

Marriage and Family Counselor; and Mother and Father.

At the close of the hearing, the record was left open for receipt of the final hearing transcript and the parties' written closing arguments. Naegeli Reporting provided the completed transcript on November 6, 2014. The parties' written closing briefs were received on November 21, 2014. The hearing record closed on November 21, 2014 upon receipt of the parties' briefs.

ISSUES

1. Whether, during the 2012-2013 school year, the District failed and/or refused to properly address the bullying of Student by another student, and, if so whether the District's action or inaction deprived Student of a free and appropriate public education (FAPE) in violation of the Individuals with Disabilities Education Act (IDEA).

2. If the District's action or inaction denied Student a FAPE, whether the Parents are entitled to reimbursement for their unilateral placement of Student at Corvallis Waldorf School for the 2013-2014 school year.¹

EVIDENTIARY RULINGS

Exhibits D1 through D18, offered by the District, were admitted into the record without objection. Exhibits S1 through S41 and S48, offered by the Parents were also admitted without objection. The Parents withdrew Exhibits S42 through S47.

FINDINGS OF FACT

1. Student was born in 2000. (Ex. D1 at 1.) At age six, Student was diagnosed with Asperger syndrome, a high functioning form of autism. (Tr. 2 at. 166.)

2. Since first grade, Student has qualified for special education services under the eligibility category of Autism Spectrum Disorder (ASD). (Ex. D1 at 22; Ex. D3.) During first grade, Student was referred for a psychological evaluation due to concerns with his/her social functioning, pragmatics, fine motor skills and some behavioral concerns. In an October 2007 psychological report, school psychologist Margie Portice, S.Psy.S, concluded as follows:

[Student] is a bright and creative student who seems to want to do well. This psychologist has concerns with [Student's] self-esteem and stress level. S/he

¹ In their Request for Due Process Hearing, the Parents also sought relief in the form of an order instructing the District "to reconvene [Student's] IEP team for the purpose of re-crafting an IEP that provides [Student] with a free and appropriate education the least restrictive environment." (Complaint at 3.) But, because the Parents and Student have since left the district and moved out of state, this basis for relief is now moot. *See, e.g., Neshaminy Sch. Dist. v Karla B.*, 25 IDELA 725 (ED Pa 1997) (holding that the claim for prospective relief was moot because the student had moved to, and enrolled in, another school district). Parents appear to concede this point, as they do not address any prospective relief in their post-hearing brief. Accordingly, only the retroactive remedy (reimbursement for the cost of private school placement) is addressed herein.

seems to be very competitive with [his/her] peers and places importance on being the best. Some of [his/her] expectations for [his/her] own performance are likely unrealistic, which may negatively affect [his/her] self-esteem. [Student] interacts with boys who are older, but has very limited interaction with students of [his/her] age group. A lot of interaction seems to be related to competition, rather than sharing interests. [Student's] difficulties at home seem much more subdued than they do within the school setting. The possibility exists that because [Student] has such high standards for [him/herself] and wants to be one of the top performing students that s/he is experiencing more stress at school than at home. [S/he] relieves some of [his/her] stress through unusual responses to sensory stimuli such as lifting up his/her shirt, chewing his/her name badge, etc. Difficulties with peers may be more pronounced, because [s/he] is frequently comparing [him/herself] with them and would prefer interacting with older children. This psychologist also suspects that [Student] feels badly about not having friends in class. School is a very different environment from any student's home and may elicit more intense responses from some students; thus [Student's] difficulties may just be more pronounced in the school setting. The evaluation team recommends special education eligibility under the educational diagnosis of Autism Spectrum Disorder (ASD). * * *

[Student] demonstrates a failure to develop peer relationships appropriate to developmental level and impairment in social/emotional reciprocity. Under the communication category, [Student] demonstrates an impairment in pragmatics or ability for reciprocal conversation and stereotyped and repetitive or idiosyncratic language. * * * [Student] also has an unusual response to sensory stimuli, which is discussed in more detail in the occupational therapy report. * * * This psychologist would recommend support for [Student] in building peer relationships and in managing [his/her] emotional wellbeing. [Student] is also likely to need support to address difficulties with social conversation, fine motor skills, and [his/her] response to sensory stimuli.

(Ex. D1 at 21-22; Ex. S23 at 5-6.)

3. In January 2012, Student's family relocated from another state to Corvallis, Oregon. (Tr. 2 at 169.) Student enrolled in the District and began attending fifth grade at Adams Elementary School. (*Id.*)

4. On February 13, 2012, Student's IEP team, including the Parents, met to discuss Student's eligibility for special education services in Oregon. The team agreed that Student should be reevaluated for eligibility under the ASD category. (Ex. D3.) The Parents signed a Prior Notice about Evaluation/Consent for Evaluation for an initial evaluation of Student in Oregon. (Ex. D18.) Their signature also confirmed that they were provided a copy of the Notice of Procedural Safeguards, an information booklet for parents of children who are, or may be, eligible for special education services under the IDEA. (*Id.*)

5. On April 30, 2012, Georgeann Harty, an Autism Specialist for the District, issued

an Autism Spectrum Disorder Re-Evaluation Report recommending that Student be found eligible for special education services in Oregon under the ASD category. (Ex. D3.)

6. On May 8, 2012, Student's IEP team, including the Parents, met again to discuss Student's eligibility. The team determined that Student exhibited impairments in communication, social interaction, patterns of behaviors and responses to sensory experiences. The team also determined that Student's disability has an adverse impact on Student's educational performance and that Student qualified for special education with the eligibility of Autism Spectrum Disorder. (Ex. D4.)

7. Also on May 8, 2012, after deeming student eligible for services in the ASD category, the team developed an IEP for Student for the 2012-2013 school year. The IEP team reviewed Student's needs and present levels of academic achievement and functional performance. Student's present levels were based on Student's records from his/her previous school, reports from Student's teachers at Adams Elementary and Ms. Hardy's Re-Evaluation Report. The team also discussed Student's transition from elementary school (fifth grade) to middle school (sixth grade). The team established measurable annual goals and short term objectives for Student in the areas of social communication, math and self-regulation. (Ex. D4.) The IEP team determined that, to meet Student's needs, Student would receive specially designed instruction (SDI) in speech/language (240 minutes quarterly in the Speech Room), math (60 minutes weekly in the classroom) and self-regulation (60 minutes weekly in the classroom). The team agreed to a placement in the regular class with pull out instruction. The team also identified several supplementary aids, services, modifications and accommodations for Student in the classroom.² (*Id.* at 24, 34.)

8. Student's May 8, 2012 IEP also documents that the Parents were given a copy of the Notice of Procedural Safeguards. (Ex. D4 at 14.)

9. In May or June 2012, prior to the end of the school year, Student had a transition visit to Linus Pauling Middle School (LPMS). During that visit, Student met Christine Madar, an Educational Assistant in charge of the middle school's Home Court program. (Tr. 1 at 17.)

10. The Home Court program works in conjunction with the school's learning resource center (LRC) to provide daily, ongoing support for support for students with autism who attend general education classes. The program provides students with resources and services, including an assigned Educational Assistant and a space at school where the student can go to calm down, self-regulate and problem solve. (Tr. 1 at 16-18.)

11. In September 2012, Student began attending sixth grade at LPMS. Every school

² The modifications and accommodations included a transition visit to the middle school prior to the end of the school year; calming breaks during class to address stress level; lengthy assignments broken into smaller pieces with frequent check points; retelling of directions/instructions to check for understanding; visual supports, including checklists for work tasks; placement in small groups for cooperative learning activities; decrease in workload when necessary; quiet work locations when the class setting becomes noisy or overwhelming; daily organizational coaching with homework planner or unfinished work; and frequent check-ins for understanding of work assignments. (Ex. D4 at 24.)

day, Ms. Madar would meet Student at drop off and walk with him/her to his/her first period math class. She would assist Student in getting settled in class and periodically check in on him/her. She often walked with Student to his/her other classes throughout the day and checked in on him/her at least once each period. She also, on occasion, walked with him/her to his/her locker and to the commons, all the while providing support and monitoring his/her anxiety level. (Tr. 1 at 25-31.)

12. Ms. Madar's responsibilities toward Student included teaching Student problem solving skills, modeling life skills and conflict resolution skills. She engaged in role playing with Student to help Student see different sides to situations and different approaches to resolving problems. Ms. Madar worked with Student to help him/her regulate his/her emotions and to help him/her identify "big" problems versus "little" problems, so that Student would not respond to every situation as if it was a big problem. (Tr. 1 at 22-24.) During Student's Extended Learning Time (XLT) period with special education teacher Suzanne Becker, Ms. Madar worked with Student and delivered the specially designed instruction focused on the self-regulation goals identified in Student's IEP. (*Id.* at 31-35.)

13. Ms. Madar's notes from the first two weeks in October 2012 document that Student was often off-task and not following direction, especially during first period math class. (Ex. D14 at 4-6.) On October 9, 2012, Ms. Madar noted that Student complained about the noise level in math class. She worked with him/her on how to ask the teacher for a quiet place to work. (*Id.* at 5.) On October 18, 2012, Ms. Madar noted that Student was refusing to follow directions and take notes. She noted that Student was pounding his/her fist on the table, chewing on his/her shirt and that s/he remarked, "Everytime I've come to this school I've been in a bad mood." (*Id.* at 6.) Ms. Madar's progress notes reflect that she and Student left the math class for several minutes that day, during which time they discussed coping strategies. Ms. Madar's notes also document that she worked with Student on self-advocacy skills, how to ask questions and obtain clarification, and how to ask for reduced work and/or for additional time to complete work. (*Id.*)

14. On October 17, 2012, Mother emailed LPMS Principal Eric Beasley with concerns that Student's school work was going downhill due, in part, to his/her special education teacher (Ms. Becker) being out on leave. Mother wrote:

I wanted to let you know that [Student] has been going downhill where school is concerned. [Student] has been frustrated about schoolwork and anxious in general. I think I see a pattern which coincides with the absence of Mrs. Becker. [Student] has an aide but I can tell [Student] doesn't feel like [s/he] has a go to person. [S/he] needs to feel like [s/he] has an anchor. [S/he] needs someone during XLT to talk to and help [him/her] with work s/he doesn't quite grasp. [His/her] words were "everyone keeps telling me what to do but doesn't help me do it if I can't." I get the impression that [s/he] feels like [s/he] is all on [his/her] own and this is very frightening to [him/her]. That is how [s/he] was treated at [his/her] former elementary school and I know [s/he] is worried about history repeating itself. Would it be possible to have another social worker assigned to [him/her] until Mrs. Becker returns? I think it would make a big difference.

(Ex. D15 at 1-2.)

15. On October 19, 2012, Principal Beasley responded to Mother's email as follows:

Thank you for your email and sorry for the delay in response. I am sorry to hear that [Student] is feeling anxious about [his/her] school work. [S/he] was up in my office the other day for a positive chat and we were talking about the video cameras in the school. [His/her] curiosity, ideas and kindness are several of the many reasons [s/he] is a joy to have at LPMS. I am going to copy our staff who work directly with [him/her] and coordinate supports. I know Mrs. Becker is really worried about the kids while she needs to be away, but we have a wonderful sub for [his/her] XLT (support class). I will have my two other special education teachers, Sandy Fong and Leigh-Ann Russell check on [him/her] while Mrs. Becker is out. Along with our teachers and counselors, [Student] does receive support from several E.A. staff during [his/her] day and we will definitely relay concern that [Student] is feeling a little overwhelmed and we may need to do some increased scaffolding with [his/her] assignments.

(Ex. D15 at 1.)

16. Following Principal Beasley's email, both Ms. Fong and Ms. Russell emailed Mother offering to help Student throughout the day. Both teachers noted that Student could come to their classrooms if s/he needed help or was feeling stressed or frustrated in his/her general education classes. (Ex. D15 at 4-5.)

17. On October 22, 2012, Mother emailed Ms. Fong and Ms. Russell to advise that Student was having difficulty in his/her first period math class. Mother explained that Student had been unable to finish his/her math homework the night before and had had difficulty listening to an instructional video during class due to the noise level, even though Student was wearing headphones. Mother thanked Ms. Fong and Ms. Russell for their emails, adding "It is nice to know someone is watching out for [Student]." (Ex. D15 at 4.)

18. Mother also emailed Student's math teacher to advise him that Student was having difficulty concentrating and keeping up with assignments in class. She reported that the classroom was way too loud for Student to get any work done, which was causing Student to become very anxious and upset. Mother also noted that Student felt like the class was moving along and switching units too quickly. (Ex. D15 at 7.)

19. On October 22, 2012, Ms. Becker emailed the following suggestion to Student's teachers and support staff:

What has worked best for [Student] is coming into my room to chill out and take a break and have someone to talk to about [his/her] concerns. [S/he] has high anxiety about math, so weeks ago [s/he] had been coming into my room to take [his/her] math quizzes, and this really helped [him/her]. Showing [him/her] that

you genuinely care about [him/her] and then focusing on [him/her] and [his/her] accomplishments works well for [him/her].

(Ex. D15 at 1.)

20. On October 23, 2012, Student's math teacher, Mr. Bowdoin, sent Mother the following email in response to her concerns about Student's math class:

Our class is specifically designed for students to work at their own pace, as you may have noticed that almost all of our lessons are recorded on video, as well. I work with small groups on the mini-lesson (topic) for the day while students gather their notes from the video. [S/he] has refused to take notes, saying that [s/he's] been told [s/he] doesn't have to . . . and only needs to take mental notes. I worked with this, and had [him/her] verbally tell me what [s/he] learned, and then wrote that down for [him/her]. A student offered to do the same with him yesterday. However, [Student] usually does not start watching the video until the very end of class. The video should be the second thing that [s/he] does when coming to class, after the warm up.

However, most classes look like this:

- [S/he] arrives to class about 3-5 minutes late.
- I give [him/her] the warm up on separate paper because the slide may change before [s/he] is ready to move on.
- After some time, [s/he] comes up and asks to use the restroom. We go check [his/her] warm up and it is blank.
- [S/he] then really pushes for a restroom break, but as I have been working with [his/her] Home Room, we are looking for [him/her] to accomplish one task first. This often results in a blow-out where [s/he] does use the restroom or heads to Mrs. Becker's room.
- Once coming back to class, [s/he] wanders around, usually taking several redirections to get [his/her] materials out for the video/notes or practice questions we are working through.

I recognize that math has provided anxiety for [him/her] and readily agree that working in Mrs. Becker's room provides a calm, quiet atmosphere where [s/he] can focus. We will continue to use this option, and then have [him/her] bring back [his/her] work to show how far [s/he] went.

You are right, in that [s/he] definitely does well when accomplishments are pointed out and [s/he] is praised for [his/her] work. I look to do this often!

(Ex. D15 at 8.)

21. One afternoon in late October 2012, Student complained to Ms. Madar that s/he had been "bullied" during his/her PE class when, during a sumo-type wrestling match, a peer

bounced or knocked him/her off the wrestling mat and other students laughed at him/her. Ms. Madar discussed with Student that the incident s/he described did not sound like bullying, but rather just life in the mat room. (Tr. 1 at 38-40.) Ms. Madar took Student back into the mat room so that s/he could watch others participate in the sumo wrestling matches. She showed Student that s/he was not a target of bullying in this instance, as other students were losing matches by being pushed off the mat. Ms. Madar attempted to “normalize” the incident for Student. She explained that the bystanders were cheering and loud, but they were not laughing at him/her for losing the match. Ms. Madar realized that Student was still upset about this incident, though she hoped that Student at least understood that s/he was not being targeted in any way. (*Id.*)

22. On the morning of October 30, 2012, just a few days before the scheduled teacher-parent conferences, Mother sent the following email Principal Beasley:

Dear Mr. Beasley,

[Student] came home from crying yesterday and told me [s/he] did not want to return to school. [Student] relayed that the bullying [s/he] is undergoing is becoming intolerable. [Student] also told me that [s/he] will not fill out anymore incident reports as “nothing is done about them.” Within the past week [s/he] has been called: retard, idiot, idgit, loser, freak, moron, gypsy, gay, SWAG (super weird and gay), other names [s/he] did not want to repeat because they contain profanities. [S/he] said that if [s/he] says hi to any boy [s/he] is usually called one of the above names. [S/he] is at the point where [s/he] said [s/he] wishes one of these kids would just beat [him/her] up at get it over with as [s/he] cannot handle the psychological torcher (*sic*) anymore. Also, while filming for a commercial in the cafeteria yesterday [s/he] was screamed at to leave because [s/he] could not get the camera to work correctly. Last week in P.E. [s/he] was thrown down exceptionally hard and then jabbed in the back by some huge 8th grader named [D].³ [Student] said [s/he] was made a total fool of because all the kids were laughing and clapping and is still embarrassed about what happened. [Student] said these occurrences happen in classrooms, locker room, bathrooms, lunchroom, etc. Why is no one watching? To allow any bullying to happen to any child is intolerable but to an autistic child who wants nothing more than to fit in is mortifying. [S/he] told me that everyday [s/he] sees [S], the girl with Down Syndrome, picked on and called horrifying names. So much for the Pride logo. As you can tell I am extremely angry and ready to remove [Student] from Linus Pauling. I will make sure the community knows why I had to find other accommodations for my [child].

(Exs. S12 and S37 at 2; Ex. D15 at 9.)

23. Principal Beasley shared Mother’s email with Student’s teachers, the school counselor and other District staff who worked with Student. He advised as follows:

³ Despite Mother’s contention, Student and D were actually of similar size and weight. (Tr. 1 at 189-90.)

I received an email of complaint from [Mother] regarding [Student's] experience at LPMS. I have observed several of you expressing sincere care for this young [person]. I want you to have this communication so you weren't blind-sided at conference. The email is quite accusatory that we are tolerant and negligent in preventing autistic kids being harassed. Obviously, this is not true. I will respond to mom our staff will look into what she is reporting and options to support (e.g. early/late passing period, assigned lunch location, etc.)

(Ex. S37 at 1-2; Ex. D15 at 9.)

24. At 4:59 p.m. that same day, Student sent the following email to John Harrison, school counselor, and Ms. Fong, a special education teacher, with a copy to Mother:

Hi,

This is [Student] and I'm at my group at the Social Communication Clinic. I've recently been bullied at LP and I need some help. It is too much for me to do by myself. Could we work on this together?

Any time would work for me during the day.

(Ex. S39 at 2; Ex. D15 at 10.)

25. At 5:18 p.m., Ms. Fong replied to Student's email as follows:

Hi [Student]:

Absolutely! I know that Mr. Harrison, Ms. Becker and Mrs. McConnell want to make sure you feel safe at LPMS. Can you tell me when this is happening so we can investigate?

Thanks for letting me know, [Student]. I am letting Ms. Becker and Mrs. McConnell know about this email so that they can help problem solve this situation.

(Ex. S39 at 1; Ex. D15 at 10.)

26. Ms. Becker also responded to Student's email that same evening:

[Student],

Thank you so much for coming forward and asking for help. We are here to help you, [Student], and you do not need to figure this out on your own. I want you to feel safe and happy here at school. The staff here at Linus Pauling care about you and your well-being and we will investigate the bullying and resolve the issue.

You are always welcome into my room during the day, even during lunch and breaks, if you are feeling unsafe and need a place to go and tell someone what is going on.

(Ex. 39 at 1; Ex. D15 at 10.)

27. On October 31, 2012, Mr. Harrison also responded to Student's email:

Good morning [Student],

Thank you for letting me (us) know about this. Please see Ms. McConnell, first thing Monday morning, and write up an incident report. This is the next step in our process on investigating any reports of teasing, harassing or bullying. If you're more comfortable talking to Ms. Diana (Hammond) or me, we'd be happy to walk you through the reporting process.

(Ex. D15 at 11.)

28. After being notified of Mother's and Student's concerns, Gen McConnell, the Behavior Support Educational Assistant at LPMS, emailed Ms. Fong, Ms. Becker, Mr. Beasley and others the following:

Just so you know Sandy, [Student] has NEVER talked with me about bullying/harassment. I just met [him/her] for the first time last week when [s/he] was looking for [his/her] thumb drive. [S/he] came in a 2nd time looking for [his/her] notebook. [Student] did not even have a file until I printed off [his/her] mom's email.

I think this is important info to know before conferences. I move bullying/harassment to the top of my list of things to take care of. I will make a point of talking with [him/her] on Monday. It does make me feel sad that a parent has such a negative view of all of us trying sooooo hard to make sure kids feel safe and supported.

(Ex. D15 at 12.)

29. That same day, Principal Beasley and Mr. Harrison spoke with Mother about her concerns. Following their conversation, Mr. Harrison contacted Sue Holmberg, District Autism Specialist, seeking a recommendation for a mental health professional with experience working with adolescents with autism. Ms. Holmberg provided Mr. Harrison with some names and also offered to help the student. In explaining why, and for whom he was seeking the recommendation, Mr. Harrison advised Ms. Holmberg that Student's transition to middle school has been difficult and that Student is "perseverating on every perceived 'insult' to [his/her] sensitivities and mom made a veiled plea for help." (Ex. D15 at 16-17.) Ms. Holmberg responded to Mr. Harrison that she also had seen Mother's letter. Ms. Holmberg added that "She (mom) was very concerned about middle school and up until June of last year was going to home

school [Student]. I wondered if some of her nervousness has carried over to [Student]. Let me know if I can help more.” (*Id.*)

30. On November 2, 2012, after reviewing Mother’s October 30th email, Ms. Madar sent the following email to Principal Beasley and other District staff who worked with Student at LPMS:

Eric,

I am shocked, sad and sincerely concerned. I spend a considerable amount of time with [Student] in all of [his/her] classes and during passing periods. I check in with [him/her] when [s/he] arrives in the morning and every day during [his/her] lunch rotation in the Commons. [Student] usually eats with [his/her] friend [B]. I end the day with [him/her] as I assist in Suzie’s 7th period XLT. I check in with [his/her] teachers during their prep period on a daily basis and none of them have reported witnessing or hearing of bullying.

I can honestly say [s/he] has never reported incidents of bullying to me. If [s/he] had I would have acted on it immediately. [S/he] did report being thrown down and beaten by [D] during Sumo wrestling in PE. [S/he] has been distressed the last week because [s/he] lost [his/her] zip drive, believed “someone had stolen it” and wanted staff to check the cameras. I believe [s/he] filled out an incident report or at least reported it to the Support Room.

Despite never having witnessed or heard of [him/her] being bullied does not mean it doesn’t occur. I am not aware of numerous incidents being filed. I check in with Gen on a daily basis and she has not mentioned reports to me. Has [Student] in fact filed reports?

This is a serious accusation. I know we are all committed to no tolerance for bullying.

By the time I return on Monday I’m sure you all will have discussed this. I hope conferences with [Mother] were positive and productive.

I will document the time I spend with [Student] and be even more diligent in my observations. I will shadow [him/her] during [his/her] second lunch rotation.

I will check in with you Eric on Monday so you can let me know what else I can do to gather more information and support [Student].

(Ex. D15 at 20.)

31. When Student’s PE teacher, Mr. McKee, became aware of the concerns raised in Mother’s October 30th email, he talked with both Student and D about their sumo wrestling match. During the conversation with D, Mr. McKee explained that Student felt humiliated after

the match. D expressed concern and told Mr. McKee he felt bad about what had happened. Mr. McKee reminded D that if another student is hurt, either physically or emotionally, as a direct result of D's actions, then D has an obligation to stop what he was doing and make sure the other student is okay. (Tr. 1 at 167-69.)

32. Mr. McKee believed that Student's concerns about the sumo wrestling match with D had been addressed and resolved because Student continued to choose sumo often as his/her activity in PE. Mr. McKee also believed that Student enjoyed the sumo wrestling activity. (*Id.* at 165, 169, 193.) Mr. McKee never saw other students bully or disrespect Student during PE class or elsewhere at school. And, Student never reported any incidents of harassment or bullying to Mr. McKee. (*Id.* at 177-80.)

33. Mr. McKee also taught Student's health class. As part of the health curriculum, Mr. McKee included an anti-bullying segment called Second Step. The Second Step program consists approximately eight 30 to 40 minute lessons and is designed to teach students three skills: recognizing what bullying is, refusing it, and reporting it. (Tr. 1 at 148-49.) Student was an active participant in class discussions on the subject and claimed that s/he had been bullied at his/her former school. One day in class, Student shared a story about how s/he had been treated in a prior PE class. Student claimed that his/her former PE teacher had lined up all the "misfits" (including Student) on one side and all the "jocks" on the other side, and then the teacher joined the jocks in pelting the misfits with balls. While the scenario that Student described sounded somewhat unlikely (and Mr. McKee was never able to elicit additional information from Student to verify whether this situation had, in fact, occurred as described), Mr. McKee nevertheless used the scenario as a discussion topic as an example of what is not acceptable behavior. (*Id.* at 152-53 and 195-98.)

34. Later in the year, during a unit in which the students were assigned the task of making up a game that involved strategy, was safe for everyone, fun for everyone, and easy to set up and take down, Student again brought up the story as an example of a game played at his/her prior school. This time, however, Student embellished the story. Student took an element of another story shared in class (a game involving golf balls) and asserted that s/he and the other misfits had been pelted with golf balls. While Mr. McKee recognized that Student had added details and embellishments to the story, Mr. McKee again used the game Student described as an example of one that involved strategy but was not safe or appropriate. (Tr. 1 at 153-54.)

35. On November 6, 2012, Ms. Madar's progress notes reflect that Student came to school upset and crying. Student told Ms. Madar that his/her mother had told him/her that s/he was not giving 100 percent at school, which was upsetting to Student. Ms. Madar worked with Student on problem solving skills. (Ex.D14 at 8.) When Student started in with negative self-talk, referring to him/herself as stupid, she worked with him/her to replace negative self talk with positive affirmations such as, "I am doing the best I can in the moment" or "I'll try harder on my next." (Tr. 1 at 37-38.)

36. Ms. Madar continued to provide support to Student at school on a daily basis. Her progress notes document that she worked with Student on social mapping and expected

behaviors to help him/her better understand social cues. For example, for November 26, 2012, Ms. Madar's notes indicate that during second period science class, Student had positive interaction with peers and took a walking break. During third period humanities, Student practiced self-advocacy regarding peers talking to him/her. During fifth period, Student worked on problem solving and how to ask peers for space. (Ex. D14 at 9.) Her notes document that, during November, December, January, February, she helped Student practice calming techniques to reduce his/her anxiety in class and self-advocacy skills in his/her dealings with teachers and peers. (*Id.* at 11-18.) Student did not report any instances of harassment or bullying to Ms. Madar during this time. (Tr. 1 at 142-144.)

37. On February 21, 2013, while Student and Ms. Madar were walking together to Student's third period class, another student (later identified as H) came up behind Student and knocked a binder out of Student's hand. This was upsetting to Student, as s/he perceived it as an intentional and malicious act. Ms. Madar as took Student to Ms. McConnell's Support Room to complete an incident report. (Tr. 1 at 46-51; Ex. D14.) On the incident report, Student asserted that a student "dressed in camo" had come up behind him/her and knocked his/her binder out of his/her arm. Student also asserted that IH turned and made taunting sounds and gestures and then went up the stairs. (Ex. S27; Ex. D11 at 1.)

38. Although Ms. Madar was there when the binder was knocked from Student's hand, she did not see or hear anyone making taunting sounds or gestures toward Student. A short time later, based on Student's description, Ms. Madar found H. She contacted H and asked him about the incident. H acknowledged knocking the binder out of Student's hand. H was contrite with Ms. Madar and admitted that he should have stopped to help Student pick up the binder. Ms. Madar did not get the sense that H intended the act in a malicious manner. Ms. Madar later told Student that she had interceded with H and that he had apologized for the incident. (Tr. 1 at 48-51.) Ms. McConnell also spoke to H about the incident and documented that she had done so. (Tr. 2 at 99-100; Ex. S27; Ex. D11 at 1.)

39. On March 1, 2013, Student reported to Ms. Madar that s/he was feeling anxious. They took a 10 minute walking break, during which time Ms. Madar attempted to determine the source of Student's anxiety. Student did not clarify what was causing the anxiety, but s/he talked about a previous preschool, another student (S) and a dream that s/he had had. Ms. Madar stayed with Student until Student was calmed down and ready to return to science class. (Ex. D14 at 19; Tr. 1 at 54-55.)

40. On March 5, 2013, Student reported to Ms. Madar that s/he was upset because a student (M) had stolen \$20 from another student. Ms. Madar's notes reflect that Ms. Becker identified the students involved in this/her incident and contacted them and their parents about the matter. (Ex. D14; Tr. 1 at 55-56.)

41. On March 14, 2013, the first day of Oregon Assessment of Knowledge and Skills (OAKS) testing at school, Ms. Madar's notes indicate that Student had no issues. Student was mostly on task and completed the testing. (Ex. D14 at 20; Tr. 1 at 57.)

42. On March 21, 2013, Ms. Madar's notes reflect that Student was hyper and off-

task during second period science class. Student was frustrated because s/he was behind on a project in class. Other students offered to help Student by sharing their work (the data they had gathered). Ms. Madar assisted Student in problem solving so that Student could complete the assignment. (Ex. D14 at 22; Tr. 1 at 57-58.)

43. On March 21 or 22, 2013, Student completed another incident report complaining about another student, S. Student wrote:

[S] is bullying me he pretend-shoots me, grabs my shoulder, steals balls from me at recess and makes fun of me. He does this in class. He also seems to be getting worse and worse daily. It has been going on sense [sic] the first day of sixth grade. It happened today.

(Ex. D11 at 2; Ex. S29.)

44. In response to Student's complaint, Ms. McConnell spoke with S about leaving others alone. (Ex. D11 at 2; Ex. S29.)

45. On April 1, 2013, the Monday after Student's spring break at LPMS, Mother sent Principal Beasley the following email:

Dear Mr. Beasley,

I hope you had a nice spring break. Unfortunately, I am writing to make you aware of a problem that [Student] is having with one of [his/her] classmates named [S]. [Student] describes him as very "troubled, sadistic, maniac who is very disruptive and distracting." [Student] feels that [s/he] is taunted and bullied by this student daily. [Student] has a bruise on [his/her] chest where this child poked him repeatedly. Apparently [S] also uses the "Vulcan grip" on [Student] quite frequently. This is addition to being made fun of everyday and being distracted to the point of not being able to complete [his/her] class work. [Student] feels that this child is running the show at LP and no one is taking the extent of the problem seriously. [Student] also relates that this child is an expert at wielding the brunt of his/her torture when teachers are not watching. [Student] feels defenseless against him.

We are very proud of all that [Student] has accomplished at LP despite everything [s/he] has to deal with everyday whether internal or external. We are also very appreciative of the great patience and extra help the teachers have shown [Student]. You have a good thing going at your institution. I trust that the aforementioned problem will be dealt with in a very serious and timely manner.

(Ex. D15 at 24; S40 at 2.)

46. Ms. Madar had seen Student and S interacting during their language arts class and did not perceive S to be bullying Student. Rather, she saw the two students provoking each

other. She saw mutual hand slapping and touching, more akin to friendly sparring than harassment or bullying. (Tr. 1 at 61.)

47. On April 1, 2013, Ms. McConnell and Ms. Madar spoke with Student and S about Student's concerns. They discussed appropriate versus inappropriate behaviors, expected behaviors and the need to respect boundaries. Ms. Madar tried to clarify with Student the difference between bullying and fooling around or provoking each other. She used social stories and drawings to show student the difference between "bullying" and what was going on between Student and S. (Tr. 1 at 62-63; Ex. D14 at 22.)

48. On April 2, 2013, Principal Beasley replied to Mother's email as follows:

[Student] reported the issue to Mrs. Becker on Friday afternoon prior to break and she had [him/her] fill out an incident report. Gen McConnell, LP behavior support, pulled the [students] in yesterday. It was revealed that there had been instances of the behavior that [Student] reported and what you describe below. We will apply appropriate consequences, contact parents, and monitor the situation. It is true that some students are covert about behavior during unstructured time . . . (e.g., passing Vulcan grip in the hallway), but by no means is the student "flying below our radar."

One of our challenges with [Student] is getting specifics of where and when negative behavior toward [him/her] is occurring. After hearing from you we talk with [Student] and hear it is "constant and everywhere." However, our observations and conversations with [Student] later prove this not to be the case. For example, [Student] likes to come to the gym at lunch. I supervise this space at lunch. I rarely see [S] in the gym at lunch. I keep a close eye on [Student] and enjoy interacting with [him/her]. The only issue there is [s/he] likes to climb the bleachers if a ball gets stuck and I have to remind [him/her] a couple times not to do this without permission. [S/he] redirects without issue.

We need to work together with [Student] to not wait, internalize and persevere, then report with hyperbole that everything is all bad. [Student] and [S] have two classes together. Mrs. Becker spoke with [Student] recently and [s/he] said it was not happening in her XLT class. Mrs. Becker communicates frequently with our Homecourt assistant, Christine Madar who supports kids in classes and during transition times such as break and passing. We'll have her do some increased monitoring. I'll check with the other teachers about any observations of times these students may have negative interactions.

We are very glad that [Student] is a student at our school. [S/he] has much to offer the world!

(Ex. D15 at 23; Ex. S40 at 1.)

49. On April 15, 2013, Ms. Madar's progress notes document that during language

arts class, Student and S were engaging in verbal and physical sparring. Ms. Madar took steps to correct and redirect their behavior. She discussed boundaries and behavior expectations. Her notes indicate that Student accepted the correction with a positive attitude. (Ex. D14 at 24, 31.) In addition, to ensure that Student and S remained physically apart during class time, Student was moved to one side of the room and S was moved to the other. S was told that if Student was up and pacing in the back of the room, S was not to get up out of his seat. (Tr. 1 at 64-65.)

50. On April 23, 2013, the Parents took Student for a behavioral health evaluation with Jean Pointon, M.D., with a chief complaint of Student having “really bad anxiety and depression.” (Ex. S3 at 1.) Mother reported to Dr. Pointon that Student, with a diagnosis of Asperger’s, had been doing well in school but suddenly began having anxiety. Mother reported that Student told her s/he felt like s/he was “flipping out” and that s/he was homesick and wanted to move back to the state where the family used to live. Student advised Dr. Pointon that s/he liked school, but there were children who bullied him/her by calling him/her names, poking him/her and trying to get him/her to steal money from other children. (*Id.*) Dr. Pointon diagnosed Student with Asperger’s and an Anxiety Disorder NOS. She noted biological factors of a strong family history of depression and alcoholism, and psychosocial factors of no supportive peer group. Dr. Pointon discussed various treatment options with Mother and Student, including doing nothing. Mother and Student opted for therapy without medication at that time. (*Id.* at 4-5.)

51. On April 24, 2013, Ms. Madar’s progress notes document that Student’s teachers reported that Student was showing improvement, his/her restroom breaks had decreased and s/he was completing work before asking for a walking break. Student’s teachers also reported that they were modifying assignments to decrease Student’s stress level. (D14 at 31-32.)

52. On April 26, 2013, Ms. Madar’s progress notes document that during third period, Mr. Patching (Student’s language arts teacher) reported that Student and S were “both provoking each other” and neither was complying with the “no contact” agreement. (Ex. D14 at 26, 32.) Ms. Madar also noted as follows:

Clarified expectations. Patching reports that [Student] often seeks [S] out. They are seated at opposite ends of the classroom. Both are expected to remain seated unless they have permission to be out of their seats. [Student] will pace on the opposite side of the room from [S] or in the house.⁴

(*Id.* at 32.)

53. On April 29, 2013, Ms. Madar’s progress notes document that Mr. Patching had decreased and modified Student’s assignments and that Student was calm and focused on work that day. She added that Student reported feeling better and less stressed with modified assignments and expectations. (Ex. D14 at 32.) On April 30, 2013, Ms. Madar noted that Mr. Bowdoin had modified Student’s math work to accommodate Student’s requests for either using an iPad or working with pencil and paper. Mr. Bowdoin also clarified that Student was welcome

⁴ The house is a carpeted area at school where students may stand or congregate outside the classrooms. There is a house for sixth graders and a house for seventh graders at LPMS. (Tr. 1 at 45.)

during lunch or sixth period for one-on-one assistance with his/her math assignments. (Ex. D14 at 32.)

54. On Friday, May 3, 2013, during first period math, Student reported to Ms. Madar that another student, M, was “bothering me, trying to hurt me and get me to hurt people he doesn’t like.” (Ex. D14 at 27.) Ms. Madar took Student to the Support Room and helped Student fill out an incident report. (*Id.*) Ms. Madar scribed Student’s complaint on the incident report as follows:

[M] started getting attached to me. He’s been asking me to kill people he doesn’t like and when I say no he grabs me by the neck and won’t let go. It takes me forever to pull him off. One time, when I wouldn’t do what he wanted me to do, he told me he was going to break into my house and bleed me in my sleep.

(Ex. D11 at 3; Ex. S25 at 1.)

55. Ms. Madar’s progress notes for May 3, 2013 document that, after assisting Student with the incident report, they took a walking break. She also worked with Student on social behavior mapping, social stories and problem solving. She noted, “No issues in any of [his/her] classes as a result, focused and on task remainder of the day.” (Ex. D14 at 32.)

56. To keep M from connecting with Student during the school day, Ms. Madar initiated a plan for Student and M to access their classrooms from different routes. She directed M to access the school from the door near the Life Skills room and to use a different hallway to get to his classes. She arranged for Student to be dropped off in the morning by the school’s front door. She could then meet Student at the front door and walk with him/her to his/her locker and to his/her first period class. (Tr. 1 at 66-69.)

57. On Monday, May 6, 2013, Student’s IEP team, including Mother, met to establish Student’s IEP for the 2013-2014 school year. The team discussed Student’s strengths and areas of concern. Mother expressed concern that Student needed to continue to have a place to go when s/he needs a break during the school day and needed to continue to have the same level of support that s/he currently had. (Ex. D5 at 26.) The team noted that Student met his/her sixth grade benchmark in reading, but was below the benchmark in math. They noted that Student had made progress and met goals in the areas of self-regulation and speech/language communication. The team established measurable annual goals and short term objectives for Student in the areas of speech-language (social thinking), math and self-management. (*Id.* at 16-18.) The IEP team determined that, to meet Student’s needs, Student would receive specially designed instruction in each of these areas. The team identified the services, modifications and accommodations that Student would need in the upcoming year, similar to those listed in the prior IEP. The team further agreed that Student would be placed in the general education setting with XLT class in the LRC and speech-language in the speech room, meaning that Student would spend approximately 11 percent of the day in the special education classroom and the remainder of the day in general education. (*Id.* at 19-20.)

58. During the IEP meeting, Mother brought up concerns about Student and M, and

requested that Student not have any classes with M in the next year. IEP meeting notes document that Mother requested that Student “not be in any classes next year with a certain Student” and that Ms. Becker would forward that request “to Mary in the office.” (Ex. D5 at 23.) Principal Beasley was not in attendance at this IEP meeting, and school staff told Mother that Student’s issues with M were a separate matter and not part of his/her academic planning. Mother understood that she could address her concerns about Student being bullied when she met with Mr. Beasley later in the month. (Tr. 2 at 184-96 and 204.)

59. Both the May 6, 2013 IEP meeting notes and Student’s May 6, 2013 IEP indicate that the Parents were given a copy of the Procedural Safeguards. (Ex. D5 at 23-24.)

60. Also on Monday, May 6, 2013, Ms. Madar’s progress notes indicate that during first period, Student had no issues and was focused and on task. During third period, Student was socializing and distracting a peer and partially on task. During the break between third and fourth periods, Ms. Madar could not locate Student. When she caught up with him/her later, s/he reported that s/he had been hiding from M. Student advised Ms. Madar that s/he was afraid M would be mad at him/her and try and strangle him/her. Ms. Madar advised Ms. McConnell of Student’s concerns so that she could speak to M about the issue. (Ex. D14 at 28; Tr. 1 at 70.)

61. Ms. Madar added the following to her May 6, 2013 progress note:

I will shadow [M] during ALL of [his/her] transitions to allow [Student] the freedom to move safely around campus during transitions, break and lunch. They no longer come in contact with each other, as a result of separate lunches and travel routes to and from the building, as well as during transitions.

(Ex. D14 at 32.)

62. On Tuesday, May 7, 2013, Student was absent from school. (Tr. 1 at 71.) At 10:54 a.m., Mother sent another email to Principal Beasley (with a copy to Student’s teachers) regarding Student’s complaints of bullying. She wrote:

Dear Mr. Beasley,

I am writing to let you know about a serious problem [Student] has been facing for many weeks. This explains [his/her] recent bout with terrible anxiety, sleeplessness, depression and not doing [his/her] school work. [S/he] broke down crying last night after I asked [him/her] why so much of his/her work was not being done. [Student] said that [s/he] is having horrible thoughts of severely hurting another student who has been bullying [him/her] for the entire year. [Student] is afraid [s/he] might lose [his/her] temper and hurt this student because [s/he] can’t take the constant bullying anymore. [Student] is a very kind, gentle soul and these thoughts of violence are extremely frightening to [him/her]. [S/he] said the other student is [M]. [M] sounds and acts like a very disturbed individual. He has always bothered [Student] but his bad behavior toward [Student] has escalated recently. For the past week or so [Student] has been

hiding during morning snack period in order to avoid [M]. [Student] said [s/he] hasn't had a snack in over a week and is starving by the time [s/he] gets to Mr. Patching's class. [Student] has been hiding in the library, Mrs. Fong's room, different remote parts of the building, and in bathroom stalls in order to avoid [M]. [M] constantly asks [Student] to buy him things or give him money. He asks [Student] to hide stolen money for him. He insists that [Student] kill people for him and "smash their heads like a watermelon." He even asked [Student] to rape his ([M's]) sister. These examples are just the tip of the iceberg. When [Student] refuses these disgusting requests, [M] hits or chokes [Student]. He also threatens to break into our house and "bleed" [Student]. [Student] hasn't been sleeping because [s/he] said that [M] is very sneaky and is concerned for the welfare of our entire family. Apparently, [M] has insinuated that he knows where [Student] lives and will kill [Student] if necessary. [M] constantly threatens [Student]. [Student] was so anxious a few weeks ago I took [him/her] to a psychiatrist. [Student's] current concern is retaliation. I told [Student] that [s/he] did not have to return to school until I was satisfied that this situation will not continue and [s/he] will not have to hide in the bathroom stalls to avoid anyone. [S/he] finally slept for eleven hours straight last pm.

[Student] has mentioned having problems with this student to Mrs. Fong, Mrs. Becker, Mrs. McConnell and Mrs. Madar. Mrs. Madar even witnessed [M] attempting to choke [Student]. What does it take to protect my child from obviously severely mentally disturbed students? You have a street smart thug who hangs out with kids with Asperger's. It doesn't take much to put two and two together. Suzy Becker was the only one to point out how [Student's] grades have taken a plunge. Now [Student's] concern is what will happen after [M] is confronted. [S/he] said, "I know he'll come after me." [Student] is also worried about the impact this will have on his/her friendship with [B] as [B] has some sort of relationship with [M]. This is why [Student] has put up with this for so long. [Student] said [s/he] won't have any friend if [s/he] doesn't have [B].

[Student] told me that whenever [s/he] is nice to someone, [s/he] ends up being taken advantage of. [Student] said that honesty and trust get [him/her] into trouble. [S/he] said that all the No Bullying signs are a huge joke. Of the 4 different schools [s/he] has attended in [his/her] life, LP has the worst bullying [s/he] has ever experienced. [S/he] said it is the norm. Everyday [s/he] is bullied or [s/he] witnesses someone else being bullied several times a day. It looks like you've got your hands full.

I don't know where to go from here. [Student] is way behind in several subjects which is the fault of an atmosphere which has been terrorizing [him/her], depriving [him/her] of sleep, causing [him/her] extreme anxiety, and not providing [him/her] with what a student needs most to succeed. A safe place to learn with adults [s/he] can depend on to be there for [him/her] if [s/he] needs them. Until I am satisfied that the situation is *entirely resolved*, my [child] will not be returning to LP. I know an incident report, for what it's worth, has been

filed.

(Ex. D15 at 25-26, emphasis in original; Ex. S11 at 2-3.)

63. Within an hour of Mother's email, Ms. Becker sent the following message to Mr. Beasley and other school staff involved with Student:

Eric,

We just met for [Student's] IEP yesterday, and it was a nice one. Mom was saying that [Student] has adjusted well overall this year to middle school and a much better experience than last year in elementary school. In the IEP we did discuss that Mom had been out of town the last couple of weeks and it has been hard on the kids and family and this might have been why [Student] has been out of sorts. I noticed [his/her] anxiety go up the last couple of weeks, and talked to mom on the phone about it (she called me), and discussed maybe it was because she was out of town. She asked that we not push [Student] in [his/her] academics, as [s/he] was getting agitated and anxious at school. But, when you don't push [Student], [his/her] grades unfortunately can drop, and they did over the last couple of weeks. I checked on [his/her] grades and let mom know last week that [his/her] grades had dropped and she understood this. I'm not saying that there might not be a situation with [M] and [Student], but I'm just wondering how much is school related anxiety, and how much is home related anxiety.

Mom had told me that [M] had been stealing food out of [Student's] lunch pack when [s/he] was not looking ([Student] told mom, and then mom told me), but [Student] has never reported bullying to me about [M]. Maybe she is getting this confused with [S]. Anyways, I asked Christine Madar to keep an eye on these [children] at lunch, and she does her best. Also, I did ask [M] about the lunches, and he denies it. How do we prove it? I was not aware of all the other details of [Student] hiding to get away from [M] and the threats.

If there are so many problems with [Student] and [M], let's make a change in at least their schedule of when they take their lunch?

Suzie

(Ex. D15 at 25.)

64. On May 8, 2013, Student was again absent from school. At school, the assistant principal and Ms. McConnell spoke with M about Student's complaint. During the meeting, M admitted to "pressure pointing" Student's neck and to tickling Student's stomach. He denied threatening Student. He asserted that he sees Student at break, lunch time and at morning drop off and afternoon pickup and they only talk about games. They discussed the school's prohibition on harassment and bullying with M and directed him to have no contact with Student. They had M sign a "Cease and Desist" directive. They also established a plan to keep M and

Student safe and apart from each other at school. M agreed that he would: (1) sit and stay at his assigned table before school; (2) have no contact with Student; (3) sit at his assigned table during lunch and break; (4) eat lunch during the first rotation; (5) go into the computer lab during the second lunch rotation; and (5) keep his hands to himself and not touch his peers. (Ex. D12 at 1-2; Tr. 2 at 103-106.)

65. Also on May 8, 2013, Principal Beasley sent Mother the following response via email:

Dear [Mother]:

I received your email regarding your son. My staff investigated the issue. We work extremely hard every day with our students to foster a respectful learning environment. It certainly isn't perfect in any middle school as early adolescence is not an easy time in life – the final stretch of the year can be especially challenging for some students. We care very deeply about our students and do the best we can with the resources we are given. In talking with my staff who observe your son in and out of the classroom on a daily basis, I do not share the negative interpretation that our school is an atmosphere of horrible terror. Perhaps you would like to visit while school is in session?

As you know, we have a seven period schedule at Linus Pauling. [Student] has only one period with the boy you are concerned about. The class period they have together is a supported XLT class which is smaller in size and has an assistant along with Mrs. Becker. We will give an expectation that [M] “cease and desist” interactions with [Student]. Mrs. Becker will continue strategic seating and monitor interactions between [Student and M]. Based on your email, it appears that break and lunch time are key areas of concern. Our Homecourt support person has been made aware of what has been reported and will increase shadowing in passing times and breaks. We will also use strategic seating and monitoring at break time. We have two lunch rotations. We will have [Student] and the other boy placed on different lunch rotations. If [Student] is approached by the other student, we need [Student] to report it right away to Mrs. McConnell or Mrs. Becker. The specific details of who, what, when, where and why is needed.

I often see [Student] in the gym at lunch doing well. I am intentional to greet [him/her] and ask [him/her] how things are going. We would like to see [Student] continue to be part of Linus Pauling Middle School. Please note that if [Student] does not return after 10 consecutive days, [s/he] will be dropped as a student from our school. Please contact our registrar if you have further questions about enrollment.

(Ex. D15 at 27; Ex. S11 at 1-2)

66. Mother was infuriated by Mr. Beasley's response. She perceived Mr. Beasley's

response as bullying her, because he asserted that Student would be dropped from school if Student did not return within 10 days. (Tr. 2 at 190-91.) She replied by email later that same day as follows:

Dear Mr. Beasley,

Obviously, you are not taking our concerns seriously. We find it outlandish that our [child's] life has been threatened multiple times and [s/he] has been asked to rape another student and [s/he] is the one that may be expelled. We would like to meet with you in person before we pursue further action.

(Ex. D15 at 27; Ex. S11 at 1.)

67. On Friday, May 10, 2013, during a student assembly, M handed a note to Student. In the note, M said that he was sorry that he could no longer be friends with Student and sorry that he would be unable to attend Student's birthday party.⁵ Although the note's content was innocuous, Student and Parents were very upset that M had made contact with Student in violation of the Cease and Desist order. (Tr. 1 at 73-74; Tr. 2 at 220-21; Ex. D14 at 28.)

68. On Monday, May 13, 2013, Student brought M's note to the attention of Ms. Becker and Ms. Madar. (Ex. D14 at 28, 33.) That same day, the assistant principal met with M to address his violation of the Cease and Desist order. M asserted that he did not know that he was prohibited from sending notes to Student. They discussed and revised M's plan. M understood and agreed to the following terms:

1. I am to have NO contact with [Student], verbal or written.
2. My assigned table in the Commons is next to the Life Skills table.
3. I will sit at my assigned table during break AND lunch.
4. I will each lunch during first rotation.
5. During second rotation I will go to the computer lab or the auditorium.
6. I will keep my hands to myself and NOT touch my peers.
7. In the morning I will enter the building through the Life Skills door NOT the front door by the office.
8. I will walk directly to my first period class and NOT to the Commons or my locker.
9. In the afternoon I will walk directly from Room 214 to the Life Skills

⁵ This part of the note made no sense to Student and the Parents because it was not around the time of Student's birthday and there was no birthday party planned. (Tr. 2 at 221.)

classroom and wait INSIDE the classroom until the bus arrives.

(Ex. D12 at 3.)

69. Ms. Madar also followed up with M to talk about what friendships look like and appropriate social behavior. She explained to M that friendship did not involve threatening others or making them afraid of you. (Tr. 1 at 73-74.)

70. On May 15, 2013, Ms. Madar's progress notes document that Student reported that "The plan with [M] is working. I'm not afraid he's going to hurt me. Keep it up. Keep watching him." (Ex. D14 at 33.) Student also advised Ms. Madar that s/he felt less anxious and more calm and safe as a result of not having any contact with M. (*Id.*; Tr. 1 at 77.) Ms. Madar reported that Student was filling out his/her planner independently, recording assignments in his/her planner, completing work as directed, eating in the Commons during break and lunch, decreasing breaks and increasing time on task. (*Id.*)

71. On May 16, 2013, Ms. Madar's progress notes state as follows:

1st Math. 1/5 on math quiz. Crying walked out of class: Break in [room] 214. Problem solved. 9:20 returned. Mr. Bowdoin reports [Student] can come in 6th period for help and retake the test.

* * * * *

Lunch. Counselor John Harrison reports [Student] left the gym upset. Brought lunch to office. Mr. Harrison was monitoring. [Student] reports [s/he] was upset about a letter at home [s/he] wanted to send to a friend but mom says [s/he] has to correct spelling before sending. [S/he] was extremely upset, rocking in chair, crying, flailing arms, biting front of shirt. [S/he] wanted to use the phone to call mom and go home. I suggested [s/he] eat first and calm down before making a decision. We ate together and I got a Wimpy Kid book [s/he's] been reading. Problem solved w/ distract skills. [S/he] relaxed, we laughed and [s/he] was ready for 5th period at 1:55. No further issues.

6th and 7th period. Checked in with Mr. McKee. PE ok.

(Ex. D14 at 30.)

72. Also during the afternoon on May 16, 2013, Ms. McConnell followed up with Student regarding the situation with M. Student advised Ms. McConnell at that time that things were going well and there were no problems with M. (Ex. D13 at 1.)

73. On the morning of May 17, 2013, Student was anxious and upset before school. Student told Mother that s/he did not want to go to school because s/he was tired of being bullied

by M.⁶ Mother believed that the school had failed to implement adequate measures to keep Student safe, so she kept Student home from school that day. (Tr. 2 at 221-22.) The Parents also kept Student out of school the week of May 20 through 24, 2013 out of concern for Student's safety at school. (*Id.*; D9.)

74. On May 21, 2013, the Parents took Student to Cindy Knapp, Licensed Marriage and Family Therapist, for treatment for depression and anxiety. The Parents reported that Student's symptoms were the result of him/her being bullied by one or two classmates at school. Ms. Knapp's diagnostic impressions, on her initial intake evaluation of Student, were: Asperger's Disorder, Anxiety Disorder, Adjustment Disorder with Mixed Anxiety and Depressed Mood with a rule out of Acute Stress Disorder related to allegations of being a victim of bullying. Her tentative treatment plan included individual psychotherapy to decrease Student's depression and anxiety and improve his/her coping strategies at school and family therapy for skill building for the Parents to assist Student and to explore Student's educational needs as appropriate. (Ex. S2 at 1-7.)

75. On May 23, 2013 (while Student remained home from school), the Parents met with Principal Beasley, Mr. Harrison, Ms. Becker, Ms. McConnell and Ms. Hardy to discuss the Parents' concerns about bullying and the dynamics of Student's sixth grade learning resource center group. During the meeting, the Parents accused LPMS staff of not doing enough to protect Student from bullying, especially bullying from M. The Parents asserted that the school's plan for keeping Student and M away from each other was not working, because M had violated the plan by passing the note to Student. The Parents rejected as ineffective the school's suggestions to alter the students' passing times, to provide Student with safe/calm rooms during lunch and breaks, and to increase the monitoring and shadowing of both Student and M to assure no contact between the two. School staff rejected the Parents' request to provide Student with a one-on-one assistant all day and refused to expel M from school for the remainder of the year. The meeting concluded without any resolution. (Ex. D13; Tr. 1 at 251-52, 316-18; Tr. 2 at 187-95.)

76. Although Student did not return to any of his/her general education classes after May 16th Student did, on three or four occasions between May 29, 2014 and June 7, 2013, come to school for an hour or two of special education services. During those sessions, s/he participated in a social skills group and had the opportunity to see and connect with a few classmates of his/her choosing. (Ex. D15 at 44-45; Ex. S17 at 1-2.)

77. The 2012-2013 school year ended on June 12, 2013. (Tr. 1 at 256.) Student received the following grades for the last quarter of the 2012-2013 school year: Language Arts R 6: B; Language Arts W 6: B; Life Science 6: C; Math Concepts 6: C; Phys Ed/Health 6: A; Pride Period: A; Social Studies 6: B; and XLT: A. Student ended the school year with a

⁶ Student told his/her parents that, among other things, MB had sharpened his fingernails to points and ran them down other people's clothing to tear the clothing. Student also told his/her parents that MB said to him, "This is what will happen if you don't do what I say [and] beat up who I say." (Tr. 2 at 226-27.) Student told his/her parents that MB called him "dog," and said things like, "If you stick with me, dog, I'll never get beat up when I steal things." (*Id.* at 227.) Student did not report these incidents to anyone at LPMS, however. (*Id.*)

cumulative grade point average of 3.39. (Ex. D17.)

78. During the summer, Student had weekly counseling sessions with Ms. Knapp to address his/her anxiety and depression. Student reported feeling terrorized by the bullying s/he received. S/he reported that there had been verbal threats to his/her life and threats to harm his/her family. S/he reported that a boy had poked him/her in the neck and that s/he been physically intimidated and blocked in the hallways at school. Student told Ms. Knapp that s/he had not reported all of the bullying incidents to his/her teachers because they would not do anything about it other than talking to him/her. (Tr. 2 at 22-25, 31-33 and 84-85.) Although Ms. Knapp was aware of Student's tendency to embellish stories, she nevertheless believed that Student had been traumatized by the environment at LPMS. (*Id.* at 37-41.) Ms. Knapp diagnosed Student with an Acute Stress Disorder and later Post-Traumatic Stress Disorder related to his/her experiences with other students, primarily S and M, at LPMS. (Tr. at 15-16, 30 and 86.)

79. Also during the summer of 2013, the Parents discussed with Ms. Knapp their belief that Student would not feel safe returning to LPMS in the fall. In a progress note from session with the Parents on June 26, 2013, Ms. Knapp wrote: "We're in agreement that it would be traumatizing for [Student] to return to Linus Pauling Middle School. Parents are likely going to need services from school by going higher up in the district and appear willing to do so." (Ex. S2 at 16.)

80. Also on June 26, 2013, Student and Mother saw Dr. Pointon for a follow up evaluation. Mom reported that Student had been bullied so badly at school that she had to pull Student out of school in May to home school him/her. Student reported that s/he was very afraid of one student (M), who had been threatening him/her, stealing money from him/her and trying to get Student to steal from others. Student also reported feeling guilty for letting himself be bullied and not protecting his/her friend (B) from being beaten up. Mother reported that Student had been having nightmares and trouble sleeping. Dr. Pointon diagnosed Asperger's Disorder, Generalized Anxiety Disorder and rule out PTSD. Dr. Pointon proscribed a trial of Zoloft for Student to treat his/her anxiety. (Ex. S4.)

81. On July 3, 2013, Student and the Parents saw Dr. Pointon for another follow up. The Parents reported that the Zoloft was making Student more irritable, nervous and abrupt. Student reported feeling "twitchy." Dr. Pointon recommended discontinuation of Zoloft and a trial of Lexapro to treat Student's anxiety. (Ex. S5.)

82. On August 5, 2013, Student and Mother saw Dr. Pointon for an office visit. Mother reported that Student was having problems with compulsions and obsessions. Mother also reported that she had increased Student's Lexapro dosage and had been giving him/her Klonopin to keep him/her calm. Dr. Pointon noted Student's diagnoses as Asperger's Disorder, Generalized Anxiety Disorder and Obsessive Compulsive Disorder. Dr. Pointon told the Parents not to use Klonopin to treat Student's anxiety. She recommended other medication that was not as potentially addicting as Klonopin. (Ex. S6.)

83. During a meeting with Ms. Knapp on August 21, 2013, the Parents reported that

Student was somewhat less depressed, but obsessing more generally. They also reported that they were not happy with how Student was doing on medication. Ms. Knapp's progress notes indicate that they discussed Student's progress with regard to his/her post-traumatic stress symptoms related to the perceived bullying. The Parents reported that Student was struggling a lot with obsessive-compulsive behaviors. They also advised Ms. Knapp that they were considering sending Student to Corvallis Waldorf School. (Ex. D6 at 2; Ex. S2 at 27.)

84. On August 26, 2013, Mother visited the Corvallis Waldorf School and completed an application for Student's admission. On August 29, 2013, LPMS received a request to send Student's records to the Corvallis Waldorf School. (Ex. D7.)

85. Student attended the Corvallis Waldorf School for the 2013-2014 school year (seventh grade). Parents paid an enrollment fee and tuition totaling \$9,377.00 for Student to attend the Waldorf School for the 2013-2014 school year. (Ex. S48.)

86. The District has a strict anti-bullying policy. The District's policy defines "harassment, intimidation or bullying" as:

[A]ny act that substantially interferes with a student's educational benefits, opportunities, or performance that takes place on or immediately adjacent to district grounds * * * that may be based on, but not limited to, the protected class status of a person having the effect of:

- a. Physically harming a student or damaging a student's property;
- b. Knowingly placing a student in reasonable fear of physical harm to the student or damage to the student's property;
- c. Creating a hostile educational environment including interfering with the psychological wellbeing of the student.

(Ex. D16 at 4.)

87. The District's Anti-Bullying and Harassment Guide offers the following explanation of bullying:

A simple explanation is that bullying happens when someone keeps hurting, frightening, threatening, or leaving someone out on purpose. Bullying is a form of intimidation or domination toward someone usually accomplished through some sort of coercion or force. It may involve physical aggression such as fighting, shoving, or kicking; verbal aggression, such as name calling or threats; or emotional aggression, such as menacing looks or gestures, social isolation or harassment.

(Ex. D16 at 2.)

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CONCLUSIONS OF LAW

1. The District reasonably addressed the reported bullying of Student by another student, and did not deprive Student of FAPE in violation of the IDEA.
2. The Parents are not entitled to reimbursement for their unilateral placement of Student at Corvallis Waldorf School for the 2013-2014 school year.

OPINION

The burden of proof in an administrative hearing alleging violations of the IDEA, 20 U.S.C § 1400 *et seq.*, is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter, the Parents filed a due process complaint seeking a determination that Student was bullied at LPMS and that the bullying resulted in a denial of a FAPE to Student. The Parents seek reimbursement from the District for the cost of their unilateral placement of Student in the Corvallis Waldorf School. Thus, the burden rests on the Parents to prove these allegations.

In administrative hearings, a party who bears the burden must establish each fact or position by a preponderance of the evidence. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Cook v. Employment Division*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

The purpose of the IDEA is to ensure that all children with disabilities are provided a FAPE. 20 USC §1400(d)(1). In *Board of Educ. of Hendrick Hudson School District v. Rowley*, 458 US 176 (1982) (*Rowley*), the United States Supreme Court held that a district satisfies the FAPE requirement by “providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Rowley*, 458 US at 203. The Court set out a two-part test for evaluating complaints about the content of an IEP and the provision of a FAPE:

[A] court's inquiry in suits brought under [§ 1415(i)(2)] is twofold. First, has the State complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. [Footnotes omitted.]

Rowley, 458 U.S. at 206-207.

If a school district makes a FAPE available to the child and the parents choose to place the child in private school, then the district is not responsible for the cost of that private school

placement. 20 U.S.C. §1412(a)(10)(C)(i) and OAR 581-015-2515(1). If, however, the district fails to provide a FAPE to a child with a disability and the parents choose to enroll the child in a private school without the consent of or referral by the district, then the district may be required to reimburse the parents for the cost of that private school enrollment. 20 U.S.C. §1412(a)(10)(C)(ii) and OAR 581-015-2515(3).

Pursuant to 20 U.S.C. §1412(a)(10)(C)(iii)⁷ and OAR 581-015-2515(4),⁸ a school district's liability for cost of reimbursement for a private school placement may be reduced or denied if: (a) at the most recent IEP meeting, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (b) the parents fail to give the district at least 10 days written notice before removing the child from public school of their intent to enroll the child in private school at public expense. Pursuant to 20 U.S.C. §1412(a)(10)(c)(iii)(III) and OAR 581-015-2515(5)(b), the cost of reimbursement may also be reduced or denied "upon a judicial finding of unreasonableness with respect to actions taken by the parents."

⁷ 20 U.S.C. §1412(a)(10)(C)(iii) states:

- (iii) Limitation on reimbursement The cost of reimbursement described in clause (ii) may be reduced or denied—
 - (I) if—
 - (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
 - (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

⁸ OAR 581-015-2515(4) similarly states as follows:

- (4) The cost of reimbursement described in paragraph (3) of this section may be reduced or denied if:
 - (a) At the most recent IEP or IFSP meeting that the parents attended before removal of the child from the public school or ECSE program, the parents did not inform the IEP or IFSP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
 - (b) At least ten business days (including any holidays that occur on a business day) before the removal of the child from the public school or ECSE program, the parents did not give written notice to the public agency of the information described in paragraph (4)(a) of this rule.

Pursuant to OAR 581-015-02515(6)(a), the cost of reimbursement must not be reduced for the parents' failure to provide notice if: (a) compliance with the notice requirement would likely result in physical harm to the child; (b) the public agency prevented the parent from providing the notice; or (c) the parents had not received notice of procedural safeguards under OAR 581-015-2315 informing them of this notice requirement. *See also* 20 U.S.C. §1412(a)(10)(c)(iv)(I). And, under OAR 581-015-02515(6)(b) and 20 U.S.C. §1412(a)(10)(c)(iv)(II), the cost may not be reduced or denied for the parents' failure to provide notice if compliance with the notice requirement "would likely result in serious emotional harm to the child."

In this case, as set out above, the Parents allege that the District failed to provide Student a FAPE during the 2012-2013 school year by failing and/or refusing to properly address the bullying of Student by another student. As a remedy, the Parents seek reimbursement for the cost of Student's enrollment at Corvallis Waldorf School for the 2013-2014 school year.

Courts have recognized that bullying of a disabled student can result in a denial of FAPE under the IDEA. In *T.K. v. New York City Dept. of Education*, 779 F Supp 2d 289 (2011) (*T.K. I*), the court held that a disabled student is deprived of a FAPE when school personnel are deliberately indifferent to or fail to take reasonable steps to prevent bullying that substantially restricts a child with learning disabilities in his or her educational opportunities. The *T.K.* court noted that the conduct does not have to be outrageous to violate the IDEA but it must be sufficiently severe, persistent, or pervasive that it creates a hostile environment. *Id.* at 317. The court added:

When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

779 F Supp 2d at 317.

The Ninth Circuit has adopted a somewhat narrower test to determine whether a district denied a student a FAPE due to bullying. In *M.L. v. Federal Way School District*, 394 F3d 634 (9th Cir 2005), the court held as follows:⁹

⁹ In *M.L.*, the student, who had been placed in an integrated kindergarten class, attended school for five days. During that time, the student was teased by other students in class and during recess. Although the student's mother witnessed the teasing incidents and reported them to the teacher, the student was likely unaware of the teasing because he had been wearing headphones and listening to music at the time. When the teacher was told the teasing incidents, she said that she would watch for the behavior and intervene if necessary. A few days later, the student's mother witnessed additional teasing of her son. The teacher did not take any action. The parents opted to remove the student from the school. In finding that the situation did not constitute a denial of FAPE, the court explained that by removing the student

Under the IDEA, a disabled child is guaranteed a FAPE, 20 U.S.C. § 1412(1), which “provide[s] *educational benefit* to the handicapped child.” *Gregory K.*, 811 F.2d at 1314 (quoting *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034) (emphasis added). If a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE. *Cf. Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (holding that to violate Title IX “harassment ... [must be] so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit”).

394 F3d at 650-51.

In a 2010 Dear Colleague Letter regarding harassment and bullying, the U.S. Department of Education noted that a school is responsible for addressing harassment and bullying incidents about which it knows or reasonably should have known. The Letter identified the following as appropriate steps to be taken when discriminatory harassment has occurred: separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. October 26, 2010 Dear Colleague Letter at 3. The Department of Education also noted that the steps should not penalize the student who was harassed. Any separation of the target from an alleged harasser should be designed to minimize the burden on the target’s educational program (*e.g.*, not requiring the target to change his or her class schedule). *Id.*

In this case, Student and the Mother notified LPMS staff in late October 2012 that Student was being bullied at school, but they did not provide enough information to allow staff to investigate the allegations and/or address them. School staff responded promptly to Student’s email and asked that Student complete an incident report. Student did not do so, and did not provide any more specific information as to when and where the alleged incidents occurred and/or who was involved. Under these circumstances, *i.e.*, without knowing who was calling Student derogatory names and when during the school day this was happening, the District cannot be faulted for failing to take further action to address this alleged bullying of Student. The evidence demonstrates that although Student complained that s/he was being bullied constantly and throughout the day, no school staff ever witnessed him/her being ridiculed, harassed or bullied in class or elsewhere.

In October 2012, Student also complained to Ms. Madar that s/he had been “bullied” during a sumo wrestling match in PE, but the persuasive evidence demonstrates that this was not an instance of bullying as the term is generally understood or as defined in the district’s anti-bullying policy. Student was upset that s/he had lost a sumo wrestling match and that other students were watching and cheering during the match. Although this was not an incident of harassment or bullying, school staff nevertheless took prompt and appropriate actions in

from school after only five days, the parents failed to give the district a reasonable opportunity to find a way to prevent teasing in the future. The court also found that the parents failed to demonstrate that the teasing resulted in any loss of educational benefit to the student. 394 F3d at 651.

response to Student's complaint. Ms. Madar took Student back into the wrestling room to watch other students participate in sumo wrestling matches to show Student that s/he had not been targeted. Mr. McKee also followed up with both Student and D once he became aware of Student's concerns. Thereafter, Student continued to choose sumo wrestling as his/her PE activity and voiced no more concerns about D.

The record also establishes that school staff took prompt and appropriate action when, in February 2013, Student reported that another student had knocked a binder out of his/her hand. Both Ms. Madar and Ms. O'Connell investigated the incident and talked to the other student. Furthermore, while Student may have perceived this incident as bullying, it was not bullying as the term is generally understood or as defined in the district's anti-bullying policy. It was an isolated event and there is nothing to suggest that this student was attempting to intimidate or dominate Student. There is also no evidence that Student had any negative interactions with H after that.

When Student reported, in late March 2013, that S was bullying him/her, school staff again took prompt and reasonable steps to address Student's complaint. Even though it appeared to Student's teachers and Ms. Madar that Student and S were provoking and distracting each other (as opposed to S bullying Student), Ms. McConnell and Ms. Madar spoke with S and Student about Student's concerns. They discussed appropriate versus inappropriate behavior and the need to respect boundaries. They tried to clarify with Student the difference between bullying and fooling around and provoking each other. When, a few weeks later, Student's language arts teacher saw that Student and S were again provoking each other in class and failing to comply with the no contact order, the two were moved to different sides of the room. S was told to remain in his seat when Student was up and pacing in the back of the room. These measures were apparently successful in keeping Student and S apart, as Student did not raise further complaints about S.

In early May 2013, Student first reported that M had been bothering him/her, grabbing him/her by the neck and threatening him/her. School staff promptly investigated Student's complaint and, in response, Ms. Madar initiated a plan to keep Student and M apart during the school day. During the May 6, 2013 IEP meeting, when Mother voiced concerns about M bullying Student, the team documented her request that M and Student not have any classes together in the future. The next day, when Mother emailed the school and asserted that M had been threatening Student and Student's family with violence, staff met with M and directed him to have no contact with Student. M was placed under a Cease and Desist directive and no contact plan. A few days later, after M handed Student an innocuous note during a school assembly, school staff again met with M to address his violation of the Cease and Desist order. Staff revised M's no contact plan. Ms. Madar followed up with M to discuss friendship and appropriate social behaviors. Thereafter, on May 15, 2013, Student advised Ms. Madar that the plan was working and M was not contacting him. And, on May 16, 2013, Student similarly advised Ms. McConnell that things were going well and there were no problems with M. Nevertheless, the following day (and for essentially the remainder of the school year) the Parents kept Student home from school.

During the May 23, 2013 meeting with the Parents, school staff offered additional

measures to keep Student and M apart during the school day. School staff suggested altered passing times, increased shadowing and monitoring of both Student and M, and providing Student with safe/calm rooms that s/he could access during lunch and breaks. The Parents rejected these suggestions. But, the fact that the Parents were not satisfied with the school's plan to keep Student and M apart and the meeting concluded without any resolution does not mean that the school failed to take prompt and appropriate action in response to Student's complaint about M.

In sum, with the exception of the situation with M (of which school staff first became aware of in early May 2013), the evidence fails to establish that Student was bullied during the 2012-2013 school year. As for the situation with M, the evidence demonstrates that M harassed and/or bullied Student by pressure pointing Student's neck and by threatening him/her and his/her family with violence. However, the evidence also shows that, once notified of the situation, LPMS staff investigated and then took prompt and reasonable steps to prevent M from harassing Student in the future. The steps included separating Student and M, imposing restrictions on M during the day, increased shadowing and monitoring of Student and M, and taking corrective action against M for his violation of the no contact order. Additionally, the steps taken to keep Student and M apart during the school day did not restrict or burden Student's educational program in any way.

Despite the Parents' contention, the facts of this case are not analogous those in *T.K. v. New York City Dept. of Education* discussed above. That case involved a 12 year old student, LK, who was originally diagnosed as autistic and then reclassified as learning disabled. The evidence demonstrated that, towards the end of the 2006-2007 school year, LK had been intentionally pinched, bruised and injured by another student. LK's parents reported the incident to the school and asked that they be informed of any action taken. The school later indicated that the matter had been taken care of, but refused to elaborate on how it had been addressed. Then, the following fall, this same student stomped on LK's toes. Even though LK continued to have problems with this other student, they remained in the same classroom. Throughout the 2007-2008 school year, LK complained to her parents almost daily about being bullied at school. Three of LK's special education itinerant teachers from the 2007-2008 school year confirmed that LK had been the subject of ridicule from other students and ostracized in the classroom. The evidence also established that LK's classroom was a hostile environment, and that the other students frequently avoided her, treated her like a "pariah" and laughed at her for trying to participate in class. *T.K. v. New York City Dept. of Education*, 2014 WL 3687244 (E.D.N.Y. July 2014) (*T.K. II*).

Here, unlike *T.K.*, once notified of Student's concerns about M (on Friday, May 3, 2013), school staff took prompt action to keep Student and M apart during the day. Mr. Beasley followed up with the Parents, letting them know that the matter had been investigated and that measures were being taken to address the problem. On May 8, 2013 (three school days after Student's incident report and the day after Mother's email), Mr. Beasley informed the Mother that: (1) M would be subject to a cease and desist order; (2) that Ms. Becker would continue strategic seating and monitor interactions between Student and M in class; (3) M would be placed on a different lunch rotation; (4) Ms. Madar would increase shadowing in passing times and breaks and use strategic seating to keep Student and M apart.

Also, unlike *T.K.*, the evidence fails to show that Student was ridiculed by other students, ostracized in class or treated like a pariah. As discussed above, Student alleged that s/he was constantly bullied and called names, but such incidents were never witnessed by school staff and Student never provided the school with specific information so that his/her claims that could be investigated. Ms. Madar spent significant time with Student and/or shadowing Student throughout the school day and, until Student reported problems with M, she never witnessed or heard of him/her being bullied. Ms. Madar checked in with Student's teachers, who also said they had never seen or heard of him/her being bullied. Similarly, Mr. McKee never saw other students disrespect or harass Student during PE class or elsewhere at school. Additionally, and again unlike *T.K.*, this case does not present a situation in which the school's response to Student's complaint would have given M, or any other student about whom student filed a report, the impression that the alleged behavior was appropriate. LPMS staff took Student's and the Parents' concerns seriously and responded appropriately. Under these circumstances, it cannot be found that LPMS staff acted with "deliberate indifference" towards Student's and the Parents' reports of Student being bullied.

Citing to *T.K.*, the Parents also contend that Student's IEP team's failure to address the bullying issue in Student's May 2013 IEP conclusively demonstrates deliberate indifference on the District's part. (Parents' Closing Argument at 23.) Considering the circumstances, however, this contention is not persuasive. As discussed above, Student first reported being bullied by M on Friday, May 3, 2013. Student's IEP team met on Monday, May 6, the next school day. Student's previous complaints – the sumo wrestling incident, the binder incident, and Student's allegations regarding S, had already been addressed and resolved. At the time of the IEP meeting, there was no evidence suggesting that the situation with M was impacting Student's academic performance. Student was making progress and met many goals from his/her 2012 IEP. Mother requested that Student have the same level of support in the next year and did not request additional services, goals or related services. The team agreed upon the services, modifications and accommodations for Student for the upcoming year. As for bullying, Mother requested that Student not have any classes with M and that request was documented in the meeting minutes. Consequently, when viewed in this context, the fact that Student's May 2013 IEP did not specifically address bullying is not determinative.

The evidence also fails to establish that these reported incidents resulted in the loss of an educational benefit to Student. As discussed above, Student made progress during the 2012-2013 school year. His/her testing scores showed that s/he was on or above target in reading and that s/he was making progress (though still below the benchmark) in math. S/he also made progress and met goals in the area of self-regulation and speech/language communication. Student maintained a GPA comparable to what s/he had earned before the alleged bullying occurred. Moreover, just a day or two before the Parents elected to pull Student out of school on May 17, 2013, Student reported to Ms. Madar and Ms. McConnell that the no contact plan was working and there were no problems with M. Accordingly, the Parents have not demonstrated that the situation with M impaired Student's opportunity to receive a FAPE.

Additionally, and despite the Parents' contention, the fact that Student developed what Ms. Knapp diagnosed as an Acute Stress Disorder and later PTSD does not mean the District

denied Student a FAPE.¹⁰ Even if the situation with M was a significant cause of Student's emotional distress in the latter part of the 2012-2013 school year, the school nevertheless satisfied its legal obligations under the IDEA by investigating Student's complaint and taking prompt and reasonable steps to prevent M from harassing or bullying Student in the future. See *T.K. I*, 779 F Supp at 317 ("When responding to bullying incidents * * * a school must take prompt and appropriate action. * * * If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future.").

Having found that the District made a FAPE available to Student, there is no need to address whether the Parents are entitled to reimbursement for their unilateral placement of Student at Corvallis Waldorf School. OAR 581-015-2515(1) and 20 U.S.C. §1412(a)(10)(C)(i). However, even assuming that the District bore some responsibility for interfering with Student's education (which has not been shown in this case), the Parents' failure to give the District proper written notice before removing Student from LPMS provides a further basis on which to deny the requested reimbursement.

As set out above, pursuant to OAR 581-015-2515(4) and 20 U.S.C. §1412(a)(10)(C)(iii), the Parents had an obligation to either (a) inform Student's IEP team at the May 2013 IEP meeting that they were rejecting Student's proposed placement at LPMS for the 2013-2014 school year or (b) give written notice of their intention to enroll Student in a private school at public expense 10 days before they removed Student from LPMS. The purpose of this notice provision is to give the district an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a FAPE can be provided in the public schools. See *West-Linn Wilsonville School Dist. v. Student*, 63 IDELR 251 (D Or 2014). In this case, the Parents did not reject Student's proposed placement at the May 2013 IEP meeting, nor did they give the District 10 days' written notice before enrolling Student at Corvallis Waldorf School in late August 2013.¹¹

¹⁰ As set out in the findings above, Dr. Pointon, a psychiatrist who first evaluated Student on April 23, 2013 and saw him for follow up appointments in June, July, August, September and October 2013, diagnosed Student with a Generalized Anxiety Disorder. Dr. Pointon ruled out PTSD and did not specifically relate Student's anxiety to being bullied at school.

¹¹ Citing to Mother's October 30, 2012 email in which she reported that Student was being bullied at school at advised Principal Beasley that she was "extremely angry and ready to remove [Student] from Linus Pauling" (Ex. S12), Parents assert that they gave the District the required 10-day notice. (Parents' Closing Argument at 31-32.) Parents further argue that because they had been in regular contact with the school about the bullying issue throughout the remainder of the school year, the notice, which came nearly 10 months before their decision to enroll Student at the Corvallis Waldorf School, was not too attenuated. (*Id.*) These arguments are not persuasive. Indeed, the law specifically requires that the parents reject the child's proposed placement at the IEP meeting and state their to "enroll their child in a private school at public expense" or give the district written notice of this information at least 10 days before removing the child from public school. OAR 581-015-2515(4) and 20 U.S.C. §1412(a)(10)(C)(iii); see also *Ashland School Dist. v Parents of EH*, 583 FSupp2d (D Or 2008) (discussing the notice requirement). Mother's assertion that she was angry and ready to remove Student from LPMS is not the same as stating the Parents' intent to enroll Student in private school at the District's expense. Further, as the Parents concede, they did not actually make the decision to enroll

Although, there are exceptions to the 10-day written notice requirement, such as when compliance with the requirement would likely result in physical or serious emotional harm to the child or if the parents did not receive notice of the procedural safeguards informing them of the notice requirement (OAR 581-015-2515(6) and 20 U.S.C. §1412(a)(10)(C)(iv)), the exceptions are not applicable in this case. The Parents have made no showing that complying with the 10-day notice requirement would have caused any harm to Student. Indeed, the record demonstrates that Parents made the decision to place Student in private school over several weeks during the summer of 2013. They therefore had ample time to notify the District of their intention to enroll Student in private school at public expense. The record further demonstrates that, on more than one occasion (first, in connection with the February 2012 special education eligibility meeting and then at Student's May 2012 and May 2013 IEP meetings), the Parents were given a copy of the Notice of Procedural Safeguards, informing them of the notice requirement. Consequently, the Parents were not exempt from the IDEA's 10 day notice requirement.

To conclude, the Parents have alleged that the District violated the IDEA by failing and/or refusing to properly address the bullying of Student by another student during the 2012-2013 school year. For the reasons explained herein, I find that the Parents failed to prove those violations. To the contrary, school staff took prompt and appropriate steps to address Student's and/or Mother's concerns. Specifically, when notified of the situation between Student and M (in early May 2013), LPMS staff investigated and implemented reasonable measures designed to keep Student and M apart at school. Therefore, the Parents' requested relief must be denied.

ORDER

Parents' request for relief, pursuant to the request for due process hearing dated May 9, 2014, is **DENIED**.

Alison Greene Webster

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 12th day of December, 2014 with copies mailed to:

Student in private school until August 2013. Given these circumstances, Mother's October 2012 threat to remove Student from LPMS does not constitute compliance with the IDEA's 10-day notice requirement.

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