEP meeting, expired on May 17, 2011. However, District continued to pay for the private program services as set out in the May 18, 2010 IEP under the Agreement through May 31, 2011. Parent did not allege that the provision of services under the Agreement under the expired IEP constituted a denial of FAPE.

District did not complete a new IEP and a placement determination for the 2011-2012 school year until June 8, 2011. As of the expiration of the 2010-2011 IEP, there was no new IEP or placement in place. As of June 1, 2011, District provided no services even under the previous, but expired, IEP. Therefore, the prior placement remained Student's placement and District violated its duty to provide FAPE for the six school days occurring in that time, Wednesday June 1 through Wednesday June 8, 2011 (there is no evidence District provided school programming on weekends for any student). From June 1, 2011 through June 8, 2011, District did not have an IEP in place for Student as required under OAR 581-015-2220 and 581-015-2225(1) and it failed to provide special education and related services to Student under IDEA.

However, as discussed below, regardless of whether all components of the plan were agreed upon, the District had an IEP in place, including a placement determination, for Student, effective June 9, 2011. Therefore, the issue to be determined next is whether the June 8, 2011 IEP constituted an offer of FAPE, as required, to Student.

What is required for an IEP to offer FAPE

As of May 18, 2011, District was required, through the IEP team process, to have developed an in IEP for Student for the 2011-2012 school year that complied with, among other things, the provisions of OAR 581-015-2105. Parents alleged that District failed to provide FAPE for the 2011-2012 school year because the IEP team 1) failed to consider the current evaluations and Student's present levels offered by Parent, and Parents' experts during the IEP meetings, 2) failed to accurately state Student's current needs for communication and behavior supports, or to provide a means by which those needs could be met, and 3) failed to offer an appropriate placement because a) the placement had been predetermined and b) because the placement decided upon by the IEP team was not one in which Student was reasonably calculated to be able to receive educational benefit. I will address the allegations in turn.

Whether the June 8, 2011 IEP provided FAPE

Required elements for an IEP under IDEA

The District was required to craft an IEP for Student that met the requirements set out in federal law and rule as implemented by state laws and rules. OAR 581-015-2200 sets forth the

requirements for the content of an IEP such that it will comply with IDEA. In relevant parts, OAR 581-018-2200 provides that:

- (1) The individualized education program (IEP) must include:
 - (a) A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum.
 - (b) A statement of measurable annual goals, including academic and functional goals (and, for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of short-term objectives) designed to:
 - (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
 - (B) Meet each of the child's other educational needs that result from the child's disability.
 - (c) A description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
 - (d) A statement of the specific special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child:
 - (A) To advance appropriately toward attaining the annual goals;
 - (B) To be involved and progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and
 - (C) To be educated and participate with other children with disabilities and children without disabilities,
 - (e) The projected dates for initiation of services and modifications and the anticipated frequency, amount, location and duration of the services and modifications described in subsection (1)(d) of this rule.
 - (f) An explanation of the extent, if any, to which the child will not participate with children without disabilities in the regular class and activities described in subsection (1)(d) of this rule[.]

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

- (1) In developing, reviewing and revising the child's IEP, the IEP team must consider:
 - (a) The strengths of the child;
 - (b) The concerns of the parents for enhancing the education of their child;
 - (c) The results of the initial or most recent evaluation of the child; and
 - (d) **The academic, developmental, and functional needs of the child.**

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

(a) **The communication needs of the child; and**

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

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

(a) ***For a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies to address that behavior;***

* * * * *

(4) If, in considering these special factors, the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) for the child to receive free appropriate public education, the IEP team must include a statement to that effect in the child's IEP.

(Emphasis added.)

a) District's obligation to adequately assess and consider relevant information on Student's needs to develop legally sufficient PLEPs

The IDEA contemplates that the IEP team will write PLEPs for a student based on considerations of current, relevant information about the student. OAR 581-015-2200(1)(a) and 581-015-02205(1)(2) and (3). Especially relevant to the current case is the obligation to include in the IEP a statement of a Student's "functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum." More particularly, District was required to consider Student's communication and behavior needs when developing the 2011-2012 IEP.

Parents' due process complaint and written closing argument includes a lengthy, specific list of needs which Parents' allege District was required, but failed, to consider and to include in the in the IEP. I will address the specifics concerns as they fall under the particular statutory and regulatory requirements for inclusion in an IEP.

District's duty to consider all relevant information when writing the IEP

As determined above, District, as of the time of the IEP meetings, had sufficient information available from which to craft an IEP that met Student's educational and related service needs. Parents argued that District failed to consider all relevant information, specifically the ISRs (including Student's communication needs related to pairing, Student's modified signs, and behavioral communication), BIP, and recommendations regarding placement. As reflected throughout the record, in testimony and exhibits, District considered the information provided by Parents. Although District was required to consider Parents' information, 34 CFR § 300.324(a)(1)(ii) and (iii), District was not required to include Parents' information, reports, or the opinions of Parents' experts in the IEP to comply with IDEA. As the entity with the ultimate responsibility for providing FAPE, the District must decide what services the IEP must include if the team cannot reach consensus. *Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities Individualized Education Programs (IEPS) and Other Selected Implementation*

Issues, Analysis and Comments and Changes, Appendix A to Part 300 – Notice of Interpretation, II. Involvement of Parents and Students, question 9, 64 CFR 12406, 12472-12473. (March 12, 1999). As evidenced in the testimony and documents at hearing, the IEP team considered Parent’s information, and the information provided by Parents’ experts, much of which was included in the IEP. Those parts of Parents’ information District declined to include in the IEP were discussed by the team. District met its burden to consider Parents’ information. However, the resulting IEP did not provide an offer of FAPE due to substantive deficiencies.

District was required to create an IEP that provides FAPE to Student based on Student’s unique educational and related service needs. The June 8, 2011 IEP did not meet that requirement.

Procedural error versus substantive denial of FAPE

District failed to meet its burden to create an IEP that was reasonably calculated to enable Student to receive educational benefit. The over-arching flaws in the June 8, 2011 IEP stemmed from, and created, both procedural and substantive defects. In developing and writing the IEP, despite lengthy discussions, the District failed to adequately consider the functional and communications needs of Student. OAR 581-015-2205(1)(d) and (2)(a).

First, District was aware that Student was unable to communicate with anyone unless the person was paired, (as Parents’ expert DeBastiani defined the term) with Student or unless a paired individual accompanied Student to facilitate communication between District personnel and Student.¹⁹ Pairing was discussed at the meetings. Parents’ expert provided a list of ISRs which included pairing as instructional support necessary for Student to learn in any environment. District declined to include the ISRs in the IEP.

The June 8, 2011 IEP included references to Student’s need for pairing and the fact that Student’s primary mode of communication was through modified sign and behavior (including vocal approximations) However, the IEP was devoid of a process by which anyone at the school (District’s placement) would pair with Student or learn Student’s modified signs and behavior. Without such a process included within the IEP, the plan fundamentally failed to include a method whereby educators could communicate with Student.

The facts of the Supreme Court’s decision in *Rowley* are particularly relevant to analyzing the current case. In *Rowley*, the Court focused on access to education. Amy Rowley, the student in that case, was deaf but was especially adept at lip-reading. The local education authority (LEA) provided Rowley with the use of an FM receiver, provided staff who could communicate in sign language, instruction from a tutor for the deaf for one hour each day, and speech therapy services. With these accommodations, Rowley was able to access her education as evidence by her advancing easily from grade to grade. However, her parents wanted a qualified sign-language interpreter to be provided for all academic classes, arguing that without

¹⁹ A paired individual for Student is analogous to the sign-interpreter in the *Rowley* case, but in this case, Student has no other means of communication, hence access to education, without the presence of a “paired” individual (a “translator”), for purposes of providing the education itself or to act as an interpreter between Student and anyone attempting to provide education to Student.

the interpreter, Rowley was being denied the FAPE guaranteed by the Act.²⁰ *Rowley*, 458 U.S. at 184.

The Supreme Court accepted the lower court's finding that Rowley understood considerably less of what when on in the classroom than she could if she were not deaf and "thus not learning as much, or performing as well academically, as she would without her handicap." *Rowley*, at 185. The Court went on to analyze application of the law in what came to be the two prong *Rowley* test as set out earlier in this opinion. When analyzing whether the IEP was reasonably calculated to enable Rowley to receive educational benefits, the Court focused on the history Congress considered and the intent it evidenced when Congress passed the Act. Significant to the current case, the Supreme Court found that creating *access to public education* was the force behind the law, and that, Rowley, through her abilities, supplemented by the school district's accommodations, had access to a free, public education. Because that access was providing "some educational benefit," the LEA had met its burden under the law. *Id.* at 210, 211. (Emphasis added.)

In the current case, the evidence established that District had not written an IEP that would allow for District to begin implementation of any of its SDI or related services because no District personnel could communicate with Student. Without the ability to communicate, Student was denied *any* access to education, regardless of what else was offered in the IEP. First, no District personnel had been paired with Student. The IEP did not adequately set out what was needed for pairing with Student or set out the procedure for pairing with Student. Second, despite some testimony from District's witnesses, no District personnel could understand Student's unique sign language and behavioral communication. The June 8 2011 IEP did not have provisions for *any one* to learn Student's unique communication.

Student's communication needs are the paramount, determinative factor when analyzing whether any IEP can provide Student FAPE. Multiple witnesses, including Parent, Parents' experts and District's own witnesses, made it clear that no one at the District was paired with Student. Pairing, as explained by DeBastiani, requires time and Student requires a longer time than most individuals with autism to pair with someone. Student has no natural interest in interacting with someone outside of having established a positive reinforcement association with that person. For anyone to establish instructional control with Student, Student must be paired to associate that person with positive reinforcement, and the person must be able to understand Student's functional communication. The record was clear that when Student could not communicate or an individual could not communicate with Student, Student's likelihood of aggressive or self-injurious behavior increased dramatically. Student's previous placements in District school resulted in a serious injury to another and Student's withdrawal from school, and a steady decrease in Student's ability and willingness to learn. The placements also led to a significant increase in Student's aggressive and self-injurious behavior before Parents withdrew Student from school and entered into the Agreement.

The District rejected Parents' request to place the ISRs, including pairing, into the June 8, 2011 IEP. District personnel either did not understand or rejected the definition, and the importance, of pairing regarding this Student. Parents and Parents' experts explained at the IEP

²⁰ *Rowley* was decided under the Education of All Handicapped Act (Pub L 94-142, 1975). The *Rowley* standard continues to apply to the subsequent amendments of the law, up to and including IDEIA of 2004.

meetings and in the reports of experts that pairing with Student, as it was designed and carried out in the private program placement, was vital to communicate with, to understand, and to educate Student in any capacity.

Despite testimony to the contrary, District had no personnel that could understand Student nor that Student could understand, at the time the June 8, 2011 IEP was to be implemented. District employees who had worked with Student in the past erroneously concluded that they understood Student or that they could learn to understand Student, in part based on observing Student and on their experience with other students who used sign language. The evidence was to the contrary, both in the history of prior attempts,²¹ in the evaluations by experts who had experience and success with Student, and in the opinion of Parent, who knew how to communicate with Student.

Even if District personnel had a process for learning Student's signs and behaviors for communication, District failed to include in the June 8, 2011 IEP an accurate definition of, and a process for, pairing as related to Student's unique needs. It was undisputed that Student would not communicate with another person at any substantive level necessary for basic safety, much less for educational purposes, if Student had not first paired with that person. Without a clear definition and a process in place for pairing, and for learning Student's unique modes of communication, District had no means of implementing any IEP it might craft for Student.

As a result of these defects, the IEP as written on June 8, 2011 did not offer FAPE. Because of the failure to adequately address Student's pairing and communication needs, District was substantively unable to implement any IEP, regardless of content.

Comparison of expert testimony regarding Student's needs

Witnesses also disagreed on what procedures were necessary to teach Student once communication was established. Parents and District disagreed on 1) the use of pairing, as that term is defined by Parents' experts, and 2) the strict application of the behavior plan, as developed under ABA principles, in its entirety.

To the extent the parties addressed differences of opinion on what Student required to be able to learn, particularly regarding pairing and behavior modification, Parent and Parents' experts opined that Student made progress only when using the principles of applied behavior analysis (ABA). District witnesses opined that, in as far as ABA is a methodology, that is a choice to be left to the District as educators and is not appropriate for inclusion in an IEP.

Under 34 CFR § 300.39(a), "special education" is defined to mean "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability[.]" Within that definition, the rules provide for the definition of individual special education terms.

²¹ James Collins testified that he would be able to understand Student, based on his prior experience with Student and with special education students in general who use sign. Dr. Glahn's evaluation of Student in Collins' classroom in December 2007 did not support Collins' opinion of past ability. Collins was not trained, as of September 2011 in Student's current modified sign or communicative behavior. Neither Wetherell nor Hartly demonstrated a current ability to communicate with Student based on their limited interactions with, or knowledge of, Student.

Specially designed instruction (SDI) means, in part, “adapting, as appropriate to the needs of an eligible child * * * the content, methodology, or delivery of instruction [t]o address the unique needs of the child that result from the child’s disability [.]” 34 CFR § 300.39(b)(i). Although the section of the rule was renumbered (*former 34 CFR §300.26(3)(i)*), IDEA 2004 did not change the text of the definition of SDI under the rules. Therefore, the Department’s comments regarding the regulation changes in 1997 continue to be applicable to the current regulations. The Department, in the *U.S. Office of Education’s Analysis of Comments and Changes, Attachment to the IDEA Regulations*, 64 FR 12537 (March 12, 1999) addressed the issue of methodology and its relation to SDI.

Prior to the 1997 changes, the Department added the term “methodology” to the definition of “specially designed instruction” to clarify when an IEP might require a certain level of specificity on day-to-day instructional methods and approaches, when normally those changes would not be included in a student’s IEP. During the rule-making process for the 1997 rules, commentators suggested further changes regarding SDI, more specifically, the term “methodology” in the definition of SDI. In its discussion, the Department noted:

Case law recognizes that instructional methodology can be an important consideration in the context of what constitutes an appropriate education for a child with a disability. At the same time, these courts have indicated that they will not substitute a parentally-preferred methodology for sound education programs developed by school personnel in accordance with the procedural requirements of the IDEA * * * *it is clear that in developing an [IEP] there are circumstances in which a particular teaching methodology that will be used is an integral part of what is “individualized” about a student’s education, and in those circumstances will need to be discussed at the IEP meeting and incorporated into the student’s IEP.*”

Analysis of Comments and Changes, 64 Fed. Reg. 12552 (March 12, 1999). (Emphasis added.)

In the current case, Student’s unique needs require that he/she be taught using the methods developed by Parents’ experts.²² There was no credible testimony that Student could learn by any other method or by a partial application of Parents’ experts’ methods. Therefore, failure to include the instructional supports as written within the ISRs by DeBastiani and Impson created a fatally defective IEP.

When last attending District schools, Student failed to make progress and experienced significant behavioral issues. Since Student was last in a District placement, Student’s IEPs, progress reports, present levels of performance, AGs and STOs, all took place within the private program provided in the home and community. In that time, Student has made steady improvement in most areas, and remarkable improvement in others. Student, by all accounts, is affected by his/her autism to such a degree that experience and training that may benefit other students on the spectrum does not work for Student. As stated by the Department in its analysis

²² Based on the record as a whole, including the manner and demeanor of testimony as well as background and experience, I give more weight to expert opinions of DeBastiani, Impson, Calouri, Tucker, and Parent (regarding the present levels of communication, behavioral, and educational needs of Student) than to District’s experts.

of what constitutes SDI for a particular student, this Student requires certain methodologies be included in the IEP to meet the requirements of IDEA. In viewing the record as a whole, Parents' witnesses, based on their experience and success with Student, established expertise in what worked for educating Student, regardless of whether ABA was the genesis of the programs or not. District witnesses, even those with expertise in special education for students with autism, were not experts in educating Student. To the contrary, District had a history of failing to acquire that expertise to the severe detriment of Student.

Failure to evaluate Student's behavior and to develop a BIP for the June 8th IEP

Parents' experts also opined that it was essential to have a behavior plan in place for Student prior to implementing the new IEP. District agreed to the extent that, at the end of the IEP meetings in June, District agreed to draft a behavior plan. The plan was not complete or in place when the June 8, 2012 IEP went into effect. The evidence was clear that Student's disability resulted in behaviors that affected Student's or others' access to education. District was obligated to have evaluated Student's behavior, if it was not going to accept Parents' experts' functional behavior analysis. District was obligated to have utilized data from an FBA to develop a BIP that would support Student in accessing his/her education.

Parents' experts provided a BIP that reflected the plan in place and implemented throughout Student's day, in all settings. Parents provided the data upon which the plan was based. Impson informed District that the plan would not work if adopted only in part. District declined to include Parents' BIP as a whole into the IEP. Despite rejecting Parents' plan, District failed to include a plan of any sort in the June 8, 2011 IEP which created a procedural defect.

District experts testified that Parents' BIP reflected a methodology which District was not required to adopt. District believed that parts of the plan were already in place in the ALS classroom and that it would be sufficient to draft a plan after District had experience with Student. Prior to the beginning of the 2011 school year, District eventually developed its own BIP based on a variety of methods, including adopting portions of Impson's BIP, among other things. However, Parents' experts determined that District's plan was insufficient to address Student's problematic behaviors and would actually increase the probability those behaviors would occur. I agree with Parent and Parents' experts.

Student requires pairing as described by DeBastiani and Impson to meet Student's communication and behavior needs. Student requires that District's offer of FAPE include establishing a paired individual with Student. The individual must be able to communicate with and understand Student before any attempt to educate Student can be effective, or more likely, will not induce reactive, negative behavior in Student and the loss of skills painstakingly acquired. Student requires, to the extent possible, incorporation of the BIP written by Impson and DeBastiani, or an FBA and a BIP based on a similar expertise in Student's needs and expertise in learning strategies that work for Student. In particular, any BIP must incorporate proven strategies to decrease or eliminate Student's aggressive behavior if it occurs.

DeBastiani and Impson crafted the BIP to provide for preventative strategies which reduced Student's aggressive behavior, both in frequency and severity. In their expert opinion and that of Parent, if Student is physically restrained in response to aggressive behavior, his/her behavior escalates. District's BIP included a progressive reaction strategy, with increasing intervention up to and including physical restraint of Student. There was no evidence that the

use of the OIS system as outlined in District's plan was appropriate for Student. The evidence was strongly to the contrary, that use of restraint would dramatically increase the probability that Student would become aggressive, towards himself/herself or others, with severe consequences. The District failed to provide Student with a FAPE by failing to craft an effective BIP based on either the expertise of others or its own FBA.

Failure to adequately provide for transportation needs of Student

Parents met their burden to prove that the June 8, 2011 IEP failed to provide FAPE because it did not adequately provide for the transportation needs of the Student. Parents and District referred to a requirement for a "bus plan." IDEA does not specifically require a "bus plan;" it requires that the IEP include supplementary aids and services, "those aids, services, and supports that are provided in a variety of settings to enable a child with a disability to be integrated to the maximum extent appropriate." 34 USC §300.42. As of June 8, 2011, District's fundamental inability to communicate with Student was not cured by the addition of the August 23, 2011 draft "bus plan" nor the revised September 2, 2011 draft "bus plan."

District's draft plans proposed to transport Student by means of an unfamiliar vehicle without the presence of a paired staff member who could communicate with or be understood by Student. As amply reflected in the evidence record, to have attempted such a plan would have been, to grossly understate it, a disservice to Student. Most likely, as emphasized by Parent and Dr. Calouri, the results would have been traumatizing to Student. District failed to adequately provide for Student's unique communication and pairing needs, in addition to behavioral supports, as necessary predicates for providing the physical requirement of transporting Student to school.

Continuing failure to provide an offer of FAPE through a statutorily sufficient IEP

District and Parents described additions to the June 8, 2011 IEP to address elements necessary to aid Student in moving from placement at home to a placement at the District's school. District was planning for Student's change from home to school environment where the parties have used the term "transition plan." Student's age was not such that District was required to include transition services under IDEA.

Parents met their burden to prove their allegation that District, as of September 2, 2011 continued to propose education for Student under an insufficient IEP. District's fatal flaw in failing to adequately acknowledge Student's communication and pairing needs continued throughout all of District's IEP proposals. As of the time Parent notified District that Student would not be attending District's placement but would continue in the private placement provided in the home, District had not offered FAPE. The supplemental plans, the "transition plan," the "bus plan," and the "behavior support plan" offered by the District prior to the start of the 2011 school year did not cure the defects in the June 8, 2011 IEP.

Placement

a) Predetermination

Parents argued that District had predetermined Student's placement prior to convening the IEP in violation of 20 U.S.C. § 1415(b)(1). *See also* 34 C.F.R. § 300.501(c)(1) ("Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child."). Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, when it presents one placement option at the meeting, and is unwilling to consider other alternatives. District did so in this case.

The evidence showed that District, from the time Davis began discussions with District counsel and the school board, intended to place Student in a District classroom. Wetherell, acting as District representative, drafted the IEP with wording that referred to District environments for provisions of services and the ALS classroom as the placement. She repeatedly referred to the IEP process as essentially aimed at bringing the Student back into the classroom. There was no actual consideration of placing Student in a private program or in any other placement than an ALS classroom at the District. District offered no options for placements between District ALS classroom and the private program delivered in the home. All of the service providers invited to the IEP team meeting by District only provided services to students placed in ALS classrooms.

The Ninth Circuit has emphasized that parents must have the opportunity for meaningful participation in the formulation of the IEPs. *See Shapiro v. Paradise Valley Unified Sch. District No. 69*, 317 F. 3d 1072, 1078 (9th Cir. 2003) ("The Act imposes upon the school district the duty to conduct a meaningful meeting with the appropriate parties.") (*quoting W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont.*, 960 F. 2d 1479, 1483 (9th Cir. 1992)). Due to the District's predetermination, Parents were denied the opportunity to meaningfully participate in the decision regarding Student's placement.

b) Appropriateness

As also argued by Parents, the proposed placement was not appropriate for Student. District's reasoning that the placement met the least restrictive environment requirement (LRE) while providing for Student's unique needs was not supported by the evidence. District heavily relied on its position that interaction with peers of Student's chronological age was necessary for Student's education. The evidence was strongly to the contrary. Student, uniquely, has little or no interest in interactions with anyone with whom Student has not been paired. Peer interactions in the past have been more aversive than otherwise. District must provide FAPE that meets the unique needs of Student, most importantly for Student, placement in an environment where Student is paired with the instructors, where the instructor's can communicate with Student and Student with them, and where Student's particular needs for sensory diet, safety, and behavioral supports allow Student to access an education. Student appears to be one of those unique children for whom peer (similar in age or development level) interaction provides no benefit, at least at this time.

REMEDY

Parents met their burden of proof to show that as of June 1, 2011, District has not provided FAPE to Student. Parents have requested that they be reimbursed for the actual costs of Student's education from, from **June 1, 2011** when District last provided services, through October 3, 2011, the date the due process complaint was filed. Parents implemented the program during that time by paying for some of it and partially by donated time from the providers. Parents incurred actual costs which appears to be \$2,451.97. Once the District failed to meet its burden of proof that it offered FAPE through a procedurally adequate IEP, resulting in educational opportunity to Student., resulting in an appropriate placement, the issue becomes whether the placement chosen by the parents would provide an appropriate education.

“If the parents of a child with a disability, who previously received special education and related services * * * enroll the child in a private * * * preschool, elementary or secondary school, without consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds the that the agency had not made FAPE available to the child n a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate * * * even if it does not meet the State standards that apply to education provided by the [District].
34 CFR §300.148(c).

OAR 581-015-2515(2).

Although the private program placement is not a preschool, elementary, or secondary school, it was the program that District itself provided as an educational placement under the Agreement for the previous three years. The evidence also showed that the program was, and is, appropriate. Student's educational and related service needs were all met in the program. Student made progress in educational and related goals. Parents are entitled to reimbursement for the actual costs of the program from June 1, 2011 to October 3, 2011.

District's argument that the private program provided in the home is the equivalent of “home schooling” is not persuasive. The program is the same as that provided by District in the Agreement. The program is provided by a professional consultant and implemented in the home. District has not provided evidence of an alternative appropriate location for the delivery of services. The private program, implemented in the home setting, is appropriate.

Parents are also entitled to reimbursement for the actual costs of the program from October 3, 2011 until such time as District offers FAPE. For the reasons above, in addition to the program being the last agreed upon placement, it is the only program shown to be appropriate for Student. District offered nothing as an alternative to its predetermined inappropriate placement in the ALS classroom in a District high school. An appropriate placement for Student is one that includes, at a minimum, training and actual pairing of any teacher, instructional aide, or service provider who works with Student. An appropriate placement also includes the requirement that any teacher, instructional aide or service provider either be able to understand Student's communication and to be understood by Student, or the constant presence of a paired individual with Student with such a provider. A placement must also account for Student's sensory needs regarding introduction of new individuals and environments. The private program

provided in the home as under the previous Agreement is the appropriate placement until District offers FAPE and an appropriate placement elsewhere.

Parents also requested reimbursement for independent evaluations in the amount of \$3,047.00.²³ There was no evidence that Parents requested and District refused, any independent education assessments under OAR 581-015-2305. Though Dr. Calouri's evaluation and opinion were relied upon in this Order, there was no evidence that without Dr. Calouri's evaluation, District would have not had sufficient information at the time the IEP meetings were held to have developed an IEP that adequately stated Student's current PLEPs and his/her educational needs and related services. Parents' did not ask District for an IEE regarding Dr. Calouri. There was no evidence that District refused any other evaluations. It is unclear what evaluations, in addition to Dr. Calouri's are included in Parents' request. Parents are not entitled to this reimbursement.

ORDER

(1) The District failed to offer Student. a free and appropriate education (FAPE) by failing to meet the requirements for developing and implementing an individualized education plan (IEP) in an appropriate placement as required by the IDEA.

(2) Because the District failed to offer FAPE, Parents are entitled to reimbursement for private program in the home placement, for actual costs from June 1, 2011 until FAPE is provided under the provisions of the IDEA.

(3) Parents are not entitled to reimbursement for costs incurred for independent evaluations.

/s/ A. Bernadette House
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 ~~22nd~~ **24th** 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.

²³ Although Parents presented evidence of the cost of Dr. Calouri's evaluation (\$1,274.00)(Ex. S151 at 8.), the remainder of the costs requested by Parents is unclear.