

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

IN THE MATTER OF:THE) **FINAL ORDER**
EDUCATION OF)
)
STUDENT V DALLAS SCHOOL)
DISTRICT) OAH Case No. 2017-ABC-00291
) Agency Case No. DP 17-103

HISTORY OF THE CASE

On January 26, 2017, Parent filed a Request for a Due Process Hearing (Complaint) with the Oregon Department of Education on behalf of AM (Student) alleging the Dallas School District (the District) violated federal and state statutes, federal regulations, and state administrative rules during the 2014/2015¹, 2015/2016, and 2016/2017 school years (the period in issue).

On January 26, 2017, the Oregon Department of Education (ODE) referred the case to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to conduct the due process hearing and issue a Final Order in this case.

On February 27, 2017, Senior ALJ Allen presided over a telephonic prehearing conference. Parent appeared through Counsel Diane Wiscarson and Elizabeth Polay. Kelly Noor, attorney at law, appeared and represented the District. The parties agreed to the issue statements for hearing as stated on in the Complaint. Also, during the conference, Parent requested and the District agreed to extend the final order due date to October 17, 2017. The parties also agreed to an in-person hearing on July 10 through 14, and 17 through 21, 2017 in Salem, Oregon. The hearing was later extended to 18 days. At the request of both parties, the Final Order due date was extended to March 1, 2018.

Senior ALJ Allen convened an in-person hearing on July 10 through 14, 17 through 21, September 18 through 22, October 19, 23, and 24, 2017, in Salem, Oregon. Ms. Wiscarson and Ms. Polay appeared and represented Parent and Student. Ms. Noor appeared and represented the District. Michelle Johnston, Superintendent for the District appeared but did not testify. The following individuals appeared and testified on behalf of the District:

¹ The Complaint specifies that Parent’s claims are limited to that portion of the 2014/2015 school year that falls within the two-year statute of limitations, *to wit* the period after January 26, 2015. (Complaint at 23.) This order accepts that representation for all background facts other than those applicable to the March 13, 2014 eligibility determination and IEP meeting, which is addressed fully in this order for reasons specified herein. All other facts referencing matters prior to January 26, 2015 are included only for historical purposes and context.

- Autymn Galbraith, Director of Special Education for the District;
- Linda North, Deaf and Hard of Hearing Specialist for Willamette Educational Services District (ESD);
- Danielle Dennis, Speech/Language Specialist for Willamette ESD;
- Brian Detweiler-Daby, Vision Specialist for Willamette ESD;
- Antonette (Anne) Olson-Murphy, Vision Specialist for Willamette ESD;
- Susan Duncan, Vision Specialist for Willamette ESD;
- Maureen Lenz, Physical Therapist for Willamette ESD;
- Edina Logan, Occupational Therapist for Willamette ESD;
- Lyn Ayer, PhD, Director of the Oregon Deafblind Project at Western Oregon University²;
- Sylvia Lawson, Registered Nurse (R.N.), school nurse at Whitworth Elementary School (Whitworth) in the District;
- Diana Christensen, special education classroom teacher and case manager at Whitworth;
- Amy McFarland, Developmental Learning Center (DLC) teacher at LaCreole Middle School (LaCreole) in the District;
- Jennifer Oace, R.N./Educational Assistant (EA);
- Tanya Stutzman, general education classroom teacher at Whitworth; and
- Linda Visuano, EA for the District.

In addition, the following individuals appeared and testified on behalf of Student:

- Bethany Stanley, Student's private Speech Language Pathologist and Augmentative and Alternative Communication Specialist;
- Linda Alsop, Director of Utah State University Program of Studies in Deafblindness, Communication Disorders, and Deaf Education Department³;
- Parent (Mom) of Student;
- Tami Ferris, EA for Student from 2012-2014;
- Ruth Auker, Private home care service provider for Student;
- Jessica Bailey, Private home care service provider for Student;
- Heather Durham, Audiologist;
- Constance Smith, Licensed Practical Nurse (LPN);
- Kathleen Johnson, Special Education Advocate;
- Sonya Lange, Private home care service provider for Student;
- Jennifer Hargis, Physical Therapist; and
- Sharlene Meakins, R.N., in-home nursing services and substitute 1:1 nurse for Student at school.

² Dr. Ayer was designated as an expert in deafblind children and multiple disabilities associated with deafblind impairments.

³ Linda Alsop was designated as an expert in deafblindness and interveners for deafblind students.

Subsequent to the hearing, counsel for Parent requested an extension of the briefing schedule for closing arguments and the Final Order, due to weather related issues causing damage to counsel's office. The District did not oppose this extension and the judge granted Parent's request extending the briefing schedule to March 1, 2018 and the Final Order due date to April 2, 2018. The parties submitted written closing arguments on March 1, 2018. The record closed on that date.

ISSUES

1. Whether the District denied Parent the opportunity for meaningful participation in the formulation and enforcement of Student's IEP⁴, which denied Student educational opportunities and, therefore, denied Student a free appropriate public education (FAPE) during the 2014/2015 academic year, in violation of the Individuals with Disabilities Education Act (IDEA) and its implementing Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR).

2. Whether District failed to properly identify Student as a student with a disability in all areas of suspected disability and misidentified Student as a student with an Intellectual Disability during the 2014/2015 academic year, in violation of the IDEA and its implementing ORS and OARs.

3. Whether District failed to properly evaluate Student during the 2014-2015 academic year, in violation of the IDEA and its implementing ORS and OARs.

4. Whether District failed to provide Student a FAPE by failing to meet his/her educational needs during the 2014/2015 academic year, in violation of the IDEA and its implementing ORS and OARs.

5. Whether District failed to provide Student with an appropriate placement during the 2014/2015 academic year, in violation of the IDEA and its implementing ORS and OARs.

6. Whether District failed to properly evaluate Student during the 2015/2016 academic year, in violation of the IDEA and its implementing ORS and OARs.

7. Whether District failed to provide Student a FAPE by failing to meet his/her educational needs during the 2015/2016 academic year, in violation of the IDEA and its

⁴ As originally stated in the complaint, Issue 1 encompassed allegations by Parent that the District failed to provide Parent with IEP Progress Reports, completed an Augmentative Communication Screening Checklist without parental knowledge, and failed to provide Parent with a completed Augmentative Communication Screening Checklist upon request. Nonetheless, in the complaint and at hearing, Parent alleged facts sufficient to raise the issue of whether the District also denied Parent the opportunity to participate in the eligibility determination and IEP formulation process for Student's March 2014 IEP. As discussed more fully in section 1.a. of the Opinion, this order finds it is appropriate to address this limited procedural violation that falls outside the two-year statute of limitations established by 20 U.S.C. §1415(f)(3)(C). Accordingly, this order addresses this procedural violation pled in the due process complaint, regardless of phrasing of the issue statements on the face of the complaint.

implementing ORS and OARs.

8. Whether District failed to provide Student with an appropriate placement during the 2015/2016 academic year, in violation of the IDEA and its implementing ORS and OARs.

9. Whether District failed to properly evaluate Student during the 2016/2017 academic year, in violation of the IDEA and its implementing ORS and OARs.

10. Whether District failed to provide Student a FAPE by failing to modify instruction and/or content to meet his/her level of ability during the 2016/2017 academic year, in violation of the IDEA and its implementing ORS and OARs.

11. Whether District failed to provide Student with an appropriate placement during the 2016/2017 academic year, in violation of the IDEA and its implementing ORS and OARs.

EVIDENTIARY RULINGS

Exhibits D1 through D283 and D284 through D346, offered by the District, were admitted into the record without objection. Exhibit D238A, offered by the District, was excluded because it was not provided to Student at least five days prior to the hearing date. Exhibits S1 through S289, S291 through S299, and S301 through S331, offered by Student were admitted into the record without objection. Student withdrew Exhibits S290 and S300 at the outset of the hearing.

At hearing, Parent offered Exhibit S332, the *curriculum vitae* (CV) for rebuttal witness Sharla Jones, PhD., Director of the Oregon School for the Deaf. Dr. Jones was called to rebut specific testimony of Susan Duncan, Orientation and Mobility Specialist for Willamette ESD. The District objected to admission of Ex. S332 and moved to prohibit introduction of the document pursuant to 34 C.F.R. §300.512(a)(3) and OAR 581-015-2360(5)(b) (C) (commonly referred to as the five-day rule) because the document was not disclosed to the District at least five business days prior to the hearing. That objection was reserved for ruling in the Final Order. Because the testimony and CV of Dr. Jones was offered solely to rebut unanticipated testimony of a District witness, the objection is overruled and Ex. S332 is admitted into the record over the District's objection. To rule otherwise would require interpreting the five-day rule as prohibiting all rebuttal evidence. The plain text of the federal regulations does not include such language and I decline the District's invitation to infer such intent on the part of the drafters.

FINDINGS OF FACT

Early medical diagnoses and intervention.

1. Student was born on June 2, 2005. *See* Ex. S1. Student has been a resident of the District during the entirety of the period in issue. (Tr. Vol XIV at 2664:7 through 20.)

2. Student was diagnosed in utero with Dandy-Walker malformation, a disorder

which inhibits the development of Student's brain. Student has also been diagnosed with atretic ears, microcephaly, cerebral palsy, vision and hearing impairments, and gastroesophageal reflux. (Tr. Vol. XIV at 2662: 13 through 2263:9.) Student also suffers from a seizure disorder. (Tr. Vol I at 41:22 through 23.) In addition, Student developed dysautonomia during the period in issue. (Tr. Vol. XI at 2352:25 through 2353: 3; *see also* Exs. S3 and S4.)

3. On June 22, 2005, Denise Kossover-Wechter, Clinical Audiologist at Legacy Emanuel Hospital in Portland, completed an Audiology Department Report (2005 Audiology Report) for Student when he/she was 20-days old. In that report, Ms. Kossover-Wechter indicated Student "did not pass [his/her] newborn hearing [sic]." (Ex. S1.) In the 2005 Audiology Report, Ms. Kossover-Wechter also opined, "These results suggest at least peripheral hearing sensitivity essentially in the /mild [sic] loss range for the right ear and in the moderate to severe loss range for the left." (*Id.*) Ms. Kossover-Wechter also indicated that an auditory brainstem response (ABR) test was completed. (Ex. S1.)

4. On October 21, 2005, Muriel Liggett, Early Intervention/Early Childhood Special Education (EI/ECSE) Specialist with Willamette ESD, and Lisa Williams , EI/ECSE Deaf and Hard of Hearing Specialist, completed an Initial Developmental Evaluation Report for Student (2005 IDE). (Ex. S4.)

5. In the 2005 IDE, Ms. Williams and Ms. Liggett noted the following cognitive abilities for Student: "[v]isually attend to a light source or interesting object moving in about a 50 degree arc directly in front of [him/her] (When [he/she] is attending, [he/she] * * * generally tracks side to side more than up and down; [he/she] can track a slowly moving object by turning [his/her] head if [he/she] is engaged); Focus toward a light source; Respond positively to social contact and tactile stimulation." (Ex. S4 at. 2.)

6. In the 2005 IDE, Ms. Williams and Ms. Liggett also indicated the following observations with regard to Student's social, emotional, and behavioral capabilities: "[s]ometimes looks at an adult's face; [e]stablishes eye contact; [a]wakens or quiets to [P]arent's voice (likes Mom the best of all people; [p]hysically responds when held; [s]ometimes shows a desire to be picked up or held by familiar people; [s]ometimes smiles to adult attention; [s]tarting to enjoy social play (smiles if you move your arms or sing); [l]ikes music[,] loves lights." (Ex. S4 at 3.)

7. In the 2005 IDE, the evaluators also stated that Student was capable of the following in the area of gross motor skills or abilities: "[m]aintain upright posture while being held on adult's shoulder; [h]old head up briefly when prone and does a little better when [his/her] mother helps [him/her]; [w]hile lying on stomach, is starting to turn head from side to side; [w]hile sitting, is starting to turn head from side to side; [e]xtends both legs * * *; Parent reports that [he/she] is starting to bear some weight on legs with total support." (Ex. S4 at 3.)

8. The 2005 IDE also indicated Student was capable of the following in the area of receptive communication: "[s]ometimes responds to sounds (voices and some loud sounds); i]s soothed by a familiar adult's voice; [s]ometimes attends to someone speaking to [him/her] (at least briefly and only when the person is interesting to [him/her]); [m]ay watch the speakers [sic]

eyes and mouth – studies faces if [he/she is] interested.” (Ex. S4 at 4.)

9. Student was identified as eligible for, and received, EI/ECSC prior to attaining school age in the area of hearing impairment (HI) and developmental delay (DD). (Tr. Vol XIV at 2663:20 through 25; Exs. S5 and S6.)

10. On December 6, 2005, Linda Poling, OTR/L, completed an Initial Sensory/Motor Evaluation of Student (2005 Sensory Evaluation). In the 2005 Sensory Evaluation, Ms. Poling stated that Student’s “[h]ands are fistled with elbows bent, legs are drawn up indicating high tone. [He/She] has very little head control in sitting. Strength is poor for developmental age.” (Ex. S8 at 1.) Ms. Poling also noted, “[Student] demonstrates full range of motion of all joints. However it does take extra time to move the joints into position secondary to high tone. Mother provides massage on a regular basis.” (Ex. S8 at 2.) In the 2005 Sensory Evaluation, Ms. Poling also stated, “[Student’s] difficulties with sensory defensiveness, hearing, feeding, possibly vision, and maintaining [his/her] respiratory status all affect [his/her] ability to learn from [his/her] environment.” (*Id.*)

11. On January 9, 2006, A. James Nezol, Ed.D., Willamette Education Services District (ESD) Vision Specialist, completed a Functional Vision Assessment of Student (2006 Vision Assessment). (Ex. S9.) Dr. Nezol observed, “[Student] was very attracted by black and white stimuli and could track them by moving [his/her] head. While [he/she] did not display a consistent blink reflex, [his/her] visual awareness was definitely focused and directed.” (*Id.* at 1 and 2.) In addition, Dr. Nezol noted, “[Student’s] ability to utilize [his/her] vision at testing was better than previously reported and thus just beginning to emerge.” (*Id.*) Dr. Nezol also stated, “[b]ased on [his/her] diagnosis of optic atrophy and other disorders by Dr. Goodman and on [his/her] current visual functioning, [Student] qualifies as visually impaired. While vision could and probably will improve, it would be prudent to provide the services of a vision specialist to help with [his/her] visual development[.]” (Ex. S9 at 2.)

12. On January 24, 2006, Willamette ESD found Student eligible for EI Services under the eligibility category of Vision Impairment (VI). (Ex. S10.)

13. Linda North, Willamette ESD Hearing Specialist, began working with Student in the home setting, transitioned into the preschool setting, and continued to work with Student in the school setting. Tr. 2509: 17-21. Ms. North has worked with approximately six deafblind students over the course of her career. (Tr. Vol XIII at 2505:3 through 2506:6.)

14. Ms. North believes that, at the time of the 2005 Audiology Report, Student could hear some speech sounds in the right ear, but that Student could not hear any sounds related to speech in the left ear. (Tr. Vol XIII at 2514:1 through 9.)

15. Student’s hearing impairment, combined with his/her visual impairment, and limited mobility, affects how Student learns. Accordingly, the pairing of information for Student needs to be “more than just the auditory.” (Tr. Vol XIII at 2515:13 through 2516: 14.) Ms. North believes that Student’s hearing impairment would impact language development unless Student had early intervention to appropriately fit him/her with amplification. (Tr. Vol XIII at

2516:15 through 25.) Ms. North believes that hearing is extremely critical for language development at early ages. (Tr. Vol XIII at 2524:12-16.)

16. Anne Olson-Murphy (Ms. Olson-Murphy), Willamette ESD Vision Specialist, started working with Student in the home setting when Student was one year old and continued through Student's time in preschool. (Tr. Vol XI at 1985:25 through 1986:6.)

17. On January 31, 2008, Nadine Palmeteer, MA, CCC-A, FAAA, Willamette ESD Audiologist, completed an audiogram for Student (2008 audiogram). (Ex. D10 at 9.) In the 2008 audiogram, Ms. Palmeteer observed, "[a]ided soundfield testing was performed with [Student] wearing [his/her] Starkey BC1 hearing aid. Minimal responses reveal a significant improvement in thresholds. * * *[Student] responded consistently to speech stimuli ([his/her] mother's voice) presented at 25dB. * * * It appears that [Student's] hearing aid is providing [him/her] with good benefit. [His/Her] ability to detect the presence of speech stimuli indicates that [Student] should be aware of the presence of softer speech at a distance of three feet (test conditions)." (Ex. D10 at 9.)

18. On April 28, 2008, Eileen S. Weekley, LPT, completed a Three Year Motor Reevaluation of Student (2008 Motor Evaluation). (Ex. S13.) In the 2008 Motor Evaluation, Ms. Weekley stated that Student is "happy when [he/she] can be in the center of activity around [him/her]. [He/She] is very vocal when happy and will squeal; at times, quite loudly!" (Ex. S13 at 1.) Ms. Weekley also noted that Student "has shown some definite progress in [his/her] ability to tolerate touch and sensory stimulation. [He/She] rarely 'tunes out' and falls asleep when exposed to sensory stimulation; a year ago, this was quite a common occurrence." (Ex. S13 at 2.) Further, Ms. Weekley opined that it was "imperative that [Student] be intentionally incorporated into the daily classroom activities/routines with specific learning strategies and accommodations." (Ex. S13 at 3.) In the 2008 Motor Evaluation, Ms. Weekley recommended: "[Student] will require a dedicated 1:1 classroom assistant, as well as a bus rider to monitor [his/her] head position during [his/her] bus ride. [He/She] will require a supine stander and Tumbleforms seat in the classroom setting for positioning. Extensive training of preschool staff will be needed to address [Student's] positioning and handling needs." (*Id.*)

19. On May 1, 2008, Ms. Olson-Murphy completed a Functional Vision Evaluation of Student (2008 Vision Evaluation). (Ex. S14.) In the 2008 Vision Evaluation, Ms. Olson-Murphy stated that Student showed response to people moving around him/her. Ms. Olson-Murphy also observed that Student "uses head turn to follow lighted objects, especially if they were paired with sound. [Student] does not show a typical blind reflect to light, movement, air or sound." (Ex. S14 at 2.) In addition, Ms. Olson-Murphy stated, "[Student] shows the greatest use of [his/her] residual vision when items are presented to [him/her] in a consistent, predictable pattern with little clutter and high contrast. [He/She] enjoys the light box, and is working at hitting a switch to turn the patterns on." (*Id.*)

20. In the 2008 Vision Evaluation, Ms. Olson-Murphy made the following recommendations, among others:

- a. Continue to expose [Student] to a variety of learning media including tactile, auditory and visual presentations. Combining these senses will give [him/her] more information about the object and [his/her] environment;
- b. Use object and touch cues CONSISTENTLY for communication;
- c. The vision specialist should help provide toys and objects for concept and sensory development; and
- d. Visual clutter should be avoided. Providing one or two objects against a high contrast background with no distractions will help direct vision use.

(Ex. S14 at 2 and 3, emphasis original.)

21. On May 30, 2008, Willamette ESD found Student eligible for special education and related services under the eligibility categories of VI, HI, and Orthopedic Impairment (OI). (Exs. S15, S16, and S17.)

22. Lyn Ayer (Dr. Ayer), Ph.D., is the Director for the Oregon Deafblind Project based out of the Research Institute at Western Oregon University (WOU). (Ex. S330.) Dr. Ayer has worked in the educational and deafblind fields since 1973 and has over 40 years of experience in the fields of general education and deafblind education. (*Id.*; Tr. Vol II at 202:21 through 24.)

23. The Oregon Deafblind Project offers training to school districts and parents of students who are deafblind. The Oregon Deafblind Project does not provide direct service to students and/or school districts. (Tr. Vol II at 209:12 through 25.)

24. Dr. Ayer has been involved with Student since Student was in preschool. Dr. Ayer cannot stay involved with a student's educational program unless the school district or a parent requests training. Dr. Ayer has not stayed consistently involved with Student's educational program after preschool because "[t]here was no training requested." (Tr. Vol II at 210:20 through 211:2 and 332:15 through 333:8.) Tr. 333:2-8.

25. Each regional educational program (i.e., Willamette ESD) in Oregon has a designated deafblind consultant who coordinates with the Oregon Deafblind Project. (Tr. Vol II at 210:1 through 13.) Ms. Olson-Murphy has been the regional consultant for District since at least 2007 when Dr. Ayer moved to Oregon. (Tr. Vol II at 211:14 through 18.)

26. The Oregon Deafblind Project is part of a network for the National Project on Deafblindness. The National Project on Deafblindness was asked by the federal government to enhance and direct a training program for deafblind "interveners" (herein after, interveners). (Tr. Vol II at 204:20 through 206:9.) The National Project on Deafblindness and the Oregon Deafblind Project reach out to providers who are involved in the field of preparing special educators. (*Id.*)

27. Student has been on the deafblind registry since birth. (Tr. Vol XI at 2132:12 through 16 and 2133:6 through 8.) A student on the deafblind registry normally receives deafblind services from his or her school district. (Tr. Vol V at 990:20 through 23.)

28. According to Dr. Ayer, an intervener is a dedicated 1:1 aide with very specific background and training to assist a deafblind student. (Tr. Vol II at 250:6 through 15.) According to Dr. Ayer, there is a difference between a paraprofessional (i.e., educational assistant) and an intervener. (*Id.*) There is only one program preparing interveners in the United States, which is at Utah State University. (*Id.*)

29. Intervener training involves completing three semesters of college-level coursework. (Tr. Vol II at 249:9 through 13.) Intervener training also involves working with deafblind students during the third semester of training. (Tr. Vol II at 252:8 through 16.) The intervener training involves “total background, in vision, in hearing and the combination,” as well as how to communicate with a deafblind student. (Tr. Vol II at 251:17 through 252:16.) Part of the intervener training program can be completed online. A person who completes the intervener training program would not need to attend classes in person for the first two semesters and the practicum during the third semester can be supervised remotely and reported back to the Utah program. Tr. Vol II at 327:20 through 328:2 and 345:12 through 21.)

30. The National Project on Deafblindness was “directed to prepare a set of online modules that would assist in training people who are working with children who are deafblind.” (Tr. Vol II at 206:13 through 19.) The deafblind modules were meant to train interveners but they have also been used by specialists in deafblindness, parents of children with deafblindness, and others. (Tr. Vol II at 206:20 through 25.) There are currently 27 modules created by the National Project on Deafblindness and each module takes approximately nine hours to complete. (Tr. Vol II at 207: 1 through 7.)

31. Dr. Ayer offers certain training modules for use by school district personnel that include a limited portion of the material a credentialed intervener is required to learn. (Tr. Vol II at 251: 17 through 252:16.) Dr. Ayer believes the deafblind modules are helpful in learning to work with a deafblind student but they are not enough to serve as an intervener for the student. (Tr. Vol II at 386:20 through 385:25.) According to Dr. Ayer, the modules are meant to be used as in-service training tool for school districts. (Tr. Vol II at 386:4 through 8.) Dr. Ayer did not offer modules to the District prior to the 2015/2016 academic year. (Tr. Vol. II at 330:14 through 19.) At that time, only eight modules were available to District staff. (Tr. Vol II at 331: 17 through 23.) The remainder of the modules became available to District staff as of September 2016. (Tr. Vol II at 331:17 through 332:10.)

32. Dr. Ayer believes Student would make progress toward IEP goals if Student had an intervener with him/her at school. (Tr. Vol II at 324:14 through 24.) Student might develop more consistency, be able to understand things better, and be able to see things better if Student had an intervener at school. (Tr. Vol II at 386:9 through 387:4.) Dr. Ayer believes an intervener would do much more for Student with communication and mobility in the school environment than nursing staff or paraprofessionals (i.e., educational assistants). (Tr. Vol II at 324:14 through

325:14.)

33. Dr. Ayer is an expert in the areas of deafblind and multiple disabilities associated with deafblind impairments. Dr. Ayer believes Student needs an intervener to be successful in school. (Tr. Vol II at 382:23 through 383:3 and 386:1 through 3.) In Dr. Ayer's expert opinion, using an intervener is the only way a deafblind student can be successfully educated. (Tr. Vol II at 427:10 through 12.)

34. Dr. Ayer believes that sometimes Student might not be awake and alert at school because his/her interest has not been maintained. In Dr. Ayer's opinion, an intervener has the skills to keep Student "tuned in" or engaged. (Tr. Vol II at 418:2 through 18.) Dr. Ayer believes that a trained intervener could also train other staff, like paraprofessionals, to work with Student effectively. (Tr. Vol II at 419: 16 through 420:5.)

35. Dr. Ayer is aware of grants and scholarships available to school districts to pay for intervener training. (Tr. Vol II at 387:25 through 389:5.)

36. On April 30, 2009, an ABR evaluation of Student was completed and "suggested a moderate to severe hearing loss for the right ear and a severe hearing loss for the left ear." (See Ex. D1 at 1.)

37. On May 2, 2010, Dr. Nezol completed a Transition Report for Student (2010 Transition Report). (Ex. S23 at 2 and 3.) In the 2010 Transition Report, Dr. Nezol made the following recommendations: "[Student] needs to be able to direct some of [his/her] own activity without teacher intervention. A well defined sensory area with familiar sounds and sights modified incrementally can help promote this self direction[.] * * * In other settings, visual and auditory clutter should be avoided. Providing one or two objects against a high contrast background with a single auditory alerter [sic] can help stimulate direct vision use[.] * * * What vision [Student] attends to tends to be peripheral [o]bjects, lights, and faces should be introduced from [his/her] right side at about eight to ten inches and brought to center[.] * * * Tactile, kinesthetic and gustatory senses are perhaps the most accessible senses and should be included in almost every activity. Hand over hand guidance should be avoided and replaced with access through placement and hand under hand exploration." (Ex. S23 at 2 through 3.)

38. On May 3, 2010, Mariane Pope, PT, completed a Transition Summary ESCE to Kindergarten Physical Therapy (PT) for Student (2010 PT Transition Summary). (Ex. S24.) In the 2010 PT Transition Summary, Ms. Pope stated that Student "loves to be placed in different positions and given opportunities for movement (rolling and vibration on the resonance board). [He/She] loves to interact with [his/her] classmates by toy exchange and verbal exchange. These activities are facilitated by classroom staff. [He/She] continues to require total assist for all functional skills. * * * It should be noted that if given verbal cues and time [he/she] will assist with transfers and sitting skills." (Ex. S24 at 1.)

39. On May 3, 2010, Ms. North completed a Summary of Educational Impact for Student (2010 Summary). (Ex. S26.) Ms. North noted that Student's main input source of information was "tactile stimulation." (*Id.* at 1.) In the 2010 Summary, Ms. North stated,

During the past several months, [Student] has had 15-20 minute sessions on a resonance board in a 'little room' space designed to help [him/her] interact with [his/her] environment and get immediate sensory input back when [he/she] causes something to happen independently. [He/She] has begun to anticipate activities connected with board and is initiating movement with more intent. [Student] uses [his/her] feet more than [his/her] hands to receive information. As [he/she] begins to make more connections in [his/her] 'little room,' the next step will be to introduce hand play activities to help [him/her] anticipate [his/her] hands as a source of information input. Eventually, introducing more formal language structures through tactile sign language is the goal.

(Ex. S26 at 1 and 2.)

40. In the 2010 Summary, Ms. North made the following recommendations: "It is important that [Student] wear [his/her] auditory processor, especially connected to learning activities, in order to give consistent auditory information to [him/her]. It is also important to use tactile cues that are established, slowly transitioning to more formal sign/tactile cues paired w/auditory input to prepare [him/her] for more formal language. [Student] should continue independent interactive activities with the 'little room', changing elements of the room periodically, to continue developing cause and effect concepts." (Ex. S26 at 2.)

Kindergarten through third grade, 2010/2011 through 2013/2014 academic years

41. For grades kindergarten through eighth grade, the District operates three separate school buildings; Lyle Elementary, serving grades kindergarten through three; Whitworth Elementary, serving grades four and five; and La Creole Middle School for grades six through eight. (Tr. Vol I at 55:13 through 16.)

42. Kim Paterson was Student's special education case manager from kindergarten through third grade (Fall 2010 through Spring 2014). (Tr. Vol I at 72:4 through 12 and Vol XIV at 2665:18 through 2666:2.) Tami Ferris was Student's Educational Assistant (EA) from kindergarten through third grade (Fall 2010 through Spring 2014). (Tr. Vol XVI at 2909:20 through 22.) Student attended a full day of school from kindergarten through third grade. (Tr. Vol XVI at 2911:19 through 2912:11.)

43. When Ms. Ferris worked with Student in kindergarten through third grade, Student was very excited about activities involving movement. Ms. Ferris could tell when Student was excited because Student would "screech" and smile. (Tr. Vol XVI at 2914:3 through 7 and 11 through 17.)

44. Student spent most of his/her school day in the general education classroom during the 2010/2011 and 2011/2012 academic years. Student began to receive more pullout services for special education during the 2012/2013 and 2013/2014 academic years. (Tr. Vol XIV at 2666:17 through 2667:5.)

45. On November 19, 2010, the District issued IEP Progress Notes for Student (November 2010 Progress Notes). (Ex. S29.) The November 2010 Progress Notes stated, in part,

[Student] seems to have more days when [he/she] is alert than days when [he/she] is not. * * * [Student] is becoming more vocal each day. [He/She] is very good at letting you know when [he/she] is enjoying an activity and that [he/she] wants more. * * * [Student] seems to understand where [he/she] is going and what to [sic] the next routine is by becoming excited, smiling and squealing. * * * [Student's] hands are often open and [he/she] will open them when closed upon request and some gentle physical massage. * * * For the most part [Student] is able to keep [his/her] head upright for just about 3 seconds when [he/she] stiffens [his/her] body to assist [him/her] in keeping [his/her] head over [his/her] shoulders.

(Ex. S29 at 6.)

46. On March 18, 2011, the District issued additional IEP Progress Notes for Student (March 2011 Progress Notes). (Ex. S30.) The March 2011 Progress Note related to Student's Cognitive annual goal stated, in part, "We are seeing more vocal [sic] and [he/she] is showing more body movement when we are doing an activity that [Student] enjoys and wants more of." (Ex. S30 at 2.)

47. In the fall of 2012, District developed a Transportation Medical Protocol for Student in case of emergencies. (Ex. S48.)

48. On November 15, 2012, District issued IEP Progress Notes for Student (November 2012 Progress Notes). (Ex. S50.) According to the November 2012 Progress Notes, Student met his/her Expressive Communication objective related to using his/her feet to communicate that he/she wants "more." (Ex. S50 at 1.) The November 2012 Progress Notes stated that Student "is using [his/her] feet to move [him/her]self around on a scooter." (Ex. S50 at 2.)

49. On April 2, 2013, a Learning Media Assessment was completed for Student (2013 Learning Media Assessment). (Ex. S54.) The 2013 Learning Media Assessment indicated, "[Student] continues to demonstrate [his/her] interest in stimulating activities that involve [his/her] visual, auditory and tactile senses. When alert [he/she] demonstrates the ability to use [his/her] foot to hit a switch placed between [his/her] feet to activate a sensory toy. [He/She] enjoys using an iPad to receive visual and auditory stimulation from various apps." (*Id.*)

50. On April 2, 2013, District convened an IEP meeting developed an IEP intended to serve Student through April 1, 2014 (2013 IEP). (Exs. S52, S53, and S55.)

51. The April 2, 2013 IEP meeting notes state that Student was able to indicate "more" in 72 percent of opportunities and to control his/her environment with a switch in 64 percent of opportunities. (Ex. S53 at 1.)

52. Present Levels of Academic Achievement and Functional Performance (Present Levels) on the April 2013 IEP states that Student was able to make a choice out of two favored activities in 82 percent of opportunities. (Ex. S52 at 2.) The 2013 IEP meeting notes state that “Student needs to demonstrate a consistent mode of communication which then leads to augmentative communication⁵ evaluation.” (Ex. S53 at 2.)

53. The April 2013 IEP provided for an Expressive Communication annual goal (AG) and short-term objectives (STOs) related to independently moving his/her body to push switches, independently participating in an alert routine, indicating a choice out of three possible choices, using a switch to communicate “more,” using a switch to control his/her environment, and using a switch to make a choice of preferred activity. (Ex. S52 at 6.)

54. The April 2013 IEP provided for specially designed instruction (SDI) in the following areas: Adaptive Skills/Receptive Communication, for 40 minutes per week; Expressive Communication, for 60 minutes per month; Fine Motor, for 40 minutes per month; and Gross Motor, for 50 minutes per month. (Ex. S52 at 14.) The April 2013 IEP also provided for Audiology/Hearing Service for three hours per year. (*Id.*)

55. The April 2013 IEP also provided the following services on a consultation basis: special education teacher consultation for 30 minutes in September and as needed throughout the remainder of the school year; Occupational Therapy (OT) for four hours per year; Physical Therapy (PT) for 10 hours per year; and Vision services for six hours per year. (Ex. S52 at 15.) The April 2013 IEP stated that Student would be removed from the general education classroom for three hours per day to work on IEP goals. (*Id.*) At the 2013 IEP meeting, the team agreed to maintain Student’s placement, from the previous IEP, of “regular class 40% to 79% of the school day.” (Ex. S52 at 16.)

56. On May 15, 2013, Parent submitted an informational sheet on Student’s “O₂ Saturation Monitor” to District. (Ex. S56.) The O₂ Saturation Monitor sheet stated, “[Student’s] normal is to sat [sic] between 97 and 100. You will likely see [him/her] start to drop to the low 90’s or high 80’s when secretions are pooling and [he/she] needs to cough. If [he/she] does not do this on [his/her] own, stimulate and encourage [him/her]. If you are unable to resolve this and [he/she] is hanging out above 86, call me. If [he/she] does not resolve at 85 or below, call for help. ‘Resolving’ means a short period around a minute or two.” (Ex. S56 at 1.)

57. During [his/her] third grade year, Student had a tasting protocol that was part of Student’s feeding protocol. (Tr. Vol I at 47:14 through 17.) Student had an increase in his/her medical needs and concerns during the 2013/2014 academic year and teachers and staff who worked with Student asked the District for additional support. (Tr. Vol I at 41:5 through 9 and Vol II at 463:20 through 23.)

58. Some of Student’s medical needs at school included the following: oxygen that could be administered to Student if Student’s oxygen levels dropped too low, seizure medication

⁵ Augmentative communication provides a means for students to communicate other than orally or manually (i.e., typing or writing.) Augmentative communication is considered a type of assistive technology. (Tr. Vol X at 1875:2 through 21.)

and a seizure protocol, and a G-tube for feeding. (Tr. Vol I at 42:14 through 45:22.)

59. Heather Durham, AuD, CCC-A, is Student's current private audiologist and has worked with Student since 2013. According to Ms. Durham, an ABR test is conducted by stimulating the ears with sound through the ear canal and through bone conduction. (Tr. Vol XVII at 3028:1 through 9.) Ms. Durham noted that during an ABR test, sensors are placed on the child to detect a charge or neural response as the ears are stimulated with sound. (Tr. Vol XVII at 3028:5 through 16.) According to Ms. Durham, if there is a charge from the auditory nerve during an ABR test, then there is usually a pattern that can be viewed on a computer screen. (Tr. Vol XVII at 3028:17 through 19.) Additionally, According to Ms. Durham, the 2005 Audiology Report that states 'nerve 8 integrity could not be determined,' means that any diagnosis of the degree of hearing loss is purely speculative. (Tr. Vol XVII at 3029:6 through 3030:6.)

60. Ms. Durham originally fit Student bone anchored hearing aid (BAHA) device. When the BAHA device broke, Ms. Durham fit Student with a Ponto device. The Ponto has different features than the BAHA. (Tr. Vol XVII at 3026:22 through 3027:4.) Ms. Durham conducts diagnostic testing of Student. Over the years, she has fit Student with two Ponto devices. (Tr. Vol XVII at 3026: 1 through 6.) The BAHA hearing aid was recommended for, and used by, Student since he/she was an infant. (Tr. Vol XIV at 2664:21 through 2665:6.)

61. Ms. Durham believes Student can hear, but she does not know how much Student can hear. (Tr. Vol XVII at 3027:5 through 8.)

62. On November 8, 2013, Ms. Durham completed an Audiology Report for Student (2013 Audiology Report). (Ex D1.)

63. Since the 2013 Audiology Report, Ms. Durham has completed functional hearing test with noisemakers on Student. (Tr. Vol XVII at 3190:1 through 5.) She used average volume noisemakers with Student in September 2017 and Student startled to the noisemakers. (Tr. Vol XVII at 3190:6 through 12.)

64. The 2013 Audiology Report stated, "The results obtained today revealed a moderately- severe to severe hearing loss for the left ear and a no-response severe/profound hearing loss for the right ear." (Ex. D1 at 2.)

65. According to Ms. North, based on the 2013 Audiology Report, Student would not hear any speech sounds in the left ear, but he/she could hear environmental sounds such as "loud planes, loud jets, workers using the things on the cement." (Tr. Vol XIII at 2523:25 through 2524:6.) Ms. North believes that Student can hear loud environmental sounds in the left ear without amplification. (Tr. Vol XIII at 2524:7 through 8.) Ms. North does not know whether Student can hear in his/her left ear with amplification such as the BAHA or Ponto. (Tr. Vol XIII at 2524:9 through 11.)

66. Ms. North believes Student experiences developmental delays in both developmental language and receptive language. (Tr. Vol XIII at 2527:12 through 15 and

2568:16 through 24.) In her opinion, at the time of hearing Student's language skills are at the level of a zero to six-month old child. (Tr. Vol XIII at 2528:3 through 14.)

67. Ms. Durham, has observed Student responding to Parent's voice during therapy sessions. According to Ms. Durham, Student can hear sounds below the level of environmental sounds indicated by Ms. North. (Tr. Vol XVIII at 3201:13 through 3202:4.)

68. According to Ms. Durham, Student's responses to sound do not match the ABR test results. (Tr. Vol XVIII at 3202:2 through 8.) Ms. Durham recommended continued use of soft band devices (BAHA or Ponto) because Student "seems to be hearing something and [he/she] definitely rouses in response to sounds when the soft band is on." (Tr. Vol XVIII at 3034:24 through 3035:19.)

69. Ms. North believes that, because of Student's hearing loss and developmental delay, the focus in working with Student should be a "tactile approach and * * * perhaps even vibrotactile approach." (Tr. Vol XIII at 2528:15 through 25.) According to Ms. North, signs and cues should be paired with routines and structures that are meaningful for Student to help him/her understand daily life. (Tr. Vol XIII at 2529:4 through 6.)

70. Ms. North is of the opinion that Student cannot see at all. (Tr. Vol XIII at 2570:7 through 8.) Her opinion on what Student can see is based on discussions she has had with a Willamette ESD vision specialist. (Tr. Vol XIII at 2570:9 through 17.)

71. Ms. North is familiar with the assistive technology that has been used with Student at school including the FM system, the BAHA, the "buttons that [Student's] used," and Student's augmentative communication device. (Tr. Vol XIII at 2530: 19 through 2531:2.)

72. District accessed professionals from Willamette ESD on behalf of Student including: PT, OT, a vision specialist, a hearing specialist, a separate vision specialist with deafblind background, an orientation and mobility (O&M) specialist, and an augmentative communication specialist. (Tr. Vol I at 52:19 through 53:7.)

73. Staff who worked with Student were trained to assist with Student's medical needs, including administering oxygen, familiarity with Student's seizure protocol, and G-tube feedings. (Tr. Vol I at 44:11 through 46:3.)

74. Sylvia Lawson, R.N., has been the District nurse since January 2014. (Tr. Vol XIII at 2339:15 through 22.) Ms. Lawson's role as school nurse is to coordinate the healthcare needs of students in the district, to write health management plans, and to consult with teachers and other staff when health issues arise. (Tr. Vol XIII at 2340:11 through 20.)

75. Ms. Lawson believes that Student is considered medically fragile under the state identification levels. (Tr. Vol XIII at 2342:20 through 25.) Ms. Lawson believes that, as a school nurse, she is qualified to make a determination of whether a student is medically fragile because she has to report the number of medically fragile and medically complex students on her caseload to the state. (Tr. Vol XIII at 2396:24 through 2397:12.)

76. According to Parent, Student has not been determined medically fragile through the State of Oregon's Children's Intensive In-Home Services (CHS) program, or the "K plan." (Tr. Vol XIV at 2676:8 through 17.) Student is evaluated yearly for services through CHS. (Tr. Vol XIV at 2676:18 through 20.) Student has never qualified for the designation of medically fragile in any of his/her CHS evaluations, including the most recent in September 2017. (Tr. Vol XIV at 2677:9 through 15.)

77. A vision specialist with experience working with deafblind students trained District staff on creating an "activity room" (also called the "little room") for Student, using the resonance board, and on a variety of methods for working on receptive and expressive communication with Student. (Tr. Vol I at 47:24 through 48:4.) A "little room" is an "area designed to help a deafblind student explore their environment" through tactile interaction with objects. (Tr. Vol I at 147:5 through 148:3.)

78. On November 19, 2013, District issued IEP Progress Notes for Student (November 2013 Progress Notes). (Ex. S58.) According to the November 2013 Progress Notes, Student was able to independently push switches 62 percent of the time, make a choice out of three options 66 percent of the time, use switches to communicate "more" 62 percent of the time, use switches to control his/her environment 25 percent of the time, and use a switch to choose an activity 55 percent of the time. (Ex. S58 at 1.)

79. On March 13, 2014, District convened an IEP meeting, without Parent participating, to develop an IEP intended to serve Student through March 12, 2015, and to discuss Student's transition to Whitworth Elementary School (March 2014 IEP). (Exs. S64 and D9; Tr. Vol. I at 57:17 through 18.) Ms. Galbraith was the special education director and District representative at the March 2014 meeting. (Ex. S65 at 1.) The March 13, 2014 IEP meeting was the first meeting Ms. Galbraith attended for Student. Ms. Galbraith attended the March 13, 2014 IEP meeting at the request of Ms. Paterson, Student's special education teacher and case manager. (Tr. Vol I at 121:1 through 9.)

80. The March 13, 2014 IEP meeting was also the three-year special education eligibility review meeting. (Tr. Vol I at 62:14 through 63:6.) The special education eligibility categories to be addressed at the March 13, 2014 meeting were HI, OI, and VI. (Tr. Vol I at 72:20 through 23.)

81. Student was hospitalized with pneumonia at the time of the March 13, 2014 IEP meeting, and therefore, Parent was with Student at the hospital and unable to attend. (Tr. Vol I at 57:18 through 20.) Parent asked to reschedule to meeting and was told, by Ms. Galbraith, that the meeting needed to be held on March 13, 2014 because of the due date of the IEP and that if Parent had concerns about the resulting IEP the District would schedule a revision meeting at a later date. (Tr. Vol XIV at 2678:6 through 14.)

82. Ms. Galbraith believed that the District's obligation to meet the IEP and/or eligibility compliance deadlines took precedence over ensuring Parent's opportunity to participate in the eligibility and IEP formulation process. (Tr. Vol III at 606: 1 through 17.)

83. The March 13, 2014 meeting notes state, “Parent may participate by phone/[Student] is in the hospital.” (Ex. S64 at 1.) Ms. Galbraith asked to call in and participate in the March 13, 2014 IEP meeting for “compliance [sic] purposes” despite being aware that Student was still hospitalized with a significant illness. Parent was unable to attend the March 13, 2014 IEP meeting or call in during the meeting to provide information for consideration by the team. (Tr. Vol I at 57:20 through 23 and 140:13 through 17.)

84. At the March 13, 2014 meeting, Student was again found eligible for special education and related services under the eligibility categories of HI, OI, and VI. (Exs. D7, D8, S64 at 1, S66, and S67; Tr. Vol I at 121:23 through 122:7.)

85. Although the meeting notes state that the “team agreed and signed” the eligibility paperwork, Parent did not sign the HI, OI, or VI eligibility forms and no one from the District requested her signature. (Tr. Vol XIV at 2679:9 through 2680:5; Ex. S64, p. 1.)

86. Prior to the March 2014 meeting, Ms. Olson-Murphy completed a Learning Media Assessment of Student as part of the vision assessment used to determine Student’s continuing eligibility for special education and related services under the eligibility category of VI. (Tr. I at 135:3-6; Ex. D10.) Ms. Olson-Murphy also completed a Functional Vision Evaluation of Student as part of the vision assessment used to determine Student’s continuing eligibility under that eligibility category. (Tr. Vol I. at 137:2 through 138:4.) Ms. Olson-Murphy shared the results of the assessment and evaluation at the March 2014 IEP meeting. Ms. Olson-Murphy does not recall sharing these results at the May 9, 2014 IEP revision meeting held because Parent could not attend the March 2014 meeting. (Tr. Vol XI 2174:4 through 25.)

87. The March 2014 IEP Present Levels include the following relevant information:

* * * [P]resent level of academic achievement and functional performance – [Student] is currently moving [his/her] body to recreate auditory, tactile and visual experiences at 73% of available opportunities. [Student] continues to work on initiating or continuing movements to participate in alert routines. When [Student] is presented with 3 preferred choices [he/she] is currently making choices at 37% of available opportunities. Choices are made by placing a pre-recorded [BIGmack] with the message “yes, that’s the one” at the left side of [Student’s] face/head. [Student] is using switches to communicate that [hs/she] would like “more” of an activity 78% of available opportunities. [Student] is using switches to independently turn on the fan, vibrating pillow etc., at 20% of available opportunities. When presented with a switch held at the left side of [his/her] head and choices of what [he/she] would like to do i.e., iPad, listen to music, etc. [Student] is pushing the switch held at the left side of [face/head] independently at 47% of available opportunities. When [Student] is excited, [he/she] will squeal, smile and move [his/her] body by kicking. * * * [Student] is remaining awake and alert during the school day at 58% of available opportunities. * * * [Student] continues to work on increasing [his/her] head control in a variety of positions throughout each day. With the use of touch and

verbal cues [Student] is increasing [his/her] ability to relax [his/her] body. * * *
When an object is placed in [Student's] hand, i.e., spoon, ball, small toy, [Student] will hold it up to 15 minutes at 70% of available opportunities.

(Ex. S65at 2 and 3.)

88. The March 2014 IEP included annual goals (AG) in the areas of Expressive Communication, Adaptive Skills, Basic Gross Motor Skills, and Fine Motor Skills. (Ex. S65 at 6 through 9.)

89. Student's AG for Expressive Communication reads, "[Student] will increase [his/her] intentional movements to communicate a choice or that [he/she] would like more of what [he/she] is already participating in." (Ex. S65 at 6.) The Expressive Communication AG contained six Measurable Short-Term Objectives (STO) that read:

2.1 [Student] will independently move [his/her] body to recreate auditory, tactile and visual experiences to include pushing switches in [his/her] immediate environment three or more times in a 15 minute period over three different occasions

2.1 [Student] will independently participate in alert routines by initiating or continuing movements. At least [sic] two movements per session over three different sessions.

2.3 When presented with 3 choices or what [he/she] would like to participate in, i.e., swing, scooter board, [Student] will do one or more of the following to indicate [his/her] choice[:] move [his/her] body, turn [his/her] head, look at, touch, etc. 3 out of 5 available opportunities.

2.4 [Student] will use switches to communicate "more" of a favored activity 4 out of 5 available opportunities.

2.5 With the use of switches, [Student] will control [his/her] environment i.e., turn on fan, vibrating pillow, more swing etc. when a switch is pushed by [his/her] head, foot or hand 4 out of 5 available opportunities.

2.6 [G]iven swich(s) [sic] i.e., read book, listen to music, iPad, [Student] will hit switch "that's what I want to do" to make [his/her] choice 50% 3 out of 5 available opportunities.

(*Id.*)

90. Student's AG for Adaptive Skills reads, "[Student] will demonstrate understanding of routines and remain awake/alert during the school day." (Ex. S65 at 7.) The Adaptive Skills AG contained two Measurable STO's that read:

3.1 [Student] will indicate acknowledgement of routines i.e., show excitement when hand placed on carpet of swing before being placed on it at 3 out of 5 available opportunities.

3.2 [Student] will remain awake and alert at least 80% of the school day 4 out of 5 days.

(*Id.*)

91. Student's AG for Basic Gross Motor skills reads, "[Student] will show increased head control as well as stiffen and relax [his/her] body during the school day." Ex. S65 at 8. The Basic Gross Motor skills AG also contained two Measurable STO's that read:

4.1 [Student] will show increased head control in a variety of positions and equipment throughout [his/her] day at 70% 3 out of 5 available opportunities.

4.2 [Student] will follow touch and verbal cues to stiffen/relax [his/her] body at 50% 3 out of 5 opportunities.

(*Id.*)

92. Student's Fine Motor skills AG reads, "[Student] will increase [his/her] fine motor skills." Ex. S65 at 9. The Fine Motor skills AG contained two Measurable STO's that read:

5.1 Once an item is placed in [Student's] hand, [he/she] will hold it in [his/her] hand for at least 1 minute 80% of available opportunities.

5.2 [Student] will use [his/her] hands to explore a variety of items placed in front of [him/her] i.e., on [his/her] wheelchair tray at 40% of available opportunities.

(*Id.*)

93. The March 2014 IEP meeting notes state, "Goals - many will stay the same as last year due to not being healthy." Ex. S64, p. 4.

94. Ms. Galbraith believes it would be challenging to develop SDI targeted at teaching Student to remain awake and alert. (Tr. Vol III at 604:16 through 605:13.) She is also unaware of any such SDI that would be appropriate for the Adaptive Skills AG related to Student remaining awake and alert as specified in the March 2014 IEP. (Tr. Vol III at 605:7 through 13.)

95. The AGs and STOs on the March 2014 IEP were virtually identical to the AGs and STOs on Student's 2013 IEP. (*Compare* Exs. S52 and S65.)

96. According to Ms. Galbraith, the meeting notes from the March 2014 IEP meeting indicate that Student had "actually shown a decrease in [his/her] ability to move forward with [his/her] goals and that many of the goals would stay the same." (Tr. Vol I at 133:10 through 17; *see* Ex. D9 at 14.) Ms. Galbraith believed it was acceptable to address Student's apparent

regression on his/her IEP goals and objectives an IEP revision meeting, if one was held. (Tr. Vol I at 133:10 through 20.)

97. The March 2014 IEP indicates Student would not be provided extended school year (ESY) services during the effective period. (Ex. S65 at 11.) The meeting notes state, “ESY –not appropriate @ this time.” (Ex. D9 at 15.) Nothing in the March 2014 IEP or the meeting notes kept by the District indicate any data relevant to ESY was reviewed or discussed. (See Exs. S65 and D9 at 13 through 15.)

98. The March 2014 IEP made no changes to the amount of SDI Student would receive for any of his/her goals and objectives. (See Exs. S52 at 14 and S65 at 10.) The March 2014 IEP provided for 60 minutes per month of SDI for Student in the area of Expressive Communication. (Ex. D9 at 10.) Ms. Galbraith does not believe that 60 minutes of SDI per month for Student’s Expressive Communication AG was sufficient to meet his/her educational needs. (Tr. Vol. II at 605:21 through 25.)

99. The March 2014 IEP also left the entirety of Student’s related services unchanged from the previous IEP. (See Exs. S52 at 14 and S65 at 10.) The March 2014 IEP made a single alteration to Student’s supplementary aides and services by increasing Student’s nursing hours from 250 minutes (approximately 4.25 hours) per week to 400 minutes (approximately 6.5 hours) per week. (*Id.*)

100. The March 2014 IEP retained the requirement for Student to have an EA with him/her 6.5 hours per day and for bus rides to and from school. (Exs. S65 at 10.)

101. The March 2014 IEP increased Student’s occupational therapy (OT) consultation time from four to five hours per year, increased the physical therapy (PT) consultation time from 10 to 12 hours per year, increased Student’s consultation time with a vision specialist from six to eight hours per year, and added a consultation by the hearing specialist for two hours per year. (Ex. S65 at 11.)

102. The March 2014 IEP maintained Student’s placement at 40 to 79 percent of the day spent in the general education setting. (Ex. S65 12.) The March 2014 IEP stated Student would join his/her typical peers in the general education setting during “opening, p.e., lunch, media, recess, team time, story, field trips, special parties and assemblies.” (Ex. S65 at 11; Tr. Vol I at 126:20 through 127:8.)

103. Ms. Galbraith believed Student was beginning to have more medical needs toward the end of his/her third-grade year that impacted Student’s ability to remain awake and alert during the school day. (Tr. Vol I at 123:4 through 11.) Student had new medical issues that arose in the spring of the 2013/2014 academic year; specifically that Student had developed dysautonomia. (Tr. Vol XIV at 2668:8 through 22.)

104. On April 3, 2014, Ms. Paterson emailed Ms. Galbraith and Todd Baughman, Principal at Lyle Elementary, regarding her concerns about Student’s medical needs at school. Ms. Paterson stated:

[Student] just had a 2 minute seizure. * * * I REALLY want to explore a nurse/respiratory therapist – someone with more medical background to be with [Student] next school year. I am concerned that if we fill this position that Rebecca is leaving, other than in a temporary position for the rest of this school year, that there will not be a place for someone with more medical background to assist with [Student] next school year.

(Ex. S71.)

105. Also on April 3, 2014, Ms. Galbraith responded to Ms. Paterson's email, including Ms. Paterson and Mr. Baughman, and stated:

Todd... I just wants [sic] to let you know that [Ms. Paterson] has brought this up many times over the past couple of months. [Ms. Lawson] and I talked about this and I have been researching the nursing requirements. I know how concerned [Ms. Paterson] is, but [Student] has conditions that are all delegated and typical of medically fragile kiddos.

Bottoms [sic] line..[.]You know the budget and that a nurse isn't in it. I just wanted to let you know this as she poses more conversations. Just [a] tough job for an EA all around[.]

(Ex. S71.)

106. If the IEP team determined Student needed a nurse at school during the 2014/2015 academic year, Ms. Galbraith had the authority to recruit and hire for that position. Tr. Vol III at 620:20 through 621: 19.)

107. On May 19, 2014, Susan Dinsmore, M.D., Student's primary care physician, wrote a letter that stated:

[Student] is a young [guy/gal] with multiple medical issues but is medically able to attend school with adequate supports. [He/She] has, however, been having episodes of airway compromise whose cause is undetermined. It seems to be due to a dysautonomia that is triggered by allergies at times and other times occurs for no apparent reason. The tools we have to help [him/her] are albuterol, simlasin [sic], benadryl, clonidine, O₂ and posterior pharyngeal suctioning. Tools should be used based on impact on O₂ sats (ie [sic] O₂ sats should remain >92%). These episodes are unpredictable and treatment tools need to be present and available at all times. These episodes may be life threatening if not managed appropriately and in a timely fashion.

(Ex. S82; *see also* Tr. Vol I at 60:18 through 24; 70:25 through 71:7; and Vol III at 614:9 through 16.)

108. Dysautonomia was a new diagnosis for Student at the time of Dr. Dinsmore's letter. (Tr. Vol XII at 2352:13 through 2353:3.) The autonomic nervous system relates to the automatic functions of the body, like breathing and heart rate. Dysautonomia is a "broad term that relates to a disorder where somehow that autonomic [nervous] system is not functioning normally." (Tr. Vol XII at 2362:25 through 2363:8.)

109. Ms. Lawson believed that the posterior pharyngeal suctioning, referred to in Dr. Dinsmore's letter, is the equivalent of "deep suctioning." (Tr. Vol XIII at 2396:2 through 10.)

110. Connie Smith, LPN, is Student's night-shift nurse at home. Ms. Smith defined posterior pharyngeal suctioning as, "suctioning the back of the mouth, essentially just back past the tongue." (Tr. Vol XVI at 3078: 1 through 8.) According to Ms. Smith, posterior pharyngeal suctioning is not the same as deep suctioning, which she defines to include suctioning of the oral cavity and tracheal suctioning. (Tr. Vol XVI at 3078: 13 through 25.)

111. With regard to dysautonomia, Parent indicated, for Student, "the most significant thing we see is an incredibly quick increase in secretions or phlegm and it comes on quickly and it's a lot. Sometimes splotches on [his/her] skin, sometimes goose bumps, a lot of sensitivity to touch that's more than what's normal for [him/her]." (Tr. Vol XIV at 2669:22 through 2670:7.)

112. Student's dysautonomia can be brought on by a variety of conditions or situations including painful stimulus, frustration, discomfort, or frustration with inability to communicate. (Tr. Vol XIV at 2669:22 through 2670: 11.)

113. The District convened an IEP revision meeting for May 19, 2014 to obtain Parent's input for Student's March 2014 IEP. (Tr. Vol I at 57:23 through 24; Exs. D13, S79, and S80.) Parent attended the May 2014 IEP revision meeting. (Tr. Vol XVI at 2682:5 through 7.)

114. Dr. Dinsmore's May 19, 2014 letter regarding Student's medical conditions was reviewed by the team at the May 2014 IEP revision meeting. (Tr. Vol XII at 2353:7 through 12 and 2346:7 through 15.) According to Ms. Lawson, Dr. Dinsmore's letter provided the basis for the team's determination that Student needed a 1:1 nurse at school. (Tr. Vol XIII at 2391:6 through 12.)

115. Ms. Olson-Murphy's Learning Media Assessment and Functional Vision Evaluation were not reviewed with Parent at the May 2014 IEP revision meeting. (Tr. Vol XI at 2176:20 through 2177:11.)

116. At the meeting, the team drafted a revised IEP for Student (May 2014 IEP Revision). (Ex. D13.) The May 2014 IEP Revision contained identical information pertaining to the frequency of Student's awake and alert states as the March 2014 IEP. Ex. D13 at 3; see also Ex. S65 at 3.) At the time of the May 2014 IEP Revision, Student was attending a full school day. (Tr. Vol I at 144:1 through 16.)

117. During the May 2014 revision meeting, Parent requested that the team "look at communication goals" and advised the team that Student's private speech therapist

“recommended that [Student] use [his/her] head for communication and [his/her] hands and feet for play.” Ex. S80 at 2.) Parent was concerned about communication goals at school because, prior to May 2014, Student’s augmentative communication needs were provided by Parent alone. In prior school years, Parent had been training District staff on techniques conveyed to her by Student’s private speech therapist. (Tr. Vol XIV at 2683:4 through 14 and 21 through 22.)

118. At the time of the May 2014 IEP Revision, Student was using his/her BIGmack to select a preferred category of activities, from choices offered, and was able to make a choice within that category from a field of three options. The team deemed this was an appropriate level of communication for Student at that time. (Tr. Vol XI at 2021:2 through 2022:7.) Student was also using “smart-partner”⁶ assistance to communicate. (Tr. Vol I at 111:15 through 19.)

119. The team added the following two STOs to the May 2014 IEP Revision under the Expressive Communication AG: “[g]iven a switch that [he/she] can activate with [his/her] head, [Student] will communicate that [he/she] would like attention from an adult;” and “[w]hen given 3 categories of what [Student] would like to do, [he/she] will indicate [his/her] choice by vocalizing, smiling, squeeling [sic], moving [his/her] body, turning [his/her] head etc. 3 out of 5 available opportunities.” (Ex. D13 at 4.) No other alterations or additions were made to Student’s IEP at that time. (See Exs. S65 and D13.)

120. Diana Christensen, special education teacher and Student’s case manager at Whitworth Elementary, attended the May 2014 IEP Revision meeting, which was also a transition meeting before Student transitioned to Whitworth Elementary for the 2014-15 academic year. (Tr. Vol I at 146:8 through 18; Ex. D13 at 1.) Ms. Christensen acted as the District representative at the meeting. (Tr. Vol VIII at 1567:13 through 21.) Ms. Christensen had never had a student on her caseload with the extent of unique needs presented by Student. (Tr. Vol VI at 1239:14 through 20.)

121. Ms. Christensen did not completely understand Student’s goals on the May 2014 IEP Revision by assumed the prior team wrote goals that were appropriate for Student and that District staff “would be able to carry them out.” (Tr. Vol VII at 1330:19 through 1331:6.)

122. Ms. Christensen never received training on how to determine whether Student was awake and alert and had only observed Ms. Ferris, Student’s EA, take awake and alert data for Student. (Tr. Vol VII at 1331:13 through 24.) Ms. Christensen does not know if she has ever able to tell when Student was truly awake and alert, and therefore ready to receive instruction. (Tr. Vol VII at 1343:12 through 13.)

123. According to Dr. Ayer, an “awake and alert” status is the target for learning because students don’t learn when they are asleep, half-asleep, or overly excited. (Tr. Vol II at 243:8 through 19.) Dr. Ayer is aware of specialized training that exists to teach school staff to

⁶ A smart-partner is an individual that provides either his or her hand, held at the side of Student’s head, or Student’s BIGmack switch at the same location, for him/her to access easier when providing responses to inquiries. (Tr. Vol I at 111:15 through 21.) This method of communication was also referred to throughout the hearing as “partner assisted scanning” or PAS. (Tr. Vol I at 83:23 through 24.) This order uses the single term smart-partner for consistency.

determine behavioral states of deafblind children, including awake and alert states. (Tr. Vol III at 409:6 through 22.)

124. In May 2014, District hired Jennifer Oace, R.N., as Student's 1:1 nurse for the 2014/2015 academic year. Ms. Oace came to the Lyle Elementary to work with Student during May 2014. (Tr. Vol I at 61:6 through 20.) Ms. Oace's training to work with Student occurred during the last two weeks of the 2013/2014 academic year, when Ms. Oace worked with Ms. Lawson and observed Student in the educational environment. (Tr. Vol I at 148:15 through 21.)

125. Ms. Lawson did a minimal amount of training with Ms. Oace because she believed Ms. Oace had "an equivalent license" to her own and therefore Ms. Lawson believed Ms. Oace didn't need training. (Tr. Vol XII at 2347:16 through 24.)

126. The District expected Ms. Oace to fill the role of Student's EA while also providing nursing assistance to Student during the school day. (Tr. Vol I at 148:22 through 149:21.) Ms. Oace had no training as a teacher, paraprofessional, or educational assistant when she was hired to work with Student. (Tr. Vol IV at 802:21 through 803:7.)

127. According to Ms. Oace, there are certain nursing tasks that can be delegated, to unlicensed individuals, under a nurse's license. (Tr. Vol IV at 655:11 through 17.) Delegated tasks are ultimately the responsibility of the delegating nurse to ensure that the unlicensed individual "knows what they are doing and that they're competent in that task." (Tr. Vol IV at 655:20 through 25.)

128. According to Ms. Oace, bronchial, or post pharyngeal, suctioning is a delegable task but it is rarely a task that a nurse is willing to delegate. Ms. Oace has not, and would not feel comfortable, delegating the task of bronchial suctioning to an unlicensed individual. (Tr. Vol IV at 656: 3 through 17.) The District has never asked Ms. Oace to delegate the task of bronchial suctioning for Student. (Tr. Vol IV at 804:7 through 17.)

Fourth grade, 2014/2015 academic year

129. According to Ms. Galbraith, Student's transition from Lyle Elementary to Whitworth Elementary, between third and fourth grade, was "huge" because, after four years in the same environment, he/she had become accustomed the sounds, smells, and people in the Lyle Elementary Developmental Learning Center (DLC). (Tr. Vol I at 58:4 through 24.)

130. Dr. Ayer recommended to Ms. Galbraith that Student's transition from Lyle Elementary to Whitworth Elementary begin early because "children who are deafblind need much longer time to transition." (Tr. Vol II at 229:2 through 20.)

131. Dr. Ayer conducted a training session with District staff before Student transitioned from Lyle to Whitworth. The training Dr. Ayer provided to District staff at that time was a basic "overview of deafblindness." (Tr. Vol II at 220:3 through 23.) According to Dr. Ayer, accomplishing adequate training regarding Student and deafblindness would be impossible because "deafblindness is far too complex." (*Id.*)

132. At the same time, Ms. Galbraith began discussing the option of home tutoring with Parent outside of IEP meetings, due to Student's increased medical needs. (Tr. Vol I at 145:14 through 146:7.) Parent indicated that she did not have concerns about Student being medically able to attend school at that time. (Tr. Vol XIV at 2702: 11 through 2703:2.)

133. While Student required additional attention at that time, he/she continued to participate in activities within the community including, horseback riding, tubing in the snow, skiing, shopping, and swimming. Parent did not always take a nurse with her when she took Student into the community. (Tr. Vol XIV at 2703:3 through 17.)

134. On June 9, 2014, Parent emailed Ms. Galbraith and asked for clarification on several issues. Among them, Parent inquired about the 1:1 nurse's schedule at school and what the District's plan was for coverage during any time Student was at school outside the nurse's scheduled hours. (Ex. S86 at 1.) Ms. Galbraith emailed Parent on June 10, 2014 and advised her that Ms. Oace had been hired, as Student's 1:1 nurse, for 5.5 hours per school day, which Ms. Galbraith indicated would be "15 minutes shy of a school day." (Ex. D16 at 2.)

135. Parent had conversations with Ms. Galbraith after the June 9, 2014 email and she ultimately acquiesced to the District's schedule because she felt it was a "reasonable compromise" to shorten Student's day to better fit Ms. Oace's scheduled hours. Parent was willing to shorten Student's day because she did not think it was safe for Student to ride the bus home without a nurse to accompany him/her. (Tr. Vol XIV at 2686:10 through 25.)

136. The District and Parent agreed that Ms. Oace would park at Student's home and ride the bus to school and home with him/her to account for the 15 minute difference between Student's school day and Ms. Oace's schedule. (Tr. Vol XIV at 2686: 10 through 2687:4.)

137. Initially, if Ms. Oace was absent, Parent kept Student home and would not allow him/her to attend school without a substitute nurse. (Tr. Vol XIV at 2688:22 through 2689:18.) The District did not offer to make up the time Student missed school because no nurse was available. (Tr. Vol XIV at 2689:22 through 24.)

138. District ordered a new chair and new adaptive toys for Student in preparation for the 2014/2015 academic year. Parent picked up the new adaptive equipment to utilize in the home setting over the summer in order to familiarize Student with the equipment before fall 2014. (Tr. Vol I at 62:2 through 13; and 71:14 through 72:3.)

139. Ms. Oace received training specific to working with a deafblind student from Ms. Olson-Murphy in August 2014. Tr. 149:22-150:9.

140. Ms. Olson-Murphy consulted with Norm Jordan, Willamette ESD Vision Specialist, before Mr. Jordan took over Student's case for the 2014/2015 academic year. (Tr. Vol XI at 2029:20 through 22.) Mr. Jordan was assigned to Student's case based on Willamette ESD geographic assignments. (Tr. Vol XI at 2143:20 through 23.) Mr. Jordan has experience working with students who are deafblind, but does not have any specific training in working with

such students. (Tr. Vol XI at 2144:24 through 2145:8.)

141. On August 14, 2014, Parent emailed Ms. Lawson and stated she was considering a late start for Student's school day at the beginning of the 2014-15 academic year. (Ex. D19 at 2; Tr. Vol I at 54:19 through 23.)

142. On September 4, 2014, the District convened another IEP revision meeting to add nursing services to Student's IEP (September 2014 IEP Revision). (Ex. S102 at 1.) At that time, Parent asked about augmentative communication services for Student. In response, the District referred Parent to Kim Olsen at Willamette ESD. In addition, Parent inquired why Student's nurse was not at school for a full day. Ms. Galbraith informed Parent that "[the District] got guidance from the State when making the decision." (Ex. S102 at 1.) The September 2014 IEP Revision reduced Student's placement from 40 to 79 percent in the general education setting to "less than 40 % in the general ed setting." (Ex. S103 at 10, Tr. Vol I at 164:4 through 17 and Vol III at 471:3 through 19.) The September 2014 IEP Revision added "Assistant with RN licensure" at 1725 minutes per week to the service summary page. (Ex. S103 at 8.)

143. The September 4, 2014 meeting notes indicate that, "[Ms. Galbraith] mentioned that the hours [from Student's reduced schedule] could possibly be made up with comp. ed[.], during ESY or at another time." (Ex. S102 at 1.)

144. On September 10, 2014, Parent emailed Ms. Christensen, Ms. Galbraith, and Ms. Oace and advised them that Student is in the hospital and would not be at school the following day (Thursday) and likely not Friday due to a significant number of seizures the night before. Parent also stated, "I don't know what to do about him/her being so worked up. [Student] has never been like this before." (Ex. D30.)

145. On September 11, 2014, Ms. Christensen emailed Ms. Galbraith and stated, "FYI- [Student] is in the hospital, 15 seizures yesterday. Mom says this is very unusual and she can't figure out why [he/she] has been so worked up lately, she has a couple of times insinuated that this transition is causing the health issues. I have assured [Parent] that we are doing everything we can to help [Student] be healthy, happy, and engaged. We have had [Ms. Ferris] come over, and I have asked if [Parent] has any ideas to help ease this transition. I feel like we are doing all we can, but still [Student] is having issues and Mom thinks it is because [he/she] is 'worked up.' I AM NOT A MIRACLE WORKER, but I am trying to stay positive." (Ex. S105 at 1.)

146. On September 11, 2014, Parent emailed Ms. Christensen and stated, among other things, "[t]he doc thinks the prolonged hypoxia⁷ coupled with severe anxiety and extra meds was a perfect storm." (Ex. S106 at 1.)

147. On September 18, 2014, Parent emailed Ms. Christensen and stated, "

So, since this transition is so rough on [Student], I have been consulting with [his/her] docs and the general consensus is *stress induced seizures* and autonomic reactions. We

⁷ Webster's Dictionary defines hypoxia as, "a deficiency of oxygen reaching the tissues of the body." <https://www.merriam-webster.com/dictionary/hypoxia>.

are looking into other contributors, but *with the sudden onset coinciding with the start of school, it's most likely the adjustment*. So, I think we are making progress, but the doc and I talked about reducing the school day even more until [he/she] adjusts. I am open to feedback on this. I am thinking of reducing by an additional 30-60 min...Late start as opposed to early release as sleep deprivation has been mentioned as well...[He/She] goes to bed plenty early but has a hard time shutting down to sleep. The hope is we will get back to where we were last year but I am trying to find the best balance for [him/her]. I'm pretty stumped honestly. This is the worst it has been in a long time.

(Ex. S107 at 1, emphasis added.)

148. On November 3, 2014, the District convened another IEP revision meeting to address Student's changes to Student's IEP for the 2014/2015 academic year. (Ex. S117.)

149. At the November 3, 2014 IEP meeting, the team discussed Student's modified schedule and agreed to a school day from 8:45 a.m. to 2:25 p.m. "until [Student's] health is better." (Ex. S117.) At the November meeting, Parent again asked about augmentative communication services for Student. The meeting minutes indicate Parent was informed, "[Ms. Christensen] will look into this[.]" (*Id.*) No changes were made to Student's AG's or STO's at the November meeting. (*See* Ex. S117.)

150. In November 2014, after the November IEP Revision, Ms. Christiansen completed an Augmentative Communication Screening Checklist to determine whether augmentative communication services were appropriate for Student. (Ex. S115; Tr. Vol III at 632: 12 through 18 and Vol VIII at 1513:17 through 23.) The District did not obtain Parent's consent before completing the screening. The District did not send Parent a prior written notice (PWN), either proposing or refusing to initiate the augmentative communication evaluation, after the September 2014 meeting. (Tr. Vol IX at 1656:3 through 7.)

151. Ms. North, Willamette ESD Hearing Specialist, believes it is necessary to obtain parental consent prior to completing the Augmentative Communication Screening Checklist the ESD provided to the District. (Tr. Vol XIV at 2614:20 through 22.)

152. In February 2015, Parent observed that Student seemed to be increasingly frustrated with his/her inability to communicate which resulted in screaming from Student on multiple occasions. On the morning of February 2, 2015, Parent emailed Ms. Christiansen and requested that she contact Student's private SLP, Ms. Stanley, to obtain input on how to address Student's screaming episodes when they occurred at school. (Ex. D48 at 3 and 4.)

153. On February 3, 2015, Ms. Christiansen emailed Parent indicating she was able to speak with Ms. Stanley regarding communicating with Student. Ms. Christiansen also advised Parent that Student had minor screaming episodes that day as well as the day prior. Ms. Christiansen asked Parent for input on how to address these episodes. (Ex. D48 at 1.)

154. On the evening of February 3, 2015, Parent responded to Ms. Christiansen's email and advised her that Student's screaming "is an indicator something is wrong" (Ex. D48 at 1.)

and provided suggestions on how to communicate with Student to encourage him/her to communicate rather than scream. Parent also informed Ms. Christiansen that Student's dysautonomia was causing "low cortisol levels and adrenaline and epinephrine dumps" for Student. (*Id.*)

155. The District did not perform a functional behavioral assessment of Student to determine whether he/she required a behavioral support plan to address screaming episodes at school. (Tr. Vol VI at 1155:6 through 12.)

156. Ms. Christensen believed Student's IEP goals were too challenging and difficult for Student. Ms. Christiansen, therefore, decided to unilaterally scale back Student's IEP goals to "get back to more of a baseline" and begin working from where she believed Student's level of ability to be. (Tr. Vol VII at 1380:12 through 23.)

157. On February 26, 2015, Parent emailed Ms. Galbraith and expressed concern that Ms. Olson-Murphy was not involved with Student and requested the regional program substitute Ms. Olson-Murphy for Mr. Jordan as Student's vision consultant. (Tr. Vol II at 235: 1 through 24.)

158. On February 28, 2015, Ms. Christiansen emailed Ms. Galbraith expressing frustration with Student's current AG's and STO's as well as events of the preceding week. Among these frustrations, Ms. Christiansen indicated, "[t]hese goals are terribly written[.]" (Ex. D60 at 3.) In addition, Ms. Christiansen informed Ms. Galbraith that Parent had visited her classroom and, during a discussion with Parent, Ms. Christiansen informed her that an Augmentative Communication Screening Checklist had been completed for Student. Ms. Christiansen advised Ms. Galbraith, "[Parent] asked to see the screening form when she was here and *I just blew it off*, could not handle that confrontation at the moment." (*Id.*, emphasis added.)

159. When Parent requested the screening checklist from Ms. Christensen, she turned and walked away from Parent. (Tr. Vol VIII at 1658:1 through 6.)

160. In Ms. Galbraith's opinion, during the 2014-15 academic year, Parent was "very welcome" at school because the District staff felt they "were missing things that Parent was able to share that Student was able to do at home or at therapy setting [sic] and needed that guidance[.]" (Tr. Vol III at 457:14 through 19.)

161. On March 3, 2015, District convened Student's annual IEP meeting without a general education teacher in attendance. (Exs. D61 at 1 and 2, D66 at 11, and D67; Tr. Vol III at 475:14 through 476:20.) The March 3, 2015 meeting was also intended to serve as a "preplanning meeting" to add the eligibility category of deafblind (DB) to Student's eligibility codes. (Exs. D66 at 11 and D68; Tr. Vol III at 467:18 through 24.) At the March 2015 IEP meeting, the team members present reviewed the special factors, the PLs, the AGs and STOs, and the service summary for Student's IEP. (Ex. D66 at 11 through 19.)

162. At the March 2015 IEP meeting, the team members present discussed the need for activities in the general education classroom to be "hands-on" for Student. (Ex. D66 at 11.) The

team members also discussed the importance of movement for students who are deafblind and addressed the FM system that Parent would be sending to school the following week. (*Id.* at 12.)

163. On March 3, 2015, the IEP team decided no new or additional information was needed to add the eligibility category of DB, along with SDI and related services, to Student's IEP. (Ex. D66 at 12.) The March 3, 2015 meeting was continued to a later date to complete Student's IEP. (Tr. Vol III at 475:14 through 20.)

164. On March 11, 2015, the District convened a continued IEP meeting to finish drafting Student's IEP. (Exs. D66, D67, and D68.) On that date, the District also issued a PWN to Parent indicating a proposal to add DB to Student's eligibilities. DB was not added to Student's March 2015 IEP. (Ex. D67.) District staff did not request any new or additional evaluations at the meeting to address a perceived lack of progress by Student or to address screaming behaviors exhibited by Student. (Tr. Vol VIII at 1598:2 through 1601:13.)

165. The March 2015 IEP Present Levels provides the following overview of Student:

[Student] is a very sweet, very complicated, [individual]. [He/She] enjoys spending time with [his/her] peers, and is very well liked. Peers like to push [his/her] wheelchair, sit by [him/her], interact, and play games (creatively), ie [sic] 4 square, follow the leader, or tetherball. [He/She] is capable of using [his/her] feet and head to push switches to communicate or interact with [his/her] environment. [He/She] attends school 4 hours a day at this point.

(Ex. D66 at 2.)

166. In addition, the March 2015 IEP contained the following data pertaining to Student's progress on AGs and STOs:

Holding objects in [his/her] hand- 100% when item is placed in [his/her] hand [he/she] will hold it until it is removed.

Exploring items on [his/her] tray- 0% independent. 100% with hand under hand support.

Staying awake alert- 20% of the day awake and alert, 44% awake[.]

Increased head control- We have not seen an increase in head control.

Asking for "More please"- 0/12 opportunities.

Making a choice between 2 items/activities "yes that's the one"- 2/25 opportunities.

(Ex. D66 at 2.)

167. The Parent concerns section of Present Levels information on the March 2015 IEP stated, in part:

[Parent] is concerned about the amount of time spent working on goals. Team discussed options to add time. She is concerned about the schedule and number of activities and options available to [Student].

(Ex. D66 at 3.)

168. The March 2015 IEP reduced Student's AGs from four to two. The March 2015 IEP contained a Communication AG that read, "[Student] will increase [his/her] ability to communicate by working toward the following objectives." (Ex. D66 at 6.) The Communication AG contained four Measurable STO's that read:

1.01 Given a switch placed to the left of [his/her] head, [Student] will move [his/her] head to activate the switch to make a choice ("Yes that's the one") between 2-3 categories and then choose an item within that category in 5/20 opportunities.

1.02 Given a switch placed to the left of [his/her] head, [Student] will move [his/her] head to activate the switch to ask for "more, please" of an activity [he/she] is doing in 5/20 opportunities.

1.03 Given a social interaction, [Student] will activate a switch on the left side of [his/her] head to gain attention or tell a peer/adult something in 6/10 opportunities.

1.04 Given 3 categories of what [he/she] would like to do [Student] will indicate [his/her] choice by vocalizing, smiling, squealing [sic], moving [his/her] body, turning [his/her] head and then make a choice within that category in 3/5 opportunities.

(Ex. D66 at 6.)

169. The March 2015 IEP contained an Adaptive Skills AG that read, "[Student] will increase [his/her] adaptive skills by working toward the following objectives." (Ex. D66 at 7.) The Adaptive Skills AG contained six Measurable STO's that read:

2.01 Once an item is placed in [his/her] hand, [Student] will hold it for 1 minute, and attempt to move item to [his/her] mouth with hand under/over hand assistance in 6/10 opportunities.

2.02 [Student] will follow touch and verbal cues to relax/stiffen [his/her] body 6/10 opportunities.

2.03 With hand under/over hand assistance, [Student] will explore with [his/her] hands a variety of items placed in front of [him/her] 3/5 opportunities.

2.04 [Student] will remain awake 80% of [his/her] school day.

2.05 [Student] will independently move [his/her] body to create auditory, tactile, and visual experiences to include pushing switches 3 or more movements in a 15 minute period.

2.06 Once positioned and prompted, [Student] will hold [his/her] head up for 3 seconds to look at [his/her] choices.

(Ex. D66 at 7.)

170. The March 2015 IEP contained no Present Level related to Student's abilities to choose between categories. (Tr. Vol VIII at 1574:11 through 13.) The March 2015 IEP did not contain Present Level data pertaining to the Adaptive Skills STO related to Student independently moving his/her body. (Tr. Vol VIII at 1596:9 through 21.) No one from the District informed Parent, at the March 2015 IEP meeting, of the level of performance Student was capable of, while at school, related to the Communication AG and STOs. (Tr. Vol XIV at 2728:8 through 16.)

171. Ms. Christensen did not know Student's Present Level related to the STO for head control at the time of the March 2015 IEP meeting. (Tr. Vol VIII at 1590:22 through 1591:2.)

172. The March 2015 IEP reduced the amount of SDI Student would receive on the Adaptive Skills AG from 40 minutes per week to 40 minutes per month with no explanation or justification. (Ex. D66 at 8.)

173. The March 2015 IEP reduced Student's related service of Audiology/Hearing from three hours per year to one hour per year but increased the time for the Hearing Specialist consultation from two hours per year to five hours per year. (Ex. D66 at 8 and 9.)

174. The March 2015 IEP stated that Student would participate in general education activities only during "recess, lunch, PE, music, social skills, library, and special activities." (Ex. D66 at 9.) The March IEP indicates Student's placement was maintained at "[l]ess than 40% of the Day in Regular Class with a modified day." (*Id.* at 10).

175. According to Student's case manager, Ms. Christensen, the goals on the March 2015 IEP were appropriate for Student because they were on Student's IEP from the previous year. (Tr. Vol VIII at 1583:6 through 1584:3.) No one at the meeting explained to Parent that Student's goals were the same as the year before. (Tr. Vol XIV at 2727:23 through 2728:7.)

176. Parent is unfamiliar with how to draft appropriate AGs and STOs for Student and, therefore, relies on the expertise and guidance of District staff. (Tr. Vol XIV at Tr. 2887: 13 through 17.)

177. Also on March 11, 2015, the District issued a PWN regarding evaluation and consent for the District to evaluate Student under the eligibility category of DB. In the PWN, the District stated, "[n]o new testing needed. We will use information from existing vision and

hearing eligibilities.” (Ex. D68 at 1.) Parent signed and returned the PWN, giving consent for the evaluation, on March 16, 2015. (*Id.*)

178. On March 20, 2015, District issued a Notice of IEP Team Meeting for Student to consider the new eligibility category of DB. (Ex. D69 at 1.)

179. On May 6, 2015, the District convened an eligibility meeting to determine Student’s continued eligibility for special education and related services. At the May 2015 eligibility meeting, the District found Student eligible for SDI and related services under the eligibility categories of DB, HI, and VI. (Exs. S163, S164, and S165; Tr. Vol III at 479:6 through 480:4.)

180. Although Student has been on the Deafblind Registry through the Oregon Deafblind Project since shortly after he/she was born, the District did not consider Student eligible for SDI and related services under the DB eligibility category until the May 2015 eligibility meeting. (Tr. Vol XI at 2132:12 through 2133:8.)

181. The purpose of adding the eligibility category of DB to Student’s IEP was to trigger additional strategies, instruction, and supports, from the case manager and related service providers, that should be in place for Student. (Tr. Vol III at 468:21 through 469:2.)

182. Parent referred substitute nurses to the District for coverage on days that Ms. Oace would not be available to work with Student. The District utilized the substituted nurses referred by Parent. The District did not independently locate any of the substitute nurses used for Student during the period in issue. (Tr. Vol I at 153:7 through 15 and Vol XIV at 2690:23 through 25; Ex. D19 at 1, see also Ex. S91.)

183. Ms. Lawson provided some coverage for Ms. Oace to take restroom and lunch breaks during the 2014/2015 academic year. (Tr. Vol XII at 2354:12 through 22.) Nonetheless, Ms. Lawson did not provide any nursing services to Student when Ms. Oace took a lunch or restroom break. Instead, Ms. Lawson simply monitored Student for Ms. Oace. (Tr. XIII 2390:1 through 12.)

184. Early in Student’s education, the District implemented object cues for Student to assist with his/her understanding of daily routines and destination within the school environment. Those object cues consisted of a small object that Student could hold and related to the destination or routine. Staff provided a small section of the mat from a changing table to represent the restroom, a jump rope for recess, an oversized pencil to indicate the general education classroom, and a spoon to indicate lunchtime. (Tr. Vol IV at 674:10 through 675:8.) The District developed new object cues for Student two or three weeks into the 2014/2015 academic year, but that those object cues were not available at the beginning of the 2014/2015 academic year. (Tr. Vol VII at 1334:14 through 21.)

185. When initially hired by the District shortly before Student’s fourth grade year, Ms. Oace initially understood that her position would be a “[1:1] nurse with a student that needed to have a nurse in order to go to school.” (Tr. Vol IV at 654:23 through 655:8.) Ms.

Oace was later notified that she was also expected to be Student's EA. (*Id.*). Ms. Oace was not informed of the educational duties related to working with Student until Student began his/her fourth grade year at Whitworth Elementary. (Tr. Vol IV at 657:11 through 15.)

186. Ms. Oace's main concern in working with Student was his/her physical safety, rather than his/her education. (Tr. Vol IV at 659:4 through 661:6.) Ms. Oace's nursing duties for Student throughout the school day required providing oxygen, bronchial suctioning, O₂ saturation monitoring, position changes, and medication administration when necessary. (Tr. Vol IV at 683:20 through 22.) Some of those nursing interventions, such as putting on Student's oxygen line, could be done in the general education or special education classroom. Other nursing interventions, like bronchial suctioning, could not be done in the classroom in front of Student's peers for his/her privacy. (Tr. Vol IV at 685:6 through 686: 14.) Student's medical needs required constant monitoring throughout the school day because his/her respiratory needs were unpredictable. (Tr. Vol IV at 682:24 through 683:4.)

187. Ms. Oace considered the language in Student's IEP to be confusing. Ms. Oace and Ms. Christensen worked together to understand the IEP goals and "figure out how * * * to best meet [the IEP] goals[.]" (Tr. Vol IV at 658: 13 through 19.) Ms. Oace did not receive specific training from school staff regarding how to work with Student on his/her IEP goals or how to record data on Student's IEP goals. (Tr. Vol IV at 672:21 through 673:9.) Ms. Oace understood her role in working with Student on IEP goals was to "help facilitate, making choices, * * * to give the opportunity for [Student to make] choices and to document when those would happen." (Tr. Vol IV at 700:24 through 701:16.)

188. Mr. Jordan set up the little room for Student at Whitworth Elementary but did not assist with object cues or other aspects of Student's education. (Tr. Vol IV at 673:10 through 674:3.) Ms. Oace believed that when Student was in his/her little room, Student was working on IEP goals related to recreating a tactile, visual, or auditory experience. (Tr. Vol IV at 701: 17 through 702:9.)

189. Ms. Oace did not always have the ability to take the data on Student's IEP goals because she was also managing various medical interventions. (Tr. Vol IV at 705:4 through 13.) Ms. Oace was informed my school personnel that she would not need to work on every goal for Student every day at school and that Student's IEP goals were only tracked occasionally. (Tr. Vol IV at 705: 19 through 23.)

190. Prior to working with Student, Ms. Oace reviewed a binder maintained by the District containing information on Student's object and touch cues, as well as various protocols to address situations that might arise at school. (Tr. Vol I at 663: 12 through 19 and Vol XIII at 2411:14 through 2413:12.) Student's binder in the 2014/2015 academic year included a list of verbal and touch cues, a description of the smart-partner process, a language learning program, information pertaining to Student's communication program, instructions on using his/her BIGmack switch, and information on communicative intent strategies, all provided by Parent. (Tr. Vol IV at 735:11 through 738:12 and 746:7 through 12; Exs. D146 and D173.) Ms. Oace also reviewed Student's health management protocols (HMP). (Tr. Vol IV at 663:20 through 24.)

191. When Ms. Oace arrived at Student's home each morning, she reviewed a checklist that informed her of any medications given to Student that morning and listed items that were to be packed in the bag for the school day. The checklist also provided an indication of how Student was feeling on that morning. (Tr. Vol IV at 664:19 through 665:8.)

192. Student had the following equipment that accompanied him/her to school each day: post pharyngeal suction machine; oxygen tank(s); Student's backpack with his/her binder and communication sheets for sharing information between home and school; one or more changes of clothes; a pulse oximeter; Student's BIGmack; and an insulated backpack with Student's G-tube feeding supplies and medications. (Tr. Vol IV at 666:5 through 667:1.)

193. When she arrived at Student's home each morning, Ms. Oace would check all of the items coming with Student to determine if everything he/she needed for the school day was packed. (Tr. Vol IV at 668: 16 through 22.)

194. When Student attended Lyle Elementary, the practice was to check Student's bag for supplies after he/she arrived at school. That practice sometimes left Student without necessary supplies, such as seizure medications or oxygen, and occasionally left school staff without the ability to charge a piece of Student's equipment. (Tr. Vol IV at 668:16 through 669:19.) Ms. Oace was uncomfortable with the morning check occurring at school because "it was not safe to have even gotten on the bus knowing that the oxygen tank was not full or that [his/her] seizure medications were not packed." (Tr. Vol IV at 669: 13 through 17.)

195. Ms. Oace did not receive any training from the District regarding Student's IEP goal related to the adaptive skill of remaining awake and alert other than shadowing Ms. Ferris for a short time during the prior school year and observing how Ms. Ferris tracked Student's awake and alert status every 15 minutes throughout the school day. (Tr. Vol IV at 677:7 through 678:12 and 744:4 through 746.)

196. Ms. Oace also worked with Student on using a gait trainer.⁸ Student had to be transferred from his/her wheelchair to the gait trainer which required two people to ensure Student's safety during the transfer. Tr. Vol IV at 691:7 through 692: 1.)

197. During the 2014/2015 academic year, Student attended Tanya Stutzman's fourth grade general education class. (Tr. Vol IV at 692:8 through 693:7.) When Student went to the general education classroom, the class would begin with Ms. Stutzman reading to the class followed by social studies and science. Student would then have library time, physical education (PE), and/or and offsite Bible class. (Tr. Vol IX at 1786:22 through 1787:3 and 1787:23 through 1788: 1.)

198. The social studies curriculum in the general education classroom for the

⁸ At hearing, Maureen Lenz testified that the gait trainer is "like a large baby walker" with trunk support, a seat, and a platform to support a student's arms. A student is able to stand in a gait trainer, and it is used to work on weight bearing and taking steps. Ms. Lenz also testified that Student was using a gait trainer with his/her private PT. (Tr. Vol V at 886:11 through 22.)

2014/2015 academic year was “more verbal, not as much hands on.” (Tr. Vol IX at 1789:5 through 7.) When Ms. Stutzman assigned the class to work on a worksheet, Student’s EA would let Student experience “the feel of writing” by putting a writing instrument in his/her hand and allowing him/her to color on the page. (Tr. Vol IV at 1789:13 through 1790:2.) Ms. Stutzman did not modify any portion of the curriculum, that she worked on in class, for Student. Nor did she provide any different level or type of instruction for Student. (Tr. Vol IV at 1797:17 through 20.)

199. In the general education classroom, Student’s peers would approach Student, rub his/her hand, and say hello as they had been taught in previous years of school with Student. (Tr. Vol IV at 1791:2 through 14.) Ms. Stutzman does not recall receiving any training on how to communicate with Student prior to the 2014/2015 academic year. (Tr. Vol IX at 1807:19 through 22.) Ms. Stutzman was unaware how Student communicates “no” if he/she did not want to do something or intended to answer a question in the negative. (Tr. Vol IX at 1812:9 through 10.) Ms. Stutzman did not receive any training on how to use tactile cues with Student. (Tr. Vol IX at 1810:12 through 19.) Ms. Stutzman did not participate in any transition activities to assist Student transition into the general education class at Whitworth Elementary. (Tr. Vol IX at 1812:5 through 8.)

200. In the general education class, Student needed to be situated as close as possible to the Ms. Stutzman due to his/her vision and hearing impairments. Tr. 692:8-693:7.

201. Student spent most of his/her school day during the 2014/2015 academic year in the general education setting except for feeding and changing time. (Tr. Vol IV at 813:20 through 23.) Student participated in read aloud time in the general education classroom. During that time, Student would be transferred to a bean bag located near Ms. Stutzman and Student’s peers. (Tr. Vol VIII at 1479:20 through 1480:11.)

202. During the 2014/2015 academic year, Ms. Christiansen used Student’s feeding time to provide his/her SDI. Feeding time was the only time Student was in the special education classroom to receive SDI during the school day. (Tr. Vol IV at 813:24 through 814:11.)

203. Ms. Christensen believed that Student received SDI at recess with his/her general education peers because he/she “always had the opportunity to make a comment to kids who came up to, and wanted to talk with [him/her.]” (Tr. Vol VII at 1335:14 through 19.) According to Ms. Christensen, SDI was delivered by “giving [Student] credit for taking [the] opportunity to make a comment” by using his/her head switch. (Tr. Vol VII at 1335:21 through 1336:2.) Ms. Christensen understood that Ms. Oace provided SDI to Student during recess time. (Tr. Vol VII at 1336:5 through 8.)

204. Ms. Christensen also believed that the time Student spent in the little room counted as SDI. According to Ms. Christensen’s understanding, Student was receiving SDI whenever he/she was offered choices. (Tr. Vol VII at 1336:7 through 22, and 1527:21 through 22.) Ms. Christensen is unaware if that process was a method by which Student learned. (Tr. Vol VII at 1528:5 through 9.)

205. During the 2014/2015 academic year, Parent observed Ms. Oace spending a significant amount of time charting Student's medical information, and believed that, although Ms. Oace kept Student safe, Student's educational needs were not being met. (Tr. Vol XIV at 2692:9 through 21.) Parent discussed her concerns with the District about Ms. Oace's inability to tend to Student's medical and educational needs and expressed her belief that Student needed an EA in addition to Ms. Oace. (Tr. Vol XIV at 2693:2 through 12.)

206. The District did not provide Student with a separate EA until his/her fifth grade year (2015/2016 academic year). (Tr. Vol XIV at 2693:11 through 16.)

207. During the 2014/2015 academic year, Ms. Oace did not see a significant change in Student's overall health. (Tr. Vol IV at 710:9 through 24.)

208. Parent did not receive any IEP progress reports for Student during the 2014/2015 academic year. (See Ex. 184 at 3; see also Tr. Vol VIII at 1628:20 through 1629:15.)

Fifth grade, 2015/2016 academic year

209. The District hired an EA, Jaimie Norman, for Student, in addition to his/her 1:1 nurse, for the 2015/2016 academic year. (Tr. Vol III at 485:21 through 25 and 491:20 through 24.) Ms. Norman has a degree in speech-language pathology. (Tr. Vol III at 492:7 through 9.)

210. On August 20, 2015, Dr. Dinsmore wrote a letter for Student that stated, "[Student] is a current patient of mine. Due to [his/her] medical needs, [he/she] will be starting school two hours late every day for the 2015-16 school year." (Ex. D79.)

211. Ms. Christensen continued to serve as Student's special education teacher during the 2015/2016 academic year. (Tr. Vol III at 443:11 through 17.)

212. The first time the District requested training regarding Student from Dr. Ayer and the Oregon Deafblind Project was during the 2015/2016 academic year. (Tr. Vol II at 333:9 through 12.)

213. On September 1, 2015, District convened an IEP meeting to revise Student's IEP for the 2015/2016 academic year (September 1, 2015 IEP Revision). (Exs. S172 and 173.)

214. At the September 1, 2015 IEP Revision meeting, the IEP team agreed to add a full day of "EA time" to Student's IEP. This added a 1:1 paraprofessional to assist the RN and Student through the school day. (Ex. D81 at 2.)

215. At the September 1, 2015 meeting, Parent requested that Student receive more modified curriculum than he/she had the previous year. (Tr. Vol IV at 716:20 through 718:19.) At that meeting, Parent also signed a consent form for an Orientation and Mobility (O&M) Screening. (Exs. S173 at 1, S174, and D81 at 4.) The September 1, 2015 O&M evaluation was the first evaluation the District had done of Student's O&M needs. The District acknowledged

that Student has required O&M services his/her entire life. (Tr. Vol V at 1014:3 through 1015:12.)

216. At the September 1, 2015 IEP Revision meeting, the team agreed to maintain Student's then-current placement of "[l]ess than 40% of the Day in Reg. Class -w/modified day." (Ex. D81 at 3.) According to the IEP, the only other placement option considered was to place Student in a self-contained special education classroom with a modified day. (*Id.*)

217. During the 2015/2016 academic year, Dr. Ayer provided access to deafblind training modules and tailored the modules to be relevant to Student. Ms. Christensen did not watch the modules unless Ms. Norman or Ms. Oace first previewed the information and recommended it to Ms. Christensen. (Tr. Vol VIII at 1477:9 through 22 and 1478:7 through 9.)

218. Ms. Christensen watched the online deafblind modules with Ms. Norman while Ms. Norman completed the modules, but only if there was something Ms. Christiansen felt was relevant for her to watch. (Tr. Vol VII at 1413:5 through 9.) Ms. Christensen did not complete any of the assignments contained in the deafblind modules provided by Dr. Ayer. (Tr. Vol VIII at 1477:23 through 25.)

219. On September 8, 2015, Student's first day of school for the 2015/2016 academic year, Ms. Oace, Ms. Norman, and Parent accompanied Student to the fifth grade general education classroom, taught by Kristen Goulding. (Tr. Vol IV at 844:7 through 846:14.)

220. Following Student's first day of school, Parent sent an email to District staff including Ms. Galbraith, Ms. Christiansen, and Ms. Goulding expressing concerns Parent observed in the classroom. Specifically, Parent's email stated, in part:

I wanted to take some time out to connect and review our first day of school. * *
*.

I was/am quite concerned that [Student] is being considered a student of [his/her] EA and [the] special ed classroom instead of a general education student who is receiving special education services. [He/She] is a general education student first. [His/Her] EA is there to help [him/her] access the education provided to [his/her] by licensed staff.

While I understand not all general education class time is appropriate for [Student], it is very important that [he/she] be considered and treated as a member of [his/her] general education classroom. Today [Student] did not have a name tag prepared for [him/her] like the other students, nor did [Student] have a homework folder provided to [him/her] until prompted by the EA. It is important that some prep time be taken to specifically design how [Student] will be incorporated and included into the classroom and curriculum. The intent is not to have [him/her] just drop in and hang out periodically. [Student] understands language and wants to learn.

* * * * *

In addition, how will [Student's] education be facilitated and [his/her] course work modified to meet [Student's] needs? I expect [Student] to come home with appropriate assignments for [him/her]. [Student] should not be sent the same homework as the other children. * * *

* * * * *

I will close by saying that I understand this is new territory and I do not think there is any intentional ill will, that said, too much time has been wasted in [Student's] education up to this point and we can no longer use these excuses. Making name tags for all children except [Student] is a pretty big deal and in my eyes a glaring indicator of a lack of understanding pertaining to what it means to have [Student] at school.

(Ex. S178 at 1.)

221. Parent was concerned that, upon entering the general education classroom, Student was introduced to the rest of the class, by Ms. Goulding, as a "visitor." (Ex. S179 at 2.)

222. On September 27, 2015, District convened another IEP Revision meeting for Student. (Ex. S184.) Parent attended the meeting with an unpaid advocate, Kathleen Johnson, to assist her. (Tr. Vol XIV at 2748:6 through 10 and Vol XII at 3143:20 through 22.)

223. Ms. Johnson has known Parent since Parent was 18 years of age and is a former roommate of Parent. Ms. Johnson was present at the hospital when Student was born. (Tr. Vol XII at 3089:13 through 17.)

224. Ms. Johnson is knows Student and is able to regularly communicate with him/her. Ms. Johnson speaks to Student as she would any other student of his/her age, albeit with more volume and animation of facial expression. Student communicates with Ms. Johnson in response using a combination of sound, pitch variation, and intentional body movements. (Tr. Vol XII at 3090:9 through 3091:8.)

225. Ms. Johnson holds Bachelor of Arts in humanities with an emphasis in speech communication and English literature as well as a minor in linguistics. Ms. Johnson also obtained a master's degree in special education and a teaching administrator's license. (Tr. Vol XII at 3087:16-24.) Ms. Johnson is also a former Assistant Director of Special Education for the Cascade School District. She currently serves as Assistant Principal for Aumsville Elementary School. (Tr. Vol XII at 3088:5 through 9.)

226. At the September 27, 2015 IEP meeting, Parent expressed concern that a modified curriculum had not yet been added to Student's IEP. (Ex. S184 at 2.) Parent requested a modified curriculum for Student so he/she could participate in the same or similar educational curriculum as Student's peers, but at a level appropriate for Student. (Tr. Vol XIV at 2751:3)

through 16.)

227. Parent discovered that the idea of modified curriculum was new for Student during his/her fifth grade year and was advised by Ms. Johnson to ensure it was added to Student's IEP. (Tr. Vol XIV at 2751:17 through 2752:15.) Prior to fifth grade, Parent had not observed any modified curriculum that she considered parallel to Student's peers. (Tr. Vol XIV at 2752: 16 through 19.) At the September 27, 2015 meeting, Ms. Johnson and Parent asked that the general education teacher and the special education teacher work together to modify Student's curriculum to allow Student appropriate access for his/her ability. (Tr. Vol XVII at 3098:5 through 9.)

228. Dr. Ayer also attended the September 27, 2015 meeting and agreed with Parent that, if Student is in the general education classroom, he/she should have curriculum appropriately modified to suit his/her ability. (Ex. S184 at 2.) At the September 27, 2015 IEP meeting, Dr. Ayer expressed concern regarding Student's schedule and that Student was "in too many places" during the school day. Ex. S184 at 2; Tr. Vol VIII at 1626:2 through 13.)

229. Parent indicated, at the meeting, that she wanted Student around his/her peers to benefit from socialization. (Ex. S184 at 2.)

230. Based on Ms. Christiansen's responses to certain questions posed at the meeting, Ms. Johnson had serious concerns about Ms. Christiansen's ability to modify curriculum appropriately for Student. (Tr. Vol XVII at 3098:10 through 16.) During the meeting, Ms. Johnson determined that Student's EAs relied heavily on Parent, instead of Ms. Christiansen, to learn how to work with Student. (Tr. Vol XVII at 3103:3 through 8.)

231. Meeting notes from the September 27, 2015 IEP meeting indicate Jaime Norman, Student's EA, would be providing modification suggestions to Ms. Christiansen, the special education teacher because Ms. Norman would "connect with [Student]" and therefore Ms. Norman would know what works for Student. (Ex. S184 at 2 and 3.)

232. Ms. Norman and Ms. Christensen had approximately 15 minutes together each morning to plan for Student's modified curriculum for the school day during the 2015/2016 academic year. (Tr. Vol IV at 718:20 through 719:18.)

233. At the September 27, 2015 IEP meeting, the general education PE teacher, Craig Button, stated that he did not have any adaptive equipment for Student to participate in PE class. (Ex. S184 at 3.)

234. At the September 27, 2015 IEP meeting, Parent asked that the IEP be revised to include a social skills goal. (Ex. S184 at 3.) The record contains no IEP document generated at or immediately following this meeting. (Record.)

235. As a result of the September 27, 2015 IEP meeting, Student's schedule was changed to reduce the number of transitions throughout Student's school day. (Tr. Vol VIII at 1626:1 through 23.)

236. On October 19, 2015, Susan Duncan, Vision and O&M Specialist with Willamette ESD, began working with Student. Ms. Duncan also works as a contractor with Oregon School for the Deaf (OSD). (Ex. D93; Tr. Vol XII at 2193:5 through 15 *see also* Ex. D100.)

237. When Ms. Duncan initially assessed Student in October 2015, District staff were using destination cues with Student made of Plexiglas. Ms. Duncan did not believe Student was able to identify where he/she was going based on the Plexiglas destination cues. (Tr. Vol XII at 2199:21 through 2200:11.) To assist Student with understanding his/her surroundings, Ms. Duncan implemented “trailing” with Student. (Tr. Vol XII at 2200:22 through 2201:7.)

238. Trailing is a process where Student will feel and follow along an exterior or interior wall to help him/her understand spatially where he/she is moving. Student requires physical support to hold his/her arm in a position that allowed him/her to maintain contact with the wall, so Ms. Duncan introduced a small paint roller that Student can hold and contact the wall while moving in his/her wheelchair. (Tr. Vol XII at 2201:4 through 7 and 2205:17 through 2206:5.)

239. Parent uses trailing effectively with Student in the home and Student appears to enjoy trailing. (Tr. Vol XIV at 2765:14 through 15.)

240. Ms. Duncan is unaware why Student was not considered for O&M services prior to the fall of 2015. (Tr. Vol XII at 2263:16 through 20.)

241. On November 18, 2015, the District convened another meeting to revise Student’s IEP for the 2015/2016 academic year (November 2015 IEP Revision). (Ex. S221.) Parent attended the meeting with Ms. Johnson again acting as her advocate. (*Id.* at 1; Tr. Vol XI at 2085:20 through 22.) At that meeting, the District presented and Parent signed a consent form permitted the District to conduct screenings of Student for augmentative communication services. (Ex. D121.)

242. Student had used and been successful with augmentative communication in private therapy. (Tr. Vol XIV at 2761:10 through 21.)

243. At the November 2015 IEP Revision meeting, the team reviewed Ms. Duncan’s O&M Assessment completed for Student. In her assessment, Ms. Duncan made several recommendations including adding O&M consultation to Student’s related services, changing Student’s tactile object and destination cues to make them consistent, and exploring hand-under-hand adaptive sign language with Student. In addition, Ms. Duncan recommended pairing preferred and non-preferred options when asking Student to make a choice. Ms. Duncan believed this would encourage consistent responses from Student. (Exs. D122 at 8 and D124; Tr. Vol III at 504:24 through 505:4 and Vol XII 2211:17 through 2212:6.)

244. Based on Ms. Duncan’s recommendations, the IEP team agreed to add eight hours of O&M services per year to Student’s IEP. (Ex. D122 at 9; Tr. Vol III at 505:5 through 7.) the

IEP team also agreed to increase the amount of SDI for Student's Adaptive Skills AG from 40 minutes per month to "40 minutes per day when awake and alert." (Ex. D122 at 2.)

245. In addition, the IEP team also agreed to again divide Student's Communication AG into two distinct areas of communication; expressive and receptive. The team increased Student's SDI in communication from 60 minutes per month to 40 mins per day of each expressive and receptive communication, when Student was awake and alert. The team also added "modified meaningful curriculum to Student's IEP. (Ex. D122 at 2.) The November 2015 IEP Revision was the first to contain modified curriculum for Student. (Tr. Vol VII at 1453:23 through 1454:3.)

246. At the November 2015 IEP meeting, the team agreed to maintain Student's placement at "less than 40% of the day in Gen. Ed class w/modified day." The only other placement option considered by the team was to place Student in a "Self-contained classroom with modified day." (Ex. D122 at 7.)

247. The November 2015 IEP concluded with a draft of updated AGs and STOs that would be refined and sent to Parent for review and input. (See Ex. D122.) On December 3, 2015, Parent emailed Ms. Christensen and approved Student's IEP AGs. (Ex. D137.)

248. Following the November 2015 IEP meeting, several District staff, including Ms. Oace, Ms. Norman, and Ms. Christiansen completed Augmentative Communication Screening Checklists to determine if Student would be an appropriate candidate for augmentative communication devices and services. (Ex. D131; Tr. Vol XIII at 2543:15 through 2544:9.) Dr. Ayer also completed a screening checklist for Student. (Ex. D143.)

249. On February 9, 2016, Dr. Ayer emailed Parent, Ms. Christensen, Ms. Norman, Ms. Oace, Ms. McFarland, and Ms. Olson-Murphy to schedule a visit to La Creole Middle School in order to begin preparations for Student's transition the following academic year. (Ex. D158 at 3.) The purpose of the February 17, 2016 visit to La Creole Middle School was for Dr. Ayer to observe the campus and classrooms for Student in the 2016/2017 academic year. (Tr. Vol II at 297:7 through 13.) According to Dr. Ayer, deafblind students require a longer transition period. Accordingly, Dr. Ayer typically recommends beginning transition planning as early as practical during the academic year preceding the transition. (Tr. Vol II at 297:7 through 298: 10.)

250. The District determined that Student did not qualify for augmentative communication services, based on the screening checklists completed by staff, but decided to complete a referral to Willamette ESD for those services because Parent wanted the services for Student. On February 16, 2016, Ms. Christensen sent a referral to Willamette ESD for Student to be further evaluated for augmentative communication services. (Ex. S241; Tr. Vol VIII at 1673: 18 through 1674:3 and 7 through 15.)

251. Parent believed that Student was demonstrating more success with communication and augmentative devices in private therapy than District personnel observed in the school setting. Student's private speech therapist recommended augmentative

communication devices for him/her in school. (Tr. Vol XIV at 2768: 16 through 2769:4.)

252. On February 26, 2016, Grace Lewis, MA, CCC-SLP, Augmentative Communication Specialist with Willamette ESD, completed an Augmentative Communication Initial Evaluation Report of Student (February 2016 Aug Comm Report). (Ex. D162.) The February 2016 Aug Comm Report stated, “[Student] could benefit immensely from an augmentative communication system that allowed [him/her] to make choices via switch access and scanning.” (Ex. D162 at 4.)

253. Willamette ESD provided Student with a Dynavox MightyMo speech generating device for use at school. (Tr. Vol XIV at 2762: 2 through 4.) Parent requested that she be allowed to take the device home to provide Student consistency in his/her augmentative communication tools but Willamette ESD refused. (Tr. Vol XIV at 2762:9 through 18.) Dr. Ayer believes Student would need to take the augmentative communication device with him/her because Student needs consistency, otherwise the device would be ineffective for Student. (Tr. Vol II at 365:10 through 21.)

254. Parent contacted local resources for deafblind individuals and was able to obtain a Dynavox MightyMo for Student to use at home. (Tr. Vol XIV at 2762: 19 through 2763:5.) Because the two devices were slightly different, Parent returned the original MightyMo to Willamette ESD and provided Student’s device for use at school as well as home. (Tr. Vol XIV at 2763:9 through 12.)

255. Ms. Olson-Murphy also believes that consistency and repetition are important for Student to learn and therefore agreed with Dr. Ayer that Student would learn better to use the device if he/she were able to use it at home (Tr. Vol II at 2111:7 through 19.)

256. When programming Student’s augmentative communication device, the simplest pictures possible are chosen and colors are used to help facilitate Student’s vision of the choices. (Tr. Vol XIV at 2764:21 through 2765:1.) Student is capable of verbalizing “thank you” and “goodbye” at appropriate times in a conversation. (*Id.* at 2844: 17 through 23.)

257. Parent cannot determine exactly what Student can see, but is confident he/she sees something because he/she demonstrates preferences and tracks movement around him/her. (Tr. Vol XIV at 2843:10 through 13.)

258. On March 2, 2016, the District convened the annual IEP meeting to develop an IEP intended to serve Student through March 1, 2017 (March 2016 IEP). (Ex. D164.) Parent attended the meeting in person. Ms. Johnson, Parent’s advocate, attended by telephone. (Ex. D164 at 2; Tr. Vol XVII at 3111:2 through 6.)

259. The Present Levels section of the March 2016 IEP contained the following overview of Student:

[Student] is a 5th grade [boy/girl] who enjoys being with peers. [He/She] enjoys movement activities and position changes. [He/She] enjoys being read to and

having lunch and recess with [his/her] friends.

Team input, “joyful when involved socially, likes to move, lots of friends, willing to work with adults, strong willed, loves music, motivated by movement, persistent, likes to have things explained to [him/her], loves [his/her] dog, easy to tell when [he/she] is interested, loves to be out and about.”

(Ex. D164 at 5.)

260. In addition, the March 2016 IEP lists Parent concerns as follows:

[Parent] is concerned about the transition and how staff will be trained, what the schedule will look like, how the plan will be carried out. She asked how we plan to teach [Student] the things [he/she] needs, that other kids [his/her] age know. [Parent] is concerned about when we will lose [Ms. Norman] and how we will prepare for that. She would like as much notice as possible as to when specialists are coming to work with [Student], she is frustrated that she does not always get enough notice to be able to join.

(Ex. D164 at 5.)

261. The Present Level section also contains the following data regarding Student’s progress toward his/her AGs:

Expressive communication annual goal- 65%

[Student] is indicating [his/her] desire to continue or stop an activity in 64% of opportunities.

[Student] will activate a switch to gain attention or tell something in 75% of opportunities.

Receptive communication annual goal- 50%

[Student] is making a choice between 2-3 items 50% of opportunities.

[Student] is indicating a choice of what [he/she] would like to do in 60% of opportunities.

[Student] is following touch and verbal cues to relax/stiffen [his/her] body in 50% of opportunities.

Adaptive skills annual goal- 57%

[Student] will hold items placed in her hand for at least one minute and move toward mouth with assistance in 60% of opportunities.

[Student] will explore a variety of items placed in front of [him/her] with assistance in 57% of opportunities.

[Student] will move [his/her] body 3 or more times in a 15 minute period in 70% of opportunities.

[Student] will hold [his/her] head up for 3 seconds after being positioned in 38% of opportunities.

[Student] will extend [his/her] hand with prompts to use a trailing technique in 63% of opportunities.

(Ex. D164 at 5 and 6, emphasis original.)

262. Student's Expressive Communication AG and STOs from the November 2015 IEP Revision was not changed on the March 2016 IEP. (Ex. D164 at 10; see also Ex. D122.) At the time of the March 2016 IEP, Student had met or exceeded the AG and STOs for Expressive Communication. (Tr. Vol IX at 1685:3 through 1686:11.)

263. Likewise, Student's Adaptive Skills AG and STOs from the November 2015 IEP Revision remained unchanged on the March 2016 IEP. (Ex. D164 at 11; *see also* Ex. D122 at 6.) As written, the Adaptive Skills AG showed Student was only expected to make three percent progress for the remainder of the then-current academic year and the 2016/2017 academic year, despite Student having already met the first, third, and fifth STOs for that AG. (Tr. Vol IX at 1687:19 through 1688:24 and 1689:10 through 1690:16.)

264. Parent was not informed by anyone present at the March 2016 IEP meeting that Student had already satisfied the criteria for certain AGs and STOs. (Tr. Vol XVII at 3115:2 through 8.)

265. The March 2016 IEP added 20 hours per year of augmentative communication consultation services for Student. (Ex. D164 at 18.)

266. According to Ms. Christensen, Student's AGs and STOs were not changed on the March 2016 IEP because Student was about to transition to a new school (La Creole Middle School). (Tr. Vol IX at 1728:15 through 18.) Nothing in the IEP or meeting notes indicate the team discussed or decided to leave Student's AGs and STOs unchanged based on the upcoming transition. (Ex. D164 at 23 through 25.)

267. The IEP team agreed to change Student's placement from "[l]ess than 40% of the day in the general education setting" to "40 to 79% of the day in the regular class." (Ex. D164 at 21 and 22.) According to the IEP, these were the only two placement options considered at the IEP meeting. (*Id.*)

268. On June 14, 2016, Ms. Christiansen prepared and issued a Progress Report for

Student's IEP AGs and STOs (June 2016 Progress Report). (Ex. S254.) According to the June 2016 Progress Report, Student made no progress on the Expressive Communication AG. In addition, Student had lost all skills related to the second STO under the Expressive Communication AG. Further, the June 2016 Progress Report showed Student had regressed on the Receptive Communication AG. (Tr. Vol IX at 1693:6 through 1694:20; Ex. S254 at 1.) Student had also regressed on the fifth STO under the Adaptive Skills AG by the time of the June 2016 Progress Report. (Tr. Vol IX at 1695:24 through 1696:7.)

269. Ms. Christensen did not work on all of the skills Student's in Student's IEP on a daily basis. (Tr. Vol IX at 1698:4 through 8.)

270. Ms. Christensen did not call an IEP meeting after preparing the June 2016 Progress Report to address Student's lack of progress and/or regression on the IEP AGs and STOs because she believed it would be unfair to Student's sixth grade teacher. (Tr. Vol IX at 1696:8 through 11 and 1702:14 through 1703:11.)

271. Ms. Norman resigned as Student's EA at the end of the 2015/2016 academic year. (Tr. Vol III at 509:11 through 14.)

272. The District hired Linda Visuano as Student's EA during summer of 2016. (Tr. Vol III at 522:9 through 17.)

Sixth grade 2016/2017 academic year

273. Student did not begin attending school until approximately October 5, 2016 during the 2016/2017 academic year. (Tr. Vol III at 529:19 through 23.)

274. During sixth grade, Ms. Oace would meet with Student's general education teachers to learn what topics would be covered in the general education classes and then assist Ms. Visuano in putting together modified curriculum for Student. (Tr. Vol IV at 753:14 through 754:20; *see also* Tr. Vol VI at 1059:11 through 17.)

275. Due to his/her health, Student was receiving educational services at home between January and March 2017. (Tr. Vol VI at 1192:3 through 7.)

276. The District did not provide Student ESY during the period in issue. (See Exs. S103 at 9, S157 at 10, S176, generally, and S221 at 3.)

Deafblind intervener at OSD

277. Sharla Jones, PhD, is the Director for OSD. (Tr. Vol XVIII at 3219:1 through 9.) During her tenure at OSD, Dr. Jones has used one intervener to assist a student. Dr. Jones observed that the intervener "had a level of expertise that [OSD staff] did not." (Tr. Vol XVIII at 3224:24 through 3225:2.) According to Dr. Jones, the student's resident school district paid for the student to have the intervener at OSD. (Tr. Vol XVIII at 3225:3 through 6.)

278. While at OSD, the intervener set up programs for the deafblind student, instructed OSD staff members how to approach and interact with the student, and instructed staff members how to support the programs the intervener had created for the student. (Tr. Vol XVIII at 3227:21 through 3228:5.)

279. According to Dr. Jones, the intervener also created activities to improve the deafblind student's mobility, the student's ability to learn sign language, and vocabulary. (Tr. Vol XVIII at 3228:25 through 3229:4.) When the student arrived at OSD, she was unable to operate her own wheelchair. After three years with the intervener, the student was able to walk independently with a cane. (Tr. Vol XVIII at 3230:17 through 3231:8.) During that time, the student increased her American Sign Language (ASL) vocabulary, increased the breadth of her friendships, increased her ability to cognitive abilities, and made progress on her IEP AGs and STOs. (Tr. Vol XVIII at 3231:12 through 3232:3.)

CONCLUSIONS OF LAW

1. The District denied Parent the opportunity for meaningful participation in the formulation and enforcement of Student's IEP for the 2014/2015 school year which denied Student a FAPE.

2. The District failed to properly identify Student as a student with a disability in all areas of suspected disability during the 2014/2015 academic year. Parent's claim that the District misidentified Student as a student with an Intellectual Disability is time barred by the IDEA's two-year statute of limitations.

3. The District failed to properly evaluate Student during the 2014-2015 academic year.

4. The District failed to provide Student a FAPE by failing to meet his/her educational needs during the 2014/2015 academic year

5. The District failed to provide Student with an appropriate placement during the 2014/2015 academic year.

6. The District failed to properly evaluate Student during the 2015/2016 academic year.

7. The District failed to provide Student a FAPE by failing to meet his/her educational needs during the 2015/2016 academic year.

8. The District failed to provide Student with an appropriate placement during the 2015/2016 academic year.

9. The District failed to properly evaluate Student during the 2016/2017 academic year.

10. The District failed to provide Student a FAPE by failing to modify instruction and/or content to meet his/her level of ability during the 2016/2017 academic year.

11. The District failed to provide Student with an appropriate placement during the 2016/2017 academic year.

OPINION

In due process proceedings alleging violations of the Individuals with Disabilities Education Act (IDEA)⁹, 20 U.S.C §1400 *et seq.*, the party seeking relief has the burden of proof to prove each allegation in the complaint. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter, the Parent filed a due process complaint on January 26, 2017, alleging procedural and substantive violations of the IDEA, resulting in a denial of the statutory guarantee of a free appropriate public education (FAPE) for her child during portions of the 2014/2015 school year as well as the entirety of the 2015/2016 and 2016/2017 school years. Specifically, the period in issue encompasses the period from January 26, 2015 through the end of the academic year in June 2017. Parent seeks the following remedies:

- Compensatory education;
- A facilitated IEP meeting;
- Appropriate evaluations of Student in all areas of suspected disability;
- A functional behavioral assessment (FBA) of Student and development of a behavior support plan (BSP) based on the FBA;
- Augmentative communication device(s) provided by the District for use in and outside the school environment;
- Appropriate placement in the least restrictive environment (LRE) for Student;
- Sufficient notice of school field trips for Parent and the District to prepare and ensure Student's ability to participate fully with appropriate transportation;
- A Deafblind Intervener to work with Student at school;
- Training for District staff in the areas of:
 - identification [of students with suspected disabilities]
 - evaluation [of students in all areas of suspected disability]
 - eligibility [of students with qualifying disabilities for specially designed instruction and related services]
 - development and implementation of IEPs
 - LRE and methods of inclusion
 - Inclusion of disabled students on school field trips
 - IEP progress reports required by the IDEA
 - Parental participation and procedural safeguards guaranteed by the IDEA
 - Instructions and protocols for use of Student's communication device(s)
 - General needs of Deafblind students
 - Extended School Year (ESY) services

⁹ Congress amended the IDEA with the Individuals with Disabilities Education Improvement Act (IDEIA) of 2004. The ease of reading and reference, this order refers to the commonly accepted acronym of the original act, *to wit* IDEA.

- Proper data collection procedures
- Reimbursement for Parent's attorney's fees and costs associated with bringing this action.

(Complaint at 57 and 58.) The burden rests on the Parent to prove the violations alleged in the complaint and the appropriateness of each remedy sought.

In administrative hearings, a party who bears the burden of proof 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).

Under the IDEA, all children deemed eligible for special education have a right to a FAPE. 20 U.S.C. §1412(1). The IDEA defines FAPE as special education and related services that: (a) have been provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the state educational agency; (c) include an appropriate preschool, elementary, or secondary school education in the state involved; and (d) are provided in conformity with the IEP required under §1414(a)(5) of the IDEA. 20 U.S.C. §1401(a)(18); *Amanda J. v. Clark County School Dist.*, 267 F3d 877, 890 (9th Cir. 2001).

Student was born June 2, 2005. As of the time of the hearing, Student was 12 years old. Student is affected with multiple disabling conditions including: Dandy-Walker malformation, a condition that affects the manner in which his/her brain develops and results in microcephaly; undetermined hearing and vision impairments; seizure disorder; dysautonomia, an autonomic nervous system disorder that can result in temperature fluctuations, breathing and heart rate issues, and touch sensitivity; and gastroesophageal reflux disease. Due to Student's disabilities, his/her brain develops atypically. This results in developmental delays that affect, and will continue to affect, his/her language development, hearing, vision, mobility, cognitive abilities, and adaptive skills. Each of these developmental delays, in turn, affects Student's academic performance.

Student travels with an oxygen tank and oxygen saturation monitor to address oxygen deficiencies that may occur as a result of his/her medical conditions. Student is non-verbal, although he/she is capable of forming sounds including laughter, squeals, and screaming/crying. Student experiences extensive muscle rigidity addressed through physical therapy. Student is unable to eat or drink due to an underdeveloped swallow reflex in his/her esophagus and therefore must be administered nourishment and hydration through a feeding tube (G-tube). Student also requires intermittent esophageal (or bronchial) suctioning to prevent choking on mucus and other fluids produced, sometimes in excess, by his/her body. Student also experiences difficulty with head control, which results in Student generally orienting his/her head in one direction rather than maintaining his/her head in an upright position along the centerline of his/her body. Student requires multiple medications for which the District

maintains medical protocols in his/her file. Student is also unable to attend to his/her own toileting needs. . Parent and the District have long disagreed over the type and extent of SDI and supplemental aids and services Student requires to access his/her education. Parent and the District have also disagreed extensively over Student’s present levels of cognitive and functional capabilities. Student’s extensive needs have also created difficulties in securing and retaining personnel to meet his/her instructional and medical needs throughout the school day.

Determining whether a school district provided the student with a FAPE is a twofold inquiry: (1) whether the district complied with the procedures set forth in the IDEA; and (2) whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefits. *Board of Educ. of Hendrick Hudson School District v. Rowley*, 458 US 176 (1982). Further, the United States Supreme Court recently determined that, in order for an IEP to be deemed sufficient to meet the stated goals, it must be appropriately ambitious in light of the child’s unique needs and circumstances. *Endrew F. v. Douglas County School District RE-1*, 580 U.S. ___, 137 S. Ct. 988, 999-1000 (2017). According to the Court, the IDEA requires that every disabled child should have the chance to meet challenging objectives. *Id.*

In this case, Parent alleges procedural and substantive violations of the IDEA. Specifically, Parent asserts that the District committed procedural violations when it failed to provide Parent with IEP progress reports, completed Augmentative Communication Screening checklists without parental knowledge, and failed to provide Parent with copies of the completed Augmentative Communication Screening checklists upon request. Parent’s complaint also alleges facts demonstrating that the District held a combined eligibility determination and IEP meeting without parental participation. Further, Parent alleges the District committed several substantive violations when it failed to properly identify Student as a student with a disability in all areas of disability and misidentified Student as a student with an intellectual disability during the 2014/2015 school year, and failed to properly evaluate Student, failed to meet his/her educational needs, and failed to provide him/her with an appropriate placement during the period in issue, resulting in a denial of FAPE.

OAR 581-015-2000 sets forth definitions applicable to Chapter 581 Section 015, and provides, in relevant part:

The definitions below apply to OARs 581-015-2000 [through] 581-015-2999, unless the context indicates otherwise.

* * * * *

(2) “Assistive technology device” means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.

(3) “Assistive technology service” means any service that directly assists a child

with a disability in the selection, acquisition, or use of an assistive technology device. The term includes:

(a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;

(b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

(c) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(e) Training or technical assistance for a child with a disability or, if appropriate, that child's family; and

(f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.

(4) "Children with disabilities" or "students with disabilities" means children or students who require special education because of: autism; communication disorders; deafblindness; emotional disturbances; hearing impairments, including deafness; intellectual disability; orthopedic impairments; other health impairments; specific learning disabilities; traumatic brain injuries; or visual impairments, including blindness.

* * * * *

(c) "Deafblindness" means having both hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that the child cannot be accommodated in special education programs designed solely for students having hearing or visual impairments.

* * * * *

(e) "Hearing Impairment" means a hearing condition, whether permanent or fluctuating, that adversely affects a child's educational performance. The term includes those children who are hard of hearing or deaf.

(f) "Intellectual Disability" means significantly sub average general intellectual

functioning, and includes a student whose intelligence test score is two or more standard deviations below the norm on a standardized individual intelligence test, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, and that adversely affects a child's educational performance.

(g) "Orthopedic Impairment" means a motor disability that adversely affects the child's educational performance. The term includes impairments caused by an anomaly, disease or other conditions (e.g., cerebral palsy, spinal bifida, muscular dystrophy or traumatic injury).

* * * * *

(k) "Visual Impairment" means a visual impairment that, even with correction, adversely affects a child's educational performance. The term includes those children who are partially sighted or blind.

(5) "Consent" means that:

(a) The parent or adult student has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language or other mode of communication;

(b) The parent or adult student understands and agrees in writing to the carrying out of the activity for which consent is sought; and the consent describes that activity and lists any records that will be released and to whom; and

(c) The parent or adult student understands that the granting of consent is voluntary and may be revoked at any time in accordance with OAR 581-015-2090(4) or 581-015-2735.

* * * * *

(10) "Evaluation" means procedures used to determine whether the child has a disability, and the nature and extent of the special education and related services that the child needs.

(11) "General education curriculum" means the same curriculum as for children without disabilities (children without disabilities). For preschool children with disabilities, the term means age-appropriate activities.

* * * * *

(15) "Individualized Education Program" (IEP) means a written statement of an educational program which is developed, reviewed, revised and implemented for a school-aged child with a disability.

* * * * *

(24) "Placement" means educational placement, not social service placement by a state agency.

* * * * *

(28) "Related services" includes transportation and such developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education, and includes orientation and mobility services, speech language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation including therapeutic recreation, school health services and school nurse services, counseling services, including rehabilitation counseling services, social work services in schools, parent counseling and training, school health services and medical services for diagnostic or evaluation purposes, and includes early identification and assessment of disabling conditions in children. This definition incorporates the exception for services for children with surgically implanted devices, including cochlear implants, in 34 CFR 300.34(b) and the definitions for individual related services in 34 CFR 300.34(c).

* * * * *

(34) "Short term objectives" means measurable intermediate performance steps that will enable parents, students and educators to gage, at intermediate times during the year, how well the child is progressing toward the annual goals by either:

(a) Breaking down the skills described in the goal into discrete components, or

(b) Describing the amount of progress the child is expected to make within specified segments of the year.

(35) "Special education" means specially designed instruction that is provided at no cost to parents to meet the unique needs of a child with a disability "Special education" includes instruction that:

(a) May be conducted in the classroom, the home, a hospital, an institution, a special school or another setting; and

(b) May involve physical education services, speech language services, transition services or other related services designated by rule to be services to meet the unique needs of a child with a disability.

(36) "Specially designed instruction" means adapting, as appropriate to the needs

of an eligible child under this part, the content, methodology, or delivery of instruction:

(a) To address the unique needs of the child that result from the child's disability; and

(b) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.

(37) "Supplementary aids and services" means aids, services and other supports that are provided in regular education classes or other education-related settings and in extracurricular and nonacademic settings to enable children with disabilities to be educated with children without disabilities to the maximum extent appropriate.

* * * * *

(40) "Transition services" means a coordinated set of activities for a student with a disability that:

(a) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the student to facilitate the student's movement from school to post school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(b) Is based on the individual student's needs, taking into account the student's preferences and interests; and

(c) Includes:

(A) Instruction;

(B) Related services;

(C) Community experiences;

(D) The development of employment and other post school adult living objectives; and

(E) If appropriate, acquisition of daily living skills and functional vocational evaluation; and

(d) May be special education, if provided as specially designed instruction, or

related services, if required to assist a student with a disability to benefit from special education.

Because the complaint in issue alleges the same or similar violations of the IDEA and it's implementing federal regulations and state administrative rules over the course of multiple academic years, this order sets forth the requirements of generally applicable laws and rules before addressing the specific allegations for each academic year.

Further, because this order determines that none of the IEPs created during the period in issue were reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances, this order does not address Parent's numerous complaints related to the District's alleged failure to implement Student's IEPs. The omission of such discussion should in no way be interpreted as a dismissal of or disregard for Parent's assertions. Rather, the ALJ has determined that even perfect implementation of Student's deficient IEPs would have resulted in a denial of FAPE for Student.

Evaluation and eligibility determinations generally.

In Oregon, state statutes and administrative rules mirror the requirements of the IDEA and it's implementing federal regulations. OAR 581-015-2100 establishes responsibility for evaluation and eligibility determination of children suspected of having one or more disabilities and provides, in relevant part:

- (1) For school-age children, school districts * * * are the public agencies responsible for evaluating children and determining their eligibility for special education services.
- (2) For preschool children,
 - (a) School districts are responsible for the eligibility evaluations of children for EI/ECSE services.
 - (b) Designated referral and evaluation agencies are responsible for determining the eligibility of children for EI/ECSE services.
 - (c) EI/ECSE programs are responsible for conducting any necessary evaluations other than for eligibility determination.

As relevant here, Oregon designates local school districts as the public agency responsible for compliance with all evaluation and reevaluation requirements established by the IDEA. OAR 581-015-2105 sets forth the requirements for school district's conducting initial evaluations and reevaluations of students suspected of having one or more disabling conditions and provides, in part:

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

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

(b) *Determining that a child continues to have a disability under OAR 581-015-2130 through 581-015-2180;*

(c) Changing the child's eligibility, or

(d) *Terminating the child's eligibility as a child with a disability, unless the termination is due to graduation from high school with a regular diploma or exceeding the age of eligibility for a free appropriate public education under OAR 581-015-2045.*

(2) Request for initial evaluation: Consistent with the consent requirements in OAR 581-015-2090, a parent or public agency may initiate a request for an initial evaluation to determine if a child is a child with a disability.

(3) When initial evaluation must be conducted:

(a) An initial evaluation must be conducted to determine if a child is eligible for special education services when a public agency suspects or has reason to suspect that:

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

(B) The child may need special education services as a result of the disability.

(b) The public agency must designate a team to determine whether an initial evaluation will be conducted.

(A) The team must include the parent and at least two professionals, at least one of whom is a specialist knowledgeable and experienced in the evaluation and education of children with disabilities.

(B) The team may make this decision without a meeting. If a meeting is held, parents must be invited to participate in accordance with OAR 581-015-2190.

(4) Reevaluation:

(a) The public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with OAR 581-015-2115, subject to subsection [sic]

(b) and OAR 581-015-2110(2):

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

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

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

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

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

(5) Summary of Achievement and Performance: For a student whose eligibility terminates due to graduation with a regular diploma or exceeding the age of eligibility, a school district must provide the student with a summary of the student's academic achievement and functional performance, including recommendations on how to assist the student in meeting the student's postsecondary goals.

(Emphasis added.) Accordingly, a school district must conduct an initial evaluation or reevaluation process that conforms to the procedures set forth in OAR 581-015-2110 prior to determining a child is eligible for special education or related services, determining a child continues to be eligible for such services, or terminating a child's eligibility for special education or related services.

OAR 581-015-2110 establishes general evaluation and reevaluation procedures to be used by school districts in Oregon, including notice to and consent from parents, and provides:

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

(2) Notice and consent.

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

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

(c) If the public agency refuses an evaluation or reevaluation requested by the parent, the public agency must provide the parent with prior written notice under OAR 581-015-2310.

(d) Parents may challenge the public agency's refusal to conduct a reevaluation under OAR 581-015-2345.

(3) Conduct of evaluation. In conducting the evaluation, the public agency must:

(a) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining:

(A) Whether the child is a child with a disability under OAR 581-015-2130 through 581-015-2180; and

(B) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(b) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(c) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

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

(a) Assessments and other evaluation materials used to assess a child under this part:

(A) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(B) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to do so;

(C) Are used for the purposes for which the assessments or measures are valid and reliable;

(D) Are administered by trained and knowledgeable personnel; and

(E) Are administered in accordance with any instructions provided by the

producer of the assessments.

(b) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(c) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

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

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

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

(5) Evaluation timelines:

(a) Initial. An initial evaluation must be completed within 60 school days from written parent consent to the date of the meeting to consider eligibility.

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

(c) Exceptions. An evaluation may be completed in more than 60 school days under the following circumstances documented in the child's educational record:

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

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

(C) The district and the parents agree in writing to extend the timeline for an

evaluation to determine eligibility for specific learning disabilities in accordance with OAR 581-015-2170.

(d) Transfer students.

(A) When a child with disabilities transfers from one school district to another school district in the same school year, the previous and current school district must coordinate any pending assessments as necessary and as expeditiously as possible to ensure prompt completion of the evaluation.

(B) The exception under subsection (c)(B) only applies if the current school district is making sufficient progress to ensure a prompt completion of the evaluation and the parent and current school district agree to a specific time for completion of the evaluation.

(Emphasis added.) As set forth above, before conducting any evaluation or reevaluation of a student suspected of having a disability, a school district must provide written notice to and obtain informed written consent from parents. Further, if a school district refuses a parent's request for evaluation of their student, the school district must provide the parent with prior written notice in accordance with OAR 581-015-2310.

OAR 581-015-2310 sets forth the requirements for issuance of a PWN and reads, in part:

(1) For purposes of this rule, school district also means ECSE program and its contractors and subcontractors.

(2) Prior written notice must be given to the parent of a child, and to the adult student after rights have transferred, within a reasonable period of time before a school district[:]

(a) *Proposes to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child; or*

(b) *Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.*

(3) The content of the prior written notice must include:

(a) A description of the action proposed or refused by the school district;

(b) An explanation of why the district proposes or refuses to take the action;

(c) A description of each evaluation procedure, assessment, test, record, or report the school district used as a basis for the proposed or refused action;

(d) A statement that the parents of a child with a disability have protection under the procedural safeguards and, if this notice is not an initial referral for evaluation, the means by which a copy of the Notice of Procedural Safeguards may be obtained;

(e) Sources for parents to contact to obtain assistance in understanding their procedural safeguards.

(f) A description of other options that the IEP Team considered and the reasons why those options were rejected; and

(g) A description of other factors that are relevant to the agency's proposal or refusal.

(4) The prior notice must be:

(a) Written in language understandable to the general public; and

(b) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(Emphasis added.) Accordingly, a school district is required to issue a PWN to parents any time it either proposes to initiate a change or refuses to do so with regard to a student's identification, evaluation, educational placement, or the provision of FAPE.

Next, OAR 581-015-2115 sets forth the requirements for evaluation planning required by OAR 581-015-2110(1) to be conducted by school districts and provides, in pertinent part:

(1) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation, the child's IEP or IFSP team, and other qualified professionals, as appropriate, must:

(a) Review existing evaluation data on the child, including:

(A) Evaluations and information provided by the parents of the child;

(B) Current classroom-based, local, or state assessments, and classroom-based observations; and

(C) Observations by teachers and related services providers; and

(b) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine:

(A) Whether the child is, or continues to be, a child with a disability;

(i) For a school-age child, under OAR 581-015-2130 through 581-015-2180; or

* * * * *

(B) The present levels of academic achievement and related developmental needs of the child;

(C) Whether the child needs, or continues to need * * * special education and related services; and

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

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

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

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

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

(4) Requirements if additional data are not needed.

*(a) If the child's IEP * * * team determines that no additional data are needed to determine whether the child is or continues to be a child with a disability, and to determine the child's educational and developmental needs, the public agency must notify the child's parents:*

(A) Of that determination and the reasons for it; and

(B) Of the right of the parents to request an assessment to determine whether, for purposes of services under this part, the child continues to be a child with a disability, and to determine the child's educational and developmental needs.

(b) The public agency is not required to conduct an assessment of the child unless requested to do so by the child's parents.

(Emphasis added.) Based on the requirements above, a school district must notify parents any time it determines no additional data are needed in order to determine whether a student is or continues to be a child with a disability. This includes adding a qualifying disability category to

a student's IEP.

OAR 581-015-2120 sets out the process and requirements for evaluation teams, which must include a parent, making a determination of eligibility for special education and related services and provides, in part:

(1) Upon completing the administration of assessments and other evaluation materials, a team must determine whether the child is a child with a disability under OAR 581-015-2130 through 581-015-2180 and the educational needs of the child.

(a) The *team must include the parent*, in accordance with OAR 581-015-2190, and two or more qualified professionals, at least one of whom is knowledgeable and experienced in the evaluation and education of children with the suspected disability. This team may be the child's IEP team.

(b) For a child suspected of having a specific learning disability, the team must meet the requirements of OAR 581-015-2170.

(2) The team must prepare an evaluation report and written statement of eligibility.

(a) The evaluation report(s) must describe and explain the results of the evaluation conducted.

(b) The written statement of eligibility must include:

(A) A list of the evaluation data considered in determining the child's eligibility;

(B) A determination of whether the child meets the minimum evaluation criteria for one of the disability categories in OAR 581-015-2130 through 581-015-2180 or 581-015-2795;

(C) A determination of whether the primary basis for the suspected disability is:

(i) A lack of appropriate instruction in reading (including the essential components of reading) or math; or

(ii) Limited English proficiency;

(D) A determination of whether the child's disability has an adverse impact on the child's educational performance;

(E) A determination of whether, as a result of the disability, the child needs special education services; and

(F) The signature of each member of the team indicating agreement or disagreement with the eligibility determination.

(c) For a child suspected of having a specific learning disability, the team's written report and documentation of determination of eligibility must meet the requirements of OAR 581-015-2170.

(3) The team must determine a child to be eligible under this rule if the child has a disability and needs special education and related services, even though the child is advancing from grade to grade.

(4) For a child who may have disabilities in more than one category, the team need only qualify the child under one disability category. However, the child must be evaluated in all areas related to the suspected disability or disabilities, and the child's IEP must address all of the child's special education needs.

(5) The team may not find a child eligible for special education services if:

(a) The determinant factor for that eligibility decision is:

(A) Lack of appropriate instruction in reading, including the essential components of reading instruction, or lack of appropriate instruction in math; or

(B) Limited English proficiency; and

(b) The child does not otherwise meet the eligibility criteria under OAR 581-015-2130 through 581-015-2180.

(6) The school district must provide a copy of the evaluation report and the documentation of determination of eligibility to the parent at no cost.

(Emphasis added.)

Evaluation requirements.

OARs 581-015-2130 through 581-015-2180 provide evaluation and eligibility requirements for specific disability categories. OAR 581-015-2140 sets forth the evaluation and eligibility requirements for deafblindness (DB) and reads:

(1) If a child is suspected of having deafblindness, the following evaluation must be conducted:

(a) The minimum evaluation procedures for hearing impairment and vision impairment under OAR 581-015-2150 and 581-015-2180, respectively;

(b) If the child demonstrates inconsistent or inconclusive responses in an

assessment of one sensory area, a functional assessment must be administered by a state licensed educator of the visually impaired, a state licensed educator of the hearing impaired or an audiologist licensed by the State Board of Examiners for Speech-Language Pathology and Audiology.

(2) To be eligible as a child with deafblindness, the child must meet one or more of the following minimum criteria:

(a) The child meets the minimum criteria for both vision impairment and hearing impairment under OAR 581-015-2150 and 581-015-2180, respectively; or

(b) The child meets the minimum criteria for either vision impairment or hearing impairment and demonstrates inconsistent or inconclusive responses in an assessment of the other sensory area; or

(c) The child meets the minimum criteria for either vision impairment or hearing impairment and has a degenerative disease or pathology that affects the acuity of the other sensory area.

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

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

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

In addition, OAR 581-015-2150 sets forth the evaluation and eligibility requirements for hearing impairment (HI) and provides, in relevant part:

(1) Early Childhood Special Education and School Age: If a child is suspected of having a hearing impairment, the following evaluation must be conducted:

(a) Audiology assessment. An audiological assessment by an audiologist licensed by a State Board of Examiners for Speech-Language Pathology and Audiology;

(b) For conductive hearing losses only, medical or health assessment statement indicating hearing loss identified by an audiologist and determined to be untreatable by a physician licensed by a State Board of Medical Examiners; a nurse practitioner licensed by a State Board of Nursing specially certified as a nurse practitioner practicing within his or her area of specialty; or a physician assistant licensed by a State Board of Medical Examiners practicing within his or her area of specialty.

(c) For sensorineural hearing loss only, documentation indicating the hearing loss identified by an audiologist, licensed by State Board of Examiners for Speech-

Language Pathology and Audiology is determined to be sensorineural.

(d) Other:

(A) Any additional assessments necessary to determine the impact of the suspected disability:

(i) On the child's educational performance for a school-age (age 5 to 21) child; or

(ii) On the child's developmental progress for a preschool child (age 3 to 5); and

(B) Any additional evaluations or assessments necessary to identify the child's educational needs.

(2) To be eligible as a child with a hearing impairment, the child must meet one of the following minimum criteria:

(a) The child has a pure tone average loss of 25 dbHL or greater in the better ear for frequencies of 500 Hz, 1000 Hz, and 2000 Hz, or a pure tone average loss of 35 dbHL or greater in the better ear for frequencies of 3000 Hz, 4000 Hz, and 6000 Hz; or

(b) The child has a unilateral hearing impairment with a pure tone average loss of 50 dbHL or greater in the affected ear for the frequencies 500 Hz to 4000 Hz; and

(c) The loss is either sensorineural or conductive if the conductive loss has been determined to be currently untreatable by a physician.

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

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

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

OAR 581-015-2160 sets forth the evaluation and eligibility requirements necessary to qualify a student under the category of orthopedic impairment (OI) and provides:

(1) If a child is suspected of having an orthopedic impairment, the following evaluation must be conducted:

(a) Medical or health assessment statement. A medical statement or a health assessment statement indicating a diagnosis of an orthopedic or neuromotor impairment or a description of the motor impairment;

(b) Motor assessment. A standardized motor assessment, including the areas of fine motor, gross motor and self-help, when appropriate, by a specialist knowledgeable about orthopedic or neuromotor development;

(c) Other:

(A) Any additional assessments necessary to determine the impact of the suspected disability:

(i) On the child's educational performance for a school-age child; or

(ii) On the child's developmental progress for a preschool child; and

(d) Any additional evaluations or assessments necessary to identify the child's educational needs.

(2) To be eligible as a child with an orthopedic impairment, the child must meet all of the following minimum criteria:

(a) The child has a motor impairment that results in deficits in the quality, speed or accuracy of movement. These deficits must be documented by a score of two or more standard deviations below the mean in fine motor skills, gross motor skills, or self-help skills, or functional deficits in at least two of these three motor areas; and

(b) The child's condition is permanent or is expected to last for more than 60 calendar days.

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

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

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

Finally, OAR 581-015-2180 provides the evaluation and eligibility requirements for the disability category of vision impairment (VI) and reads:

(1) If a child is suspected of having a vision impairment, the following evaluation must be conducted:

(a) Medical statement. A medical statement by an ophthalmologist or optometrist licensed by a State Board of Examiners indicating whether the child has a vision impairment;

(b) Vision assessment. An assessment by a teacher of the visually impaired to identify the child's educational and compensatory needs, including a functional assessment of the child's residual visual acuity or field of vision.

(c) Other: Any additional assessments necessary to determine the impact of the suspected disability:

(A) On the child's educational performance for a school-age child; or

(B) On the child's developmental progress for a preschool child.

(2) To be eligible as a child with a vision impairment, the child must meet one or more of the following minimum criteria:

(a) The child's residual acuity is 20/70 or less in the better eye with correction;

(b) The child's visual field is restricted to 20 degrees or less in the better eye;

(c) The child has an eye pathology or a progressive eye disease which in the opinion of the ophthalmologist is expected to reduce either residual acuity or visual field according to the criteria stated in subsections (2)(a) or (b); or

(d) The assessment results of a licensed ophthalmologist or optometrist are inconclusive, and the child demonstrates inadequate use of residual vision.

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

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

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

Through these proceedings, Parent challenges several of the District's decisions regarding eligibility determinations for Student during the period in issue. Each is discussed in the context of the academic years covered by the period in issue.

IEP requirements

In addition, Parent challenges the sufficiency of Student's IEP's across multiple academic years within the period in issue. Accordingly, a general overview of the legal requirements for IEP content and implementation is appropriate before addressing Parent's specific allegations for each academic year.

OAR 581-015-2200 sets forth the requirements for the minimum content of a disabled student's IEP and provides, in part:

(1) The individualized education program (IEP) must include:

(a) *A statement of the child's present levels of academic achievement and functional performance*, including how the child's disability affects the child's involvement and progress in the general education curriculum.

(b) A statement of measurable annual goals, including academic and functional goals (and, for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of short-term objectives) designed to:

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability.

(c) A description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(d) A statement of the *specific special education and related services and supplementary aids and services* * * * to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child:

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

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

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

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

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

(g) A statement of any individual appropriate accommodations that are necessary

to measure the academic achievement and functional performance of the child on State and district-wide assessments of student achievement that are needed for the child to participate in the assessment:

(A) A child may not be exempt from participation in State or district-wide assessment, including extended and juried assessments, because of a disability, unless the parent has requested an exemption under OAR 581-022-0612.

(B) If the IEP team determines that the child must take the alternate assessment instead of the regular Statewide or a district-wide assessment, a statement of why the child cannot participate in the regular assessment, and why the alternate assessment is appropriate for the child.

(Emphasis added.)

OAR 581-015-2205 provides team considerations and special factors to be used in developing a disabled student's IEP and provides:

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

(a) The strengths of the child;

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

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

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

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

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

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

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

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

(b) For a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;

(c) For a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child; and

(d) For a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode.

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

(5) Nothing in OAR 581-015-2200 or this rule may be construed to require the IEP team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

(Emphasis added.)

In addition, OAR 581-015-2220 provides requirements for when a student's IEP must be in effect and provides:

(1) General:

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

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

(2) Initial IEPs:

(a) A school district must conduct a meeting to develop an initial IEP within 30 calendar days of a determination that the child needs special education.

(b) As soon as possible following development of the IEP, special education and related services must be made available to the child in accordance with the child's IEP.

(3) Accessibility of IEPs. Each school district must:

(a) Ensure that the IEP is accessible to each regular education teacher, special education teacher, related service provider and other service provider who is responsible for its implementation; and

(b) Inform each teacher and provider described in (3)(a) of his or her specific responsibilities for implementing the child's IEP and the specific accommodations, modifications and supports that must be provided for or on behalf of the child in accordance with the IEP.

Finally, OAR 581-015-2225 establishes requirements for the periodic review and revision of a disabled student's IEP and provides, in pertinent part:

(1) Annual review: Each school district must ensure that the IEP Team reviews the child's IEP periodically, but at least once every 365 days, to:

(a) Determine whether the annual goals for the child are being achieved; and

(b) Revise the IEP, as appropriate, to address:

(A) Any lack of expected progress toward the annual goals described in OAR 581-015-2200 and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under OAR 581-015-2105;

(C) Information about the child provided to, or by, the parents;

(D) The child's anticipated needs; or

(E) Other matters.

(2) Agreement to amend or modify IEP

(a) In making changes to a child's IEP between annual IEP Team meetings, the parent of a child with a disability and the school district may agree not to hold an IEP Team meeting to make these changes, and instead may develop a written document to amend or modify the child's current IEP.

(b) If changes are made to the child's IEP in accordance with subsection (1), the district must ensure that the child's IEP team is informed of these changes.

(3) Amendments to IEP

(a) Changes to the IEP may be made either by the entire IEP team at an IEP team meeting, or as provided in subsection (2) by amending the IEP rather than by redrafting the entire IEP.

(b) Upon request, the parent must be provided with a revised copy of the IEP with the amendments incorporated.

The above rules make clear that an IEP is not a form document. Recently, the Supreme Court identified that, under the IDEA, an IEP “is constructed only after careful consideration of [a] child’s present levels of achievement, disability, and potential for growth.” *Endrew F.*, 137 S.Ct. at 999, citing 20 U.S.C. §§1414(d)(1)(A)(i)(I)-(IV) and (d)(3)(A)(i)-(iv). In addition, the Court stated an IEP must strive to enable the child to make progress; “[a]fter all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Id.* The Court went on to state an “IEP need not aim for grade-level advancement. But [the IEP] must be appropriately ambitious in light of [the child’s] circumstances. * * * The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.* at 1000.

Placement, LRE, and ESY.

In her complaint, Parent also challenges the appropriateness of the District’s placement decisions during the period in issue, including home based instruction and whether the District’s placement decisions provided for the least restrictive environment (LRE) for Student.

OAR 581-015-2245 addresses the requirements for school districts to ensure a continuum of alternative placements, as well as supplementary aids and services, are available to meet the needs of disabled students and provides:

School districts must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The continuum must:

- (1) Include as alternative placements, instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions;
- (2) Make provision for supplementary aids and services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement; and
- (3) Not include sheltered workshops as defined in OAR 581-015-2000(33) and 407-025-0010(16).

OAR 581-015-2250 provides general requirements for the educational placement(s) of a disabled student and provides:

School districts must ensure that:

- (1) The educational placement of a child with a disability:
 - (a) Is determined by a group of persons, including the parents, and other persons

knowledgeable about the child, the meaning of the evaluation data, and the placement options;

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

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

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

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

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

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

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

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

Moreover, OAR 581-015-2610 provides requirements and standards for home, hospital, institutional or other regularly scheduled instruction and provides, in relevant part:

(1) School districts may provide home, hospital, institutional, or other regularly scheduled instruction to any eligible student with a disability.

* * * * *

(3) Criteria for Placement: School districts that propose to place a student with a disability in a home, hospital, institutional, or other regularly scheduled program must ensure that the following criteria are met:

(a) The student must be enrolled as a resident student of the school district;

(b) The home, hospital, institutional, or other regularly scheduled program *must be appropriate to the unique educational needs of the student*;

(c) The student must meet the minimum criteria established by the State Board of Education for determining eligibility to receive special education as set forth in OAR 581-015-2130 through 581-015-2180[.]

(Emphasis added.)

Parent also challenges the appropriateness of the District's ESY decisions as applied to Student during portions of the period in issue. OAR 581-015-2065 identifies requirements for school districts to provide ESY services to qualifying disabled students and provides:

(1) School districts must ensure that extended school year services are available as necessary to provide a free appropriate public education to a child with a disability.

(2) Extended school year services must be provided only if the child's IEP team determines, on an individual basis, that the services are necessary for the provision of free appropriate public education to the child.

(3) A school district may not:

(a) Limit extended school year services to particular categories of disability; or

(b) Unilaterally limit the type, amount, or duration of those services.

(4) The purpose of extended school year services is the maintenance of the child's learning skills or behavior, not the teaching of new skills or behaviors.

(5) School districts must develop criteria for determining the need for extended school year services. Criteria must include regression and recoupment time based on documented evidence or, if no documented evidence, on predictions according to the professional judgment of the team.

(6) For the purposes of section (5) of this rule:

(a) "Regression" means significant loss of skills or behaviors in any area specified on the IEP as a result of an interruption in education services;

(b) "Recoupment" means the recovery of skills or behaviors specified on the IEP to a level demonstrated before the interruption of education services.

(7) For the purposes of this rule, "extended school year services" means special education and related services that:

(a) Are provided to a child with a disability:

(A) Beyond the normal school year of the school district;

(B) In accordance with the child's IEP; and

(C) At no cost to the parents of the child; and

(b) Meet the standards of the Department.

(Emphasis added.)

This order addresses each academic year covered by Parent's complaint with this general legal framework in mind and also addresses any allegations unique to a given year below.

1. *2014/2015 school year.*

Parent alleges that, during the 2014/2015 academic year, the District committed multiple procedural and substantive violations that infringed on her right to participate meaningfully in the IEP formulation and enforcement process and denied Student a FAPE.

OAR 581-015-2190 mirrors the requirements of 34 C.F.R. §300.322, which identifies general requirements for a school district to ensure opportunities for parental participation, and provides, in relevant part:

(1) School districts must provide one or both parents with an opportunity to participate in meetings with respect to the identification, evaluation, IEP and educational placement of the child, and the provision of a free appropriate public education to the child.

(2) Meeting Notice:

(a) School districts must provide parents with a written notice of the meeting sufficiently in advance to ensure that one or both parents will have an opportunity to attend.

(b) The written notice must:

(A) State the purpose, time and place of the meeting and who will attend;

(B) Inform the parent that they may invite other individuals whom they believe have knowledge or special expertise regarding the child;

(C) Inform the parent that the team may proceed with the meeting even if the parent is not in attendance; and

(D) Inform the parent of whom to contact before the meeting to provide information if they are unable to attend.

(3) The school district must take whatever action is necessary to ensure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than

English.

(4) A meeting does not include informal or unscheduled conversations involving school district personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(5) Conducting a meeting without a parent in attendance: A meeting may be conducted without a parent in attendance if the school district has given the parent notice under subsection (2), or, for IEP or placement meetings, in accordance with OAR 581-015-2195.

(6) Transfer of rights:

(a) The right to parent participation transfers to an adult student under OAR 581-015-2325.

(b) After the transfer of rights to an adult student under OAR 581-015-2325, the school district must provide written notice of meetings to the adult student and parent, if the parent can be reasonably located. A parent receiving notice of a meeting under this subsection is not entitled to attend the meeting unless invited by the adult student or by the school district.

As specified above, the IDEA and its implementing rules and regulations requires that a school district provides expansive opportunities for parental participation in almost all areas of a disabled student's educational decisions including identification, evaluation, IEP formulation and enforcement, educational placement of a student, and the provision of a free appropriate public education to the student.

Further, OAR 581-015-2195 provides additional requirements for parental participation specifically for IEP and educational placement meetings and reads:

(1) Parent Participation: School districts *must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP or placement meeting* or are afforded the opportunity to participate, including:

(a) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(b) Scheduling the meeting *at a mutually agreed on time and place.*

(2) Other Methods to Ensure Parent Participation: If neither parent can attend, the school district must use other methods to ensure parent participation, including, but not limited to, individual or conference phone calls or home visits.

(3) Conducting an IEP/Placement Meeting without a Parent in Attendance: An IEP or placement meeting may be conducted without a parent in attendance if the school district is unable to convince the parents that they should attend.

(a) If the school district proceeds with an IEP meeting without a parent, the district must have a record of its attempts to arrange a mutually agreed on time and place such as:

(A) Detailed records of telephone calls made or attempted and the results of those calls;

(B) Copies of correspondence sent to the parents and any responses received; and

(C) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(b) The Department considers school district attempts to convince parents to attend sufficient if the school district:

(A) Communicates directly with the parent and arranges a mutually agreeable time and place, and sends written notice required under OAR 581-015-2190(2) to confirm this arrangement; or

(B) Sends written notice required under OAR 581-015-2190(2) proposing a time and place for the meeting and states in the notice that the parent may request a different time and place, and confirms that the parent received the notice.

(c) "Sufficient attempts" may all occur before the scheduled IEP or placement meeting, and do not require the scheduling of multiple agreed-upon meetings unless the team believes this would be in the best interest of the child.

(4) Considering Transition: If a purpose of the meeting is to consider postsecondary goals and transition services for a student, the written notice required by OAR 581-015-2190(2) must also:

(a) Indicate this purpose;

(b) Indicate that the school district will invite the student; and

(c) Identify any other agency that will be invited to send a representative in accordance with OAR 581-015-2210(2)(b).

(5) The school district must give the parent a copy of the IEP at no cost to the parent. If the parent does not attend the IEP meeting, the school district must ensure that a copy is provided to the parent.

(6) When conducting IEP team meetings and placement meetings, the parent of a child with a disability and a school district *may agree* to use alternative means of meeting participation, such as video conferences and conference calls.

(Emphasis added.)

Based on the above, and as discussed more fully below, a school district is justified in holding an IEP meeting without parental participation only if the school district is unable to convince at least one parent he or she should attend. As addressed below, courts have consistently interpreted this provision to permit a school district to hold a meeting without parent(s) when he or she (or both) refuse to participate. Further, the above rule permits alternate means of parent participation, other than in-person attendance, when neither parent can attend or when the school district and parent(s) agree to utilize alternate means of participating. OAR 581-015-2195(2) and (6). Importantly, the rule does not permit a school district to unilaterally implement alternate mean of parental participation, such as telephonic or video participation, simply because a parent is not able to attend on the school district's chosen date and/or time. This is underscored by the requirement that school districts take steps to ensure meetings are schedules at a mutually agreed upon time and place. OAR 581-015-2195(1)(b).

a. District conducted eligibility determination and IEP meeting(s) without Parent's participation.

As an initial matter, Parent's complaint alleges facts sufficient to raise a procedural violation that falls outside the two-year statute of limitations established by the IDEA. Parent alleges, and the District concedes, that on March 13, 2014 the District convened a combined eligibility determination and IEP meeting for Student without Parent participation. The evidence at hearing demonstrates that Parent was unable to attend because Student was hospitalized for several days due to illness and Parent was unable or unwilling to leave Student in the hospital alone to attend the March 13, 2014 meeting. The evidence also reveals that District personnel, including the District's Director of Special Education, were aware of Student's illness and resulting hospitalization as well as Parent's representation, several days in advance, that she would be unable to attend the March 14, 2014 meeting. Finally, the evidence reflects that Parent requested to reschedule the meeting to a time when she could attend and participate but that the District refused to reschedule the meeting citing the upcoming statutory deadlines for Student's eligibility determination and IEP as the reasons for its refusal. The District argues that it offered Parent the opportunity to participate by phone and, when she indicated she would be unable to do so from the hospital, convened the meeting and formulated Student's IEP without Parent's participation or input.

To determine procedural compliance by the District, it must be determined whether the Parent's right to participate in the IEP process, an integral part of the educational process for a students with disabilities, was seriously compromised. *W.G. v. Target Range Sch. Dist. No. 23, Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992), see also *Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1046 (9th Cir. 2013). Under the IDEA, Congress requires that the development of a student's IEP must "be informed not only by the expertise of school officials, but also by the

input of the child's parents or guardian." *Andrew F.*, 137 S.Ct. at 999 (citing *Rowley*, 458 U.S. at 208-209).

As a threshold matter, the IDEA demands that parents have the opportunity to "participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education of such child." 20 U.S.C. §1415(b)(1). *See also* 34 C.F.R. §300.501(b). The Ninth Circuit in *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189 (9th Cir. 2017), repeating the oft cited language of the Court in *Rowley*, stated that, "[I]n enacting the IDEA, Congress was as concerned with parental participation in the *enforcement* of the IEP as it was in its *formation*." *Id.* at 1198, citing *Rowley*, 458 U.S. at 205 (Emphasis original.). The Court went on to point out that, "[p]arents must be able to use the IEP to monitor and enforce the services that their child is to receive." *Id.* "Parental participation in the IEP team process is central to the IDEA's goal of protecting disabled students' rights." *Southfield Pub. Sch. Dist.*, 115 LRP 31270 (SEA MI 06/19/15). Parent participation means more than simply having an opportunity to speak. Districts should be receptive and responsive to parents' input. *R.L. v. Miami-Dade County School Board*, 757 F.3d 1173, 1188 (11th Cir. 2014). In *Shapiro ex rel. Shapiro v. Paradise Valley Unified*, 317 F.3d 1072 (9th Cir. 2003), the Court held that school districts must include parents in IEP meetings "unless [parents] affirmatively refuse to attend." *Id.* at 1078.

Under the IDEA, school districts are obligated to provide for meaningful parental participation. 34 C.F.R. §300.501(b). "Procedural compliance is essential to ensuring that every eligible child receives a FAPE, and those procedures that provide for meaningful parent participation are particularly important." *Amanda J.*, 267 F.3d at 891. "Not only will parents fight for what is in their child's best interests, but because they observe their children in a multitude of different situations, they have a unique perspective of their child's special needs." *Id.* Recently, the Ninth Circuit pointed out that, "[b]ecause disabled children and their parents are generally not represented by counsel during the IEP process, *procedural errors at that stage are particularly likely to be prejudicial and cause a loss of educational benefits*." *Antelope Valley*, 585 F.3d at 1195, (emphasis added). As such, the Court determined that, "[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." *Id.*, citing *Amanda J.* 267 F.3d at 892. As part of the IDEA's parental participation requirements, parents must be invited to attend eligibility determination and IEP meetings and must have the opportunity for meaningful participation in the formulation of IEPs. *H B. v. Las Virgenes Unified Sch. Dist.*, 48 IDELR 31, at 166 (9th Cir. 2007); *See Shapiro*, 317 F.3d at 1078 ("The Act imposes upon the school district the duty to conduct a meaningful meeting *with* the appropriate parties." Quoting *Target Range*, 960 F.2d at 1483, Emphasis original).

In this matter, the record shows that the District convened an eligibility determination and IEP meeting on March 13, 2014 despite being advised by Parent, well in advance of the meeting, that she was unable to attend or participate by phone on that day because Student was hospitalized due to illness. Despite Parent's requests to reschedule the meeting to a time and date when she could attend, the District held the meeting without Parent's attendance or input. At hearing, District witnesses testified that they believed the March 13, 2014 meeting could not be rescheduled because Student's (re-eligibility determination and) IEP was due on that date and

rescheduling the meeting would result in the District missing the deadline(s).

The Ninth Circuit has addressed this issue in *Doug C.*, 720 F.3d 1038 (9th Cir. 2013). In that case, like this one, the school district convened an IEP meeting without parent participation after the parent informed the school district that he could not participate in person or by phone on the scheduled date because he was ill. The school district refused the parent's request to reschedule the meeting to a later date when he could attend, citing the student's upcoming IEP renewal date and staff schedules as the reasons for the refusal. The school district then held a follow up IEP meeting approximately one month later with the parent in attendance. *Id.* at 1041-1042. The Court found that, "[t]he fact that it may have been frustrating to schedule meetings with or difficult to work with [the parent] * * * does not excuse the [school district's] failure to include him in [the student's] IEP meeting when he expressed a willingness to participate." 720 F.3d at 1045. Ultimately, the Ninth Circuit found the school district's arguments regarding necessity of meeting the IEP deadline to be untenable. The Court declared that, "[w]hen confronted with the situation of complying with one procedural requirement of the IDEA or another, * * * the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of FAPE." *Doug C.* 720 F.3d at 1046. The Ninth Circuit went on to point out that both that court and the Supreme Court of the United States have "repeatedly stressed the vital importance of parental participation in the IEP creation process" and that "delays in meeting IEP deadlines do not deny a student a FAPE where they do not deprive a student of any educational benefit." *Id.* citing *A.M. v. Monrovia*, 627 F.3d 773, 779 (9th Cir. 2010). The Court found the school district's decision to prioritize strict deadline compliance over parental participation to be unreasonable and the failure to include parent in the IEP meeting clearly infringed on his ability to participate in the formation of the student's IEP. 720 F.3d at 1046-1047. The Court declared, "[t]hat reason alone is cause to conclude that [the student] was denied a FAPE." (*Id.*)

Further, in *Doug C.*, like here, the district argued that any potential violation of the parental participation requirement that may have occurred as a result of holding the IEP meeting without the parent was remedied when the district held a follow up IEP meeting, which the parent attended, less than a month after the creation of the IEP. The Ninth Circuit rejected this argument and reiterated that, once a district has violated the IDEA by developing a new IEP without parental participation, "after-the-fact parental involvement is not enough because the IDEA contemplates parental involvement in the creation process." 720 F.3d at 1047, citing *Shapiro*, 317 F.3d at 1078.

The Court in *Doug C.* echoed its earlier findings that, "[w]here a court identifies a procedural violation that denied a student a FAPE, the court need not address [whether the IEP was reasonably calculated to enable the student to receive educational benefit]." 720 F.3d at 1043, citing *Shapiro*, 317 F.3d at 1079.

A more apropos case is not likely to be found with regard to this issue. Here, like in *Doug C.*, Parent was unavailable due to illness. Parent, as Student's primary caregiver, could not reasonably be expected to eschew her responsibilities to Student and leave him/her in an unfamiliar setting in order to attend the IEP meeting which the District refused to reschedule. I find Parent's reason for not attending the eligibility determination and IEP meeting on March 13,

2014 to be even more compelling than that of the parent in *Doug C.* In that case, parent was ill and believed he might be able to participate within a day or two when he was feeling better. He also expressed a desire to participate in person. Based on this, the Court determined that the school district's offer for him to participate by phone was unreasonable. Here, Student was hospitalized due to the severity of the illness and Parent was uncomfortable leaving Student in order to attend the meeting. Nor did she believe she could effectively participate in the meeting by phone while in the hospital attending to Student. Under the circumstances, I find the District's insistence on holding the eligibility determination and IEP meeting on March 13, 2014 was unreasonable, clearly infringed on Parent's ability to participate in the formation of Student's IEP, and denied Student a FAPE. This is particularly true in light of the record which reveals that the March 13, 2014 formed the basis for subsequent IEPs that followed in May and September 2014 and beyond.

Based on the severity of the procedural errors committed by the District at the March 13, 2014 eligibility determination and IEP meeting, it is of no consequence whether the District's one-sided eligibility determination was correct or whether the unilaterally created IEP was reasonably calculated to enable Student to receive educational benefit. See *Shapiro*, 317 F.3d at 1079

Of course, because the March 13, 2014 meeting occurred more than two years prior to the filing of Parent's complaint, the above analysis is purely academic unless the facts reveal that an exception to the statute of limitations applies and therefore equitable tolling of the statute of limitations as applied to Parent's complaint is appropriate.

i. Relief from the IDEA's two-year statute of limitations.

20 U.S.C. §1415 establishes requirements for procedures and timelines to ensure safeguards for the rights of disabled students and their parents with regard to the provision of a FAPE and provides, in relevant part:

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include the following

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an

independent educational evaluation of the child.

* * * * *

(6) An opportunity for any party to present a complaint--

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child[.]

* * * * *

(f) Impartial due process hearing

* * * * *

(3) Limitations on hearing

* * * * *

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency *knew or should have known* about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to--

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.

(Emphasis added.)

The Ninth Circuit has interpreted the IDEA's two year statute of limitations as follows, "the IDEA's statute of limitations requires courts to bar only claims brought more than two years after the parents or local educational agency 'knew or should have known' about the actions forming the basis of the complaint." *Avila v. Spokane Sch. Dist.* 81, 852 F.3d 936, 937 (9th Cir. 2017); *see also* 20 U.S.C. §1415(f)(3)(C). Here, nothing in the record indicates that Parent knew

or should have known that the District's assertions regarding the legal requirements of the IDEA as a justification for holding the IEP without her participation was incorrect and therefore constituted a basis for complaint any time before consulting legal counsel and filing the current due process complaint in January 2017.

Courts have unequivocally interpreted the requirements of the IDEA to provide broad protections to students with disabilities and their parents with regard to the provision of FAPE to such students. As the Supreme Court stated previously, “[a] reading of the [IDEA] that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress’ acknowledgment of the paramount importance of properly identifying each child eligible for services.” *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009). The broad purpose of the IDEA is clear and has been acknowledged repeatedly by our court. *See E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings*, 758 F.3d 1162, 1173 (9th Cir. 2014) (citing *Forest Grove*, 557 U.S. at 244-45, 129 S.Ct. 2484); *Michael P. v. Dep’t of Educ.*, 656 F.3d 1057, 1060 (9th Cir. 2011) (same); *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181, 1184 (9th Cir. 2010) (same). *Avila* 582 F.3d at 943. There is no reason to conclude that such broad sweeping protections are limited to the identification of disabled children. Rather, a plain reading of the text and context of the IDEA reveals that Congress intended these expansive protections to apply equally, if not more so, to parental participation. *See e.g., Doug C.* 720 F.3d 1038 (9th Cir. 2013), *A.M. v. Monrovia*, 627 F.3d 773 (9th Cir. 2010).

The Ninth Circuit Court of Appeals recently addressed the IDEA’s statute of limitations in *Avila v. Spokane School Dist.* 81, 852 F.3d 936 (9th Cir. 2017). In that case, the Ninth Circuit reversed a district court decision that dismissed parents’ complaints because the events complained of occurred outside the two-year statute of limitations established by 20 USC §1415(f)(3)(C). In that case, the Ninth Circuit found that the district court failed to consider when parents knew or should have known about the alleged action that formed the basis of their complaint.

[T]he district court barred the Avilas’ claims arising before April 26, 2008 based on when the actions complained of occurred, rather than applying the discovery rule. The district court found that Ms. Avila signed forms agreeing with the 2006-2007 evaluation results, but this does not end the inquiry because the Avilas’ awareness of the evaluations does not necessarily mean they ‘knew or had reason to know’ of the basis of their claims before April 26, 2008. *Cf. A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1205 (9th Cir. 2016) (holding that parents' consent to a disabled child's placement does not waive later challenges to the placement under Title II of the Americans with Disabilities Act and §504 of the Rehabilitation Act, “at least where the issue is one that requires specialized expertise a parent cannot be expected to have”). Other courts have held that the ‘knew or had reason to know date’ stems from when parents know or have reason to know of an alleged denial of a free appropriate public education under the IDEA, not necessarily when the parents became aware that the district acted or failed to act. *See, e.g., Somoza v. N.Y. City Dep’t of Educ.*, 538 F.3d 106, 114 (2d Cir. 2008) (holding that the ‘knew or should have known’ date occurred

when parent viewed a child's rapid improvement in a new program); *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1288 (11th Cir. 2008) (holding the 'knew or should have known date' occurred after new evaluation and declining to hold that 'famil[ies] should be blamed for not being experts about learning disabilities').

Avila 852 F.3d at 944-945. The Ninth Circuit found that strict application of the two-year statute of limitations, and the limited exceptions found in 20 U.S.C. §1415(f)(3)(D), without consideration of when parents knew or should have known (the discovery rule) about the action(s) that forms the basis of the complaint required remand to the district court.

Here, the evidence reveals that Parent objected to the March 13, 2014 date of the IEP meeting because she was unable to attend due to Student's hospitalization. In response, the District erroneously advised Parent that it could not reschedule the meeting because the IDEA required that the District hold the meeting on or before March 13, 2014.¹⁰ In addition, the District informed Parent that, if she had concerns about the resulting IEP, the District would convene an IEP revision meeting at a later date to address. Parent, dealing with the District in good faith, had no reason to doubt those claims and therefore no reason to know that the District's actions, allegedly in compliance with the IDEA, formed the basis for a complaint. Nothing in the record indicates that Parent, who cannot be deemed to hold any expertise in special education or the procedural requirements of the IDEA, knew or should have known that the District's misrepresentations were incorrect and therefore constituted a basis for complaint any time before she consulted legal counsel and filed the present complaint in January 2017. The evidence in the record supports the reasonable inference that, more likely than not, Parent did not discover the District's misrepresentations prior to consulting with counsel and filing the present complaint in January 2017. Accordingly, I find equity requires tolling of the statute of limitations, at least with regard to this issue, until January 2017.

Parent's complaint pled facts related to the March 13, 2014 meeting as context and background facts. The complaint did not, however, include the alleged procedural violation as an issue for hearing, presumably interpreting the two-year statute of limitations as barring such allegations. Nonetheless, the complaint and the hearing record contain ample factual allegations and evidence to develop this alleged violation. Further, two opinions from the Ninth Circuit, *Avila* and *Antelope Valley*, each issued after Parent file the present complaint, support the opinion and conclusion of this order with regard to inclusion of the alleged violation.

In *Antelope Valley*, the Ninth Circuit recognized, for the first time, the applicability of Rule 15 of the Federal Rules of Civil Procedure (FRCP) to IDEA proceedings. Specifically, the Court applied FRCP 15(b)(2), permitting trial by consent, to a due process complaint that contained facts sufficient to raise an issue otherwise omitted from the issue statements agreed to for hearing. 858 F.3d at 1196. FRCP 15(b)(2) provides:

¹⁰ It is notable that, as of March 13, 2014, Student's IEP was already overdue according to the evidence in the record. Student's prior IEP was completed on March 2, 2013. Ex. S52. Accordingly, Student's 2014 IEP was overdue as of March 3, 2014. According to the evidence, March 13, 2014 was actually Student's tri-annual re-eligibility determination date. See Ex. S52 at 1. Nothing in the applicable statutes or rules requires an IEP and re-evaluation to be conducted simultaneously.

For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(Emphasis original.) In that case, the Court stated, “Rule 15 of the [FRCP] provides that an issued tried by parties' express or implied consent...must be treated in all respects as if raised in the pleadings.” *Antelope Valley*, 858 F.3d at 1196, internal citations omitted. Here, while not explicitly raised as an issue statement for hearing in the complaint, the District and Parent extensive evidence regarding the March 13, 2014 eligibility determination and IEP meeting as well as the justifications for holding that meeting without parental participation and over Parent's objections. The District engaged in a full direct examination of its Special Education Director that developed a full record on exactly why the District elected to hold the IEP meeting without Parent's participation and why District personnel believed it was justifiable to do so. Further, that examination covered the details of the IEP and eligibility determinations. Parent, in turn engaged in ample cross-examination of the District's witness on these issues and further developed the record through her own witnesses. This is sufficient to meet the implied consent for Rule 15 applicability.¹¹

b. District failed to provide Parent with IEP progress reports

Parent also asserts that the District failed to provide Parent with IEP Progress Reports so that Parent could monitor Student's progress toward his/her IEP goals and objectives. Specifically, Parent asserts that, at the September 27, 2015 IEP meeting, she expressed concern that she had not received progress notes for Student during the 2014/2015 academic year. IEP Progress Reports are required by the IDEA. 20 U.S.C. §141 4(d)(I)(A); 34 CFR §300.320(a)(3)(ii). According to the vast majority of Student's IEPs, progress reports were the specified method by which the District would report Student's progress toward his/her AGs and STOs. Further, the intervals at which progress would be reported through those reports was specified as parent teacher conferences, annual IEP meetings, and with Student's report cards. (See, e.g., Ex. S65 at 6.) The District points out, correctly, that the Ninth Circuit has affirmed the opinion of the U.S. District Court in Oregon determining there is no per se right to receive progress reports. However, the District fails to address whether the Parent in this case had a right to receive such reports because the requirement to provide them was contained within Student's IEP. Further, the District fails to address recent guidance, following the Court's opinion in *Andrew F.*, from the United States Department of Education identifying the “periodic progress reporting required at 34 C.F.R. §300.320(a)(3)(ii).” *Questions and Answers on Andrew F. v. Douglas County School District Re-1* U.S. Department of Education (Dec. 7, 2017). Based on the evidence in the record and the Department of Education's characterization above, this order addresses the District's failure to provide IEP Progress Reports to Parent as a denial of

¹¹ Despite the extensive discussion herein, it is worth noting that the remedies ordered herein would be no different were this tribunal to find this issue to be time-barred by the statute of limitations. The violations addressed herein, excluding the March 2014 IEP meeting and denial of Parent's right to participate, are sufficient to support the remedies ordered below.

Parent's right to meaningfully participate in the IEP process.

To determine if a procedural error occurred and resulted in a denial of FAPE or due process, an inquiry must be made into whether a school district has met the rigorous procedural requirements of the IDEA and/or any analogous state statutes or rules that may impose a greater duty. *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994). If a school district cannot demonstrate that it has complied with the procedures mandated by the IDEA and state laws, the question of whether the school district's proposed program meets the substantive benefit test need not be addressed. *Target Range*, 960 F.2d at 1485. Nonetheless, courts have routinely recognized that not every procedural violation is sufficient to rise to a denial of a FAPE. *Amanda J.*, 267 F.3d at 892. See also *L.M v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008) (Finding harmless procedural errors do not constitute a denial of FAPE.).

In *Target Range* and *Amanda J.*, the Ninth Circuit cited *Roland M v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990), which identified a test for procedural compliance. The test set forth by the Court is an "either/or" test that consists of types of procedural violations that courts must consider. *Id.* at 994. The first category of potentially fatal procedural errors includes those that cause a student to suffer a loss of educational opportunity. *Target Range*, 960 F.2d at 1484. The second type of potentially fatal procedural error encompasses those where the parent(s)' right to participate in the IEP process is infringed. *Id.* Finally, the court must determine whether the procedural error caused a "deprivation of educational benefit." *Amanda J.*, 267 F.3d at 892 citing *Roland M*, 910 F.2d at 994.

Procedural errors rise to the level of a denial of FAPE where, absent such errors, there is a "strong likelihood" that alternative educational possibilities for the student "would have been better considered." *M L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 657 (9th Cir. 2005). "Thus, an IEP team's failure to properly consider an alternative educational plan can result in a lost educational opportunity even if the student cannot definitively demonstrate that [the student's] placement would have been different but for the procedural error." *Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1047 (9th Cir. 2013). There is no compelling reason to expect that the Court intended that this analysis should be limited to alternative educational placements and not apply equally to alternative related services or modifications needed by a student to access his or her educational environment and curriculum.

The September 27, 2015 IEP meeting was intended to develop an IEP that would serve Student through the same date in 2016 (i.e., the 2015/2016 academic year). Accordingly, progress reports for the 2014/2015 academic year were essential for developing an appropriately ambitious educational program that included challenging goals and objectives for Student as well as necessary supports and related services. At hearing, Ms. Lenz testified that she wrote progress notes every time she visited with Student at the school, but those progress notes were not shared with the IEP team or with Parent unless requested. The District's IEP meeting notes indicate that, despite having progress reports completed by Ms. Christiansen and Ms. Lenz, no progress reports had been sent to Parent. At hearing, Ms. Christensen initially testified that she could not explain why the meeting notes from the September 27, 2015 IEP meeting stated that progress notes were not sent home because she was not the author of the meeting notes. However, Ms. Christiansen later testified that she wrote the District's notes for the September 27, 2015 IEP

meeting. Tr. Vol. VIII at 1629:7 through 15. Regardless, it is undisputed that the District failed to provide Parent with IEP progress notes for the 2014/2015 academic year.

Given the standard set forth in *Target Range*, *Federal Way*, and *Doug C.*, one must first determine whether the procedural errors in this case resulted in loss of educational opportunity for Student. The Ninth Circuit noted that “[t]he significance of the procedures provided by the IDEA goes beyond any measure of a child’s academic progress during the period at issue.” *Target Range*, 960 F.2d at 1485. FAPE is available even to students who are advancing from grade to grade. OAR 581-015-2080. “Congress did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Amanda J.*, 267 F.3d at 890. Here, Parent objects to the District’s refusal to provide progress reports that would enable her to measure Student’s academic advancement and progress toward goals and objectives in his/her IEP, and to determine whether alternative or additional aids or services might be appropriate.

The Ninth Circuit has opined that, “[u]nder the IDEA, parental participation doesn’t end when the parent signs the IEP. Parents must be able to use the IEP to monitor and enforce the services that their child is to receive.” *Antelope Valley*, 858 F.3d 1198. The Court went on to point out that, when a parent cannot monitor which services a student receives as well as the manner in which such services are provided to a student, FAPE has been denied regardless of whether the parent had the opportunity to participate in the formulation of the IEP. *Ibid.* While the Court in *Antelope Valley* addressed a school district’s failure to include an accurate offer of services in a student’s IEP and a subsequent unilateral revision of that IEP without parental knowledge or participation, there is no reason to suspect the Court would not apply the same logical analysis to a school district’s failure to allow parental participation in the drafting and enforcement of a student’s IEP by denying regular progress reports, required by the federal regulations and, as in this case, required by the IEP itself, whether or not those reports were requested by the parent.

Accordingly, this order adopts the Ninth Circuit’s logic and applies it to Parent’s claim that she was denied IEP progress reports that would allow her to participate in the formulation, monitoring, and enforcement of Student’s IEP progress, as well as aids and services specified in Student’s IEP, and find that the District’s failure to provide progress reports resulted in a denial of Parent’s right to meaningfully in the IEP process, a procedural error that denied Student a FAPE. Parent was unable to meaningfully participate in the formulation of an IEP that was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances because she was denied information necessary to determine what progress would be reasonable based on her child’s current progress toward AGs and STOs. Parent was unable to participate in the enforcement of Student’s IEP to ensure all required aids and services were provided as specified in the IEP or to determine whether revisions to Student’s AG’s, STO’s, or supplemental aids and services were necessary because she was denied the ability to monitor and gauge Student’s progress toward the goals and objectives in the IEP. Such procedural errors deprived Student of educational benefit.

- c. *District completed an Augmentative Communication Screening Checklist without parental knowledge or consent*

Next, Parent alleges that, in or about November 2014, Student's case manager and special education teacher, Ms. Christiansen, completed an Augmentative Communication Screening Checklist without parental knowledge or consent. Parent asserts that such screening tools are actually an evaluation of Student to determine eligibility for augmentative communication services and assistive technology devices.¹² As discussed more fully below, I agree and find that the District was required to notify Parent of its intent to administer such screenings and to obtain her consent prior to evaluating Student for augmentative communication services or devices.

OAR 581-015-2110 requires that a school district, prior to conducting any evaluation or reevaluation, provide written notice to parents that describes the evaluation procedure(s) the school district proposes to conduct as the evaluation planning process. Further, school districts must obtain informed written consent for the proposed evaluation. OAR 581-015-2110(2)(a) and (b).

OAR 581-015-2090 identifies the requirements for obtaining parental consent and provides, in relevant part:

- (1) Consent means that the parent or adult student:
 - (a) Has been fully informed * * * of all information relevant to the activity for which consent is sought; and
 - (b) *Understands and agrees in writing* to the carrying out of the activity for which his or her consent is sought.

¹² OAR 581-015-2000(2) defines assistive technology devices to include and equipment or product used to increase, maintain, or improve the functional capabilities of a child with a disability. There is no dispute in this matter that augmentative communication devices are assistive technology devices as defined by rule. OAR 581-015-2055 sets for the requirements for the provision of such assistive technology devices and provides:

- (1) School districts must ensure that assistive technology devices or assistive technology services, or both, are made available to a child with a disability if required as a part of the child's special education, related services or supplementary aids and services.
- (2) On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP team determines that the child needs access to those devices to receive a free appropriate public education.
- (3) School district policies govern liability, if any, for the loss or damage of assistive technology devices.
- (4) School district policies govern transfer of an assistive technology device when a child with a disability using the device ceases to attend school in the district that purchased the device. "Transfer" means the process by which a school district that has purchased an assistive technology device may sell, lease or loan the device for the continuing use of a child with a disability who is ceasing to attend school in the district.

(2) Consent is voluntary on the part of the parent and meets the requirements of the consent provisions of this rule and 34 CFR 300.622 and 34 CFR 99.30 implementing IDEA, and FERPA respectively.

(3) Consent for initial evaluation:

(a) The school district must provide notice under OAR 581-015-2310 and obtain informed written consent from the parent or adult student before conducting an initial evaluation to determine if a child qualifies as a child with a disability under OAR 581-015-2130 through 581-015-2180.

(A) Consent for initial evaluation may not be construed as consent for the initial provision of special education and related services.

(B) The school district must make reasonable efforts to obtain the informed consent from a parent for an initial evaluation to determine a child's eligibility for special education services.

* * * * *

(4) Consent for initial provision of services:

(a) A school district must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.

(b) The school district must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child.

(c) If a parent or adult student does not respond or refuses to consent for initial provision of special education and related services or revokes consent for the initial provision of special education and related services, the school district may not seek to provide special education and related services to the child by using mediation or due process hearing procedures.

(d) If a parent or adult student refuses to grant consent for initial provision of special education and related services, does not respond to a request to provide such consent, or revokes consent for the initial provision of special education and related services:

* * * * *

(5) Consent for reevaluation:

(a) A school district must obtain informed parent consent before conducting any

reevaluation of a child with a disability, except as provided in subsections (b) and OAR 581-015-2095.

(b) If a parent refuses to consent to the reevaluation or revokes consent for the reevaluation, the school district may, but is not required to, pursue the reevaluation by using mediation or due process hearing procedures. A district does not violate its child find obligations if it declines to pursue the reevaluation using these procedures.

* * * * *

(7) Revocation of consent:

(a) A parent or adult student may revoke consent at any time before the completion of the activity or action for which they have given consent.

(A) A parent or adult student may revoke consent for an evaluation or reevaluation that has not yet been conducted.

(B) A parent or adult student may revoke consent for the provision of special education services in writing at any time before or during the provision of those services.

(C) A parent or adult student may revoke consent for release of personally identifiable information to the State's public benefits or insurance program (e.g., Medicaid).

(b) If a parent or adult student revokes consent, that revocation is not retroactive.

(8) Other consent requirements:

(a) The school district must document its reasonable efforts to obtain parent consent in accordance with OAR 581-015-2195(3).

* * * * *

(c) A refusal to consent to one service or activity may not be used to deny the parent or child any other service, benefit, or activity of the school district, except as provided in this rule.

(Emphasis added.)

The record in this matter shows the District failed to notify Parent that it intended to have school personnel complete the checklist to determine if Student was an appropriate candidate for augmentative communication devices and/or services. If implemented successfully, access to augmentative communication devices and services was likely to have a significant impact on

Student's access to his/her educational materials and environment through increased communication. This is particularly true considering Student is non-verbal and experiences significant challenges communicating with those around him/her in school settings. Accordingly, the District was required to notify Parent and obtain her consent before conducting what amounts to an evaluation for related services unless an exception to the consent requirement applies.

OAR 581-015-2095 provides exceptions to the consent requirements of the IDEA and provides, in pertinent part:

- (1) Written parent or adult student consent is not required before:
 - (a) Reviewing *existing data* as part of an evaluation or a reevaluation;
 - (b) Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children; or
 - (c) Conducting evaluation tests, procedures or instruments that are identified on a child's IEP as a measure for determining progress; or
 - (d) *Conducting a screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation.*

* * * * *

(3) If, after reasonable efforts to obtain parent consent, the parent does not respond, the school district may conduct a reevaluation without consent, unless the reevaluation is an individual intelligence test or test of personality. "Reasonable efforts" means that the school district has used procedures consistent with OAR 581-015-2195(3).

(4) Written consent is not required if an administrative law judge determines under OAR 581-015-2375 that the evaluation or reevaluation is necessary to ensure that the child is provided with a free appropriate public education.

(Emphasis added.)

The Augmentative Communication Screening Checklist provided to the District by Willamette ESD contains ten questions, regarding a student's communication abilities and behaviors, for evaluators to answer either in the affirmative or negative. In addition, each question contains an empty space for the evaluator to describe the behavior observed. Each of the questions contained on the checklist requires the individual completing the form to observe the student, collect data to determine whether the subject student can perform the described activity or behavior at least 90 percent of the time, and provide the evaluator's response and description. See, Exs. D39 and D131.

At hearing, the District's Director of Special Education, Ms. Galbraith, testified that the Augmentative Communication Screening Checklist was not the type of evaluation that required parental consent because it is a "tool for teachers to develop goals, instructional practices and to review at a later time." Tr. Vol. I at 172:15 through 20. Nonetheless, such testimony was inconsistent with prior statements by this witness indicating the form was a screening tool "provided by Willamette ESD * * * to see if a referral for *service* is appropriate." Tr. Vol. I at 172:9 through 14; emphasis added. It is noteworthy that, at hearing, Willamette ESD personnel testified that parental consent is required before completing the screening checklist the ESD provided to the District. I am not persuaded by the District's characterization of the checklist merely as a tool to be used by teachers to develop instructional practices.

Nothing on the face of the checklist, provided by Willamette ESD, rather than the District or individual schools, lends itself to utility as a tool for teachers to develop goals or instructional practices as claimed at hearing. Despite the District's characterization of the documents at hearing, I find nothing on the face of this checklist to indicate it has any practical application in the "screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation." OAR 581-015-2095(1)(d). Instead, the Augmentative Communication Screening Checklist appears more analogous to an evaluation tool to determine eligibility for assistive technology (i.e., augmentative communication devices) and/or related services. This is supported by evidence in the record indicating that Ms. Christiansen, in an email to Ms. Galbraith, referenced the results of the checklist and stated, "We did the screening form- [Student] DOES NOT even come close to qualifying for services." Ex. S147 at 1. The definitive nature of Ms. Christiansen's statement, based on the results of the Augmentative Communication Screening Checklist, does not support the District's characterization of the form. Rather, it bolsters Parent's claim that the District used the checklist as an evaluation tool to determine Student's eligibility for augmentative communication services and devices. Parental participation in such determinations is required by the IDEA.

In addition, the Augmentative Communication Screening Checklist, provided by Willamette ESD and completed by District personnel, was not merely a review of existing data to be used by the District as part of an evaluation or reevaluation process. See, OAR 581-015-2095(1)(a). The evidence shows that, more likely than not, this checklist was used to evaluate Student for augmentative communication devices and/or services. As such, the District was required to obtain Parent's consent prior to completing the evaluation. Failure to do so was a violation of the consent requirements set forth in OAR 581-015-2090.

Considering the potential importance of augmentative communication services and devices for a non-verbal child such as Student, it cannot be said that evaluations for eligibility performed without Parent's knowledge or consent constitute harmless procedural error. Rather, based on the discrepancies between the level of capabilities observed by District staff and Parent, Student's private caregivers, and his/her private medical providers, it is likely that Parent would have a significant amount of information to provide regarding each of the questions on the checklist. That input was likely to have a significant impact on whether Student was referred for augmentative communication devices and/or services. Further, it is likely that such aids and

services would have been added to Student's IEP. Accordingly, the District's actions infringed upon Parent's right to participate in the evaluation and IEP formulation process and deprived Student of educational opportunities.

As discussed more fully below, Parent first requested a copy of the November 2014 Augmentative Communication Screening checklist in February 2015. Nothing in the record demonstrates that the District informed Parent that Ms. Christiansen had completed the checklist in November 2014. The District failed to put forth any evidence indicating Parent was advised of the existence of such a checklist prior to February 2015. The best evidence in the record indicates that Parent did not learn of the Augmentative Communication Screening Checklist prior to February 2015 when she requested a copy of the form from Ms. Christiansen. February 2015 is within the two-year statute of limitations established by the IDEA.

d. District failed to provide Parent with a completed Augmentative Communication Screening Checklist

Next, Parent claims that the District failed to provide her with a copy of the completed Augmentative Communication Screening Checklist, completed by Ms. Christiansen in November 2014, thereby denying her the ability to meaningfully participate in the IEP process. The record in this matter indicates that Parent showed up at Student's special education classroom sometime during the week of February 23 through 27, 2015 and spoke with Ms. Christiansen about augmentative communication services for Student. During that conversation, Ms. Christiansen informed Parent for the first time that an Augmentative Communication Screening Checklist had been completed for Student. At that time, Parent requested a copy of the completed Augmentative Communication Screening Checklist from November 2014.

At hearing, the District presented a significant amount of evidence regarding what Ms. Christiansen perceived as Parent's unorthodox and disruptive manner of requesting a copy of the checklist completed for Student. The evidence at hearing revealed that Ms. Christiansen sent an email to Ms. Galbraith on Saturday, February 28, 2015 and informed her, *inter alia*, that she received the request for documentation from Parent and that she "just blew it off." Ex. S147 at 1. While Ms. Galbraith testified that she did not believe Ms. Christiansen's response was appropriate, she did nothing to rectify the situation including making sure Parent received a copy of the checklist.

Nothing in the IDEA or its implementing federal regulations or state administrative rules require that a parent request records in writing, or that such request be made of a particular individual. Further, nothing in the statute or rules requires that a parent or guardian observe particular protocols or niceties when making such requests. Rather, the applicable statute, rules, and regulations require only that a school district provide such documents to a parent or guardian upon request. Accordingly, the District's failure to provide Parent with a copy of the Augmentative Communication Screening Checklist completed by Ms. Christiansen in November 2014 constitutes a procedural violation that deprived Parent of the opportunity to participate in the evaluation process with regard to augmentative communication services and devices as guaranteed by OAR 581-015-2105.

- e. *District failed to properly identify Student as a student with a disability in all areas of disability and misidentified Student as a student with an Intellectual Disability*

The IDEA requires school districts to locate, identify, and evaluate all children with disabilities who reside within the district, regardless of the severity of their disabilities, and who are in need of special education and related services. 20 U.S.C. §1412(a)(3); 34 C.F.R. §300.125; OAR 581-015-2080. This is commonly referred to as a local education agency's (LEA or school district) "child find" obligation. The child find obligation applies to "children who are *suspected* of being a child with a disability..." *Department of Educ., St. of Hawaii v. Cari Rae S.*, 158 F.Supp. 2d 1190, 1194 (D. Hawaii, 2001). A [school district] or LEA "shall be deemed to have knowledge that a child is a child with a disability if [among other things]...the behavior or performance of the child demonstrates the need for such services." *Id.*, citing 20 U.S.C. §1415(k)(8)(B)(ii). The child find duty requires children to be identified and evaluated within a reasonable time after school officials are on notice of the behavior [or performance deficit] that is likely to indicate a disability. *W.B. v. Matula*, 67 F.3d 484,501 (3rd Cir. 1995).

- i. *Delay in identifying Student as deafblind.*

Parent asserts the District unreasonably delayed identification of Student as eligible under the category of DB and that, as a result of this delay, Student was denied educational opportunities and deprived of educational benefit. Further, once the District identified Student as eligible under the category of DB, the District unreasonably delayed in adding that eligibility to Student's IEP. I agree.

As identified above, Student has resided within the District and has attended District schools since kindergarten. In addition, Student was identified as eligible for early intervention services prior to beginning kindergarten. Most notably, however, is the fact that Student has been on the Deafblind Registry in Oregon since shortly after birth. Anne Olson-Murphy, Vision Specialist with Willamette ESD,¹³ had worked with Student from the time he/she entered kindergarten until he/she completed third grade. Throughout the entirety of that period, Student was determined eligible for special education and related services under the categories of HI and VI, among others. Based on these eligibilities, Student has received services from a vision specialist and hearing specialist, among others, to address deficits in these individual areas.

The evidence shows that the District began to review eligibility for DB in March 2015, after Parent raised the issue with District personnel in February 2015. According to the evidence in the record, the District made the determination that Student met the eligibility criteria for DB

¹³ Despite characterizations of Ms. Olson-Murphy, by District witnesses at hearing, as a regional deafblind specialist for Willamette ESD, the record shows that the only relevant endorsement Ms. Olson-Murphy holds is as a vision specialist. Further, the District's attempt to qualify this individual as an expert in the area of deafblind was denied by the ALJ based on a lack of evidence pertaining to such expertise. The fact that Ms. Olson-Murphy may have acted as, and been treated by the District as, a deafblind specialist with regard to evaluations of and services provided to Student is not dispositive. The best evidence in the record shows Ms. Olson-Murphy is qualified as a vision specialist and not as a deafblind specialist.

based on a review of existing data as of March 11, 2015 and that no further information or assessments were necessary to add this eligibility to Student's IEP. Ex. D68. The evidence also shows that Parent consented to the District's proposal on March 16, 2015; five days after the District issued a PWN notifying Parent of its decision. Despite needing no new information to make the eligibility determination and having parental consent less than one week later, the District failed to convene an IEP meeting to add DB eligibility, with necessary SDI and related services, until May 6, 2015; nearly 60 days after notifying Parent that Student was eligible for special education and related services under a new category. In light of the evidence, I find that delay to be unreasonable.

At hearing, the District offered no explanation or justification for why Student was not found eligible, or even evaluated, under the category of DB. Rather, evidence presented by the District attempted to characterize the DB eligibility as a formality because Student was already receiving services for HI and VI. At hearing, Ms. Galbraith testified that, "[v]ision and hearing together combine the deafblind eligibility. The same services that [Student] received for vision and hearing * * * were the same services that [he/she] received when [he/she] became later [sic] eligible for deafblind." Tr. Vol. V at 991:9 through 13. Based on the evidence provided at hearing, vision specialists work with students to assist them in developing their remaining senses, such as hearing, to compensate for deficits in sight. Likewise, hearing specialists work with hearing impaired individuals to utilize other senses, particularly sight, to compensate for a lack of sensory input due to hearing impairment.

According to testimony from the District's expert and Director of the Oregon Deafblind Project, Dr. Lyn Ayer, average individuals obtain approximately 90 percent of all learned information through a combination of hearing and vision. Individuals who are deafblind miss all such sensory input and learning. Tr. Vol. II at 208:4 through 24. It is unclear how the District determined that a vision specialist and a hearing specialist, each working with Student independently, were able to coordinate services and strategies to serve Student's unique needs. In truth, the evidence in this record indicates neither was able to do so effectively and Student's education suffered as a result.

In addition, I disagree with the District's assessment that SDI and related services Student received under the categories of VI and HI were adequate to satisfy his/her SDI and related service needs under the category of DB. Were that the case, the distinct eligibility category of DB would be superfluous. The fact that District personnel assumed SDI and related services provided under the categories of VI and HI were adequate to meet Student's unique needs under the category of DB speaks to a lack of understanding of Student's extensive needs. As discussed more fully below, that lack of understanding impacted many of Student's IEPs during the period in issue.

Ms. Galbraith's position is also contrary to other District witnesses who indicated the addition of DB to Student's eligibilities resulted in the use of different instructional strategies with Student as well as additional supports and services provided to Student. Nothing in the record suggests that such changes to instruction and services would have occurred if not for the addition of DB eligibility.

The District failed to identify Student as eligible under the category of DB and failed to timely add that eligibility, along with special education and related services, to Student's IEP once it determined he/she was eligible. These failures and delays denied Student educational opportunities and deprived him/her of education benefit for the period from January 26, 2015 through May 5, 2015.

ii. Misidentification of Student as intellectually disabled.

Next, the Parent asserts the District misidentified Student as intellectually disabled. According to the evidence in the record, that identification and eligibility determination occurred in May 2012. Accordingly, that event falls far outside the two-year statute of limitations established by the IDEA. Moreover, there is no evidence in the record to demonstrate that Parent was unaware of the designation in May 2012. The record is also devoid of any evidence to indicate Parent was unaware at that time that Student was not intellectually disabled. Accordingly, Parent's claim that the District committed a substantive violation and denied Student a FAPE based on this allegation is time barred.

In her closing brief, Parent asserts that the ID eligibility was held by the District through the beginning of the period in issue. Parent's Post-Hearing Brief at 354. Nonetheless, a review of the evidentiary record draws this contention into doubt. As discussed previously, the District held a tri-annual eligibility determination meeting at the same time it held Student's March 13, 2014 IEP meeting. A review of the eligibility documents and resulting IEP reveal that Student's ID eligibility was not addressed, and therefore appears to have been allowed to lapse by the District. Exs. D7, D8, and D9. In addition, Student's revised IEP, completed on May 19, 2014, also omitted any mention of ID as an eligibility category for Student. See, Ex. D13.

Accordingly, while the District may have misidentified Student as eligible under the disability category of ID, and may also have allowed that eligibility to lapse – thereby changing the identification of Student – without providing Parent with a PWN notifying her of the proposed change, that conduct falls outside the statutory period and is thus time barred.

f. District failed to properly evaluate Student in all areas of suspected disability

Parent alleges the District failed to properly evaluate Student, during the 2014/2015 academic year, and to properly assess him/her in all areas related to suspected disabilities including communication needs as well as social and emotional needs. Specifically, for this academic year, Parent asserts the District failed to properly evaluate Student's communication needs to determine whether he/she was eligible for augmentative communication devices and/or services and failed to conduct a FBA to determine whether Student needed a BSP¹⁴ to address certain behaviors exhibited by Student including screaming in the classroom.

To provide a FAPE in compliance with the IDEA, a public school district must evaluate a student in all areas of suspected disability, determine whether that student is eligible for special education, and formulate and implement an IEP with appropriate measurable goals and related services. 20 U.S.C. §1414. An IEP informs how a student is to be educated, especially with

¹⁴ Behavioral support plans are also commonly referred to as behavioral intervention plans (BIP).

regard to the student's particular needs resulting from his or her disability. Each IEP must contain measureable annual goals. *Id.* §1414(d)(1)(A)(i)(I)(cc). The IEP team must consider the strengths of the student, concerns of the parents, evaluation results, and the academic, developmental, and functional needs of the student. *Id.* §1414(d)(3)(A). Nonetheless, none of these determinations of IEP formation and implementation can be made before a school district performs proper evaluations of a student in all areas of suspected disability.

In the Ninth Circuit, "the sufficiency of a school district's actions, including evaluation decisions and decisions regarding the student's substantive educational curriculum are judged by the snapshot rule." *Forest Grove Sch. Dist. v. Student*, No. 3:12-cv-01837-AC, 2014 WL 2592654 at *20 (D. Or. June 9, 2014) (citing *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999).) When making an assessment of whether an eligibility determination is "appropriate" under the IDEA, the administrative law judge or hearing officer looks to the time of the student's evaluation by the school district. *See L.J. v. Pittsburg Unified Sch. Dist.*, 835 F.3d 1168, 1175 (9th Cir., 2016.) In applying the snapshot rule, a court must determine whether the school district's actions were reasonable considering the facts known when the decision was made. *Adams*, 195 F.3d at 1149. Moreover, the team's decision is judged based whether it took all relevant information from the snapshot period into account. *L.J.*, 835 F.3d at 1175.

While the IDEA provides no specific right for a student to be classified under a particular disability, it does require that the student's educational program be designed to suit the student's demonstrated needs: "Given the IDEA's strong emphasis on identifying a disabled child's specific needs and addressing them * * * the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs." *Fort Osage R-1 School District v. Simms*, 641 F.3d 996, 1004 (8th Cir. 2011). Nonetheless, a school district's failure to conduct appropriate assessments or to evaluate in all areas of suspected disability is a procedural violation that may result in a substantive denial of FAPE. *Park v. Anaheim Union High School Dist.*, 464 F.3d 1025, 1031 through 1033 (9th Cir. 2006).

The Court of Appeals for the Ninth Circuit has clearly established that a disability is suspected, and therefore must be assessed by a school district, when the school district has notice that the child has displayed symptoms of that disability. *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9th Cir. 2016). In *Timothy O.*, school administrators noted that a three-year-old child displayed autistic-like characteristics. In response, the district hired an outside consultant to informally observe the child. That individual then concluded, erroneously, that the child did not have autism. The court specifically held that school districts cannot circumvent their responsibility "by way of informal observations, nor can the subjective opinion of a staff member dispel such reported suspicion." *Id.* at 1119. The school district's failure to assess the child in all areas of suspected disability "deprived his IEP team of critical evaluative information about his developmental abilities as an autistic child," denying him "critical educational opportunities and substantially impairing his parents' ability to fully participate in the collaborative IEP process." *Id.*

In addition, the Ninth Circuit has held that the "informed suspicions of parents, who may have consulted outside experts," also triggers the duty to evaluate, even if the school personnel

disagree with the parents' suspicions. *Pasatiempo by Pasatiempo v. Aizawa*, 103 F.3d 796, 802 (9th Cir.1996). Nonetheless, a parent's request to evaluate a student in an area of suspected disability is not absolute; the suspicions must be informed, such as by a medical diagnosis or outside professional opinion. *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2008)

As set forth above, OAR 581-015-2105(1) mandates that a school district must conduct an evaluation *or reevaluation process* in accordance with this rule and 581-015-2110 before determining that a child is a child with a disability, that a child continues to have a disability under OAR 581-015-2130 through 581-015-2180, or changing the child's eligibility. OAR 581-015-2105(1)(a) through (c). OAR 581-015-2110(1) requires a school district to conduct evaluation planning in accordance with OAR 581-015-2115 before conducting any evaluation or reevaluation of a child.

An evaluation of a student for special education eligibility must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. 20 U.S.C. §1414(b) & (c)(5); OAR 581-015-2110(3) and (4); *See also Cobb Cnty. Sch. Dist. v. D.B.*, Civ. Action No. 1:14-CV-02794-RWS (N.D. Ga. Sep. 28, 2015).

OAR 581-015-2110(4)(c) requires that school districts ensure students are assessed in all areas related to the suspected disability, *including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities*. (Emphasis added). The tools and strategies selected by a school district must be tailored to assess specific areas of educational need, target all areas related to the suspected disability, be sufficiently comprehensive to identify all of a student's special education and related services needs, and provide relevant information that directly assists persons in determining the educational needs of the child. 34 C.F.R. §300.304(c); 20 U.S.C. §1414(b)(3); *see also Timothy O.*, 822 F.3d at 1122.

The Office of Special Education Programs (OSEP), within the U.S. Department of Education, has opined that an FBA, used to determine the nature and extent of special education and related services that a student requires, is an evaluation as defined by the IDEA and its implementing rules and regulations. *See Letter to Christiansen*, 48 IDLER 161 (OSEP 2007). As such, an FBA conducted to develop or modify a BSP requires PWN to the parent and includes the right of the parent to request an IEE at public expense if he or she disagrees with the FBA. *Id.* Further, the U.S. Department of Education has recently stated that, "IEP teams must

consider and, if necessary, to provide FAPE, include appropriate behavior goals and objectives and other appropriate services and supports in the IEP's of children whose behavior impedes their own learning or the learning of peers." *Questions and Answers on Andrew F. v. Douglas County School District Re-1*, 71 IDLER 68 (ED 2017).

As discussed above, Student is non-verbal and has been since he/she began attending school in the District in kindergarten. Since that time, Student has received a variety of special education and related services in multiple areas including physical therapy, occupational therapy, hearing, vision, cognitive, adaptive, social, communication (expressive and receptive), gross, and fine motor skills development. Student has also utilized a BAHA or similar hearing aid device throughout his/her tenure at District schools.

On September 4, 2014, the District convened an IEP meeting. Parent attended that meeting. During the course of the IEP meeting, Parent inquired about augmentative communication aids and services for Student. That inquiry constituted a request, by Parent, to reevaluate and assess Student in an area related to at least one of his/her documented disabilities. The District representative at the meeting directed Parent to contact Ms. Olsen at Willamette ESD to initiate an augmentative communication assessment. This was an improper abdication by the District of its duty to reevaluate Student and assess him/her in areas related to a documented disability as required by OAR 581-015-2110(4)(c). The District took no action, between the September IEP meeting and November 2014, to assess Student's augmentative communication needs associated with his/her preexisting disabilities in the areas of HI and VI.

In addition, the District convened another IEP meeting for Student on November 3, 2014. Parent attended that meeting and again requested a referral for augmentative communication assessment. Parent was advised that Ms. Christiansen would "look into [the referral]." Ex. S117 at 1. Parent also requested that District personnel contact Student's private SLP for input on his/her communication needs. As discussed above, sometime after this meeting Ms. Christiansen completed an Augmentative Communication Screening Checklist but did not inform Parent or obtain her written informed consent prior to doing so. Nor did Ms. Christiansen, or anyone else within the District, share the results of the screening with Parent. Importantly, neither Ms. Christiansen nor anyone else within the District informed Parent that Ms. Christiansen, based on the checklist, determined Student was not an appropriate candidate for referral to the Willamette ESD augmentative communication specialist. Nothing in the record demonstrates Ms. Christiansen, Student's special education teacher and case manager, possessed the requisite skills and experience to determine whether augmentative communication devices and/or services were appropriate for Student during the 2014/2015 academic year. Further, the District allowed Ms. Christiansen, rather than Student's IEP team, to decide whether Student should be referred for augmentative communication services through Willamette ESD. The referral and evaluations of Student in 2016 demonstrated Ms. Christiansen's conclusion was erroneous.

On at least two occasions during the early part of the 2014/2015 school year, Parent requested augmentative communication assessments of Student and requested the District confer with Student's SLP to determine Student's communication needs based on her informed suspicions that Student might benefit from augmentative communication devices and services at school. Those requests triggered the District's duty to reevaluate and assess Student's

communication needs, even if the District's personnel disagreed with Parents' suspicions. See *Pasatiempo*, 103 F.3d at 802. As addressed above, the District cannot circumvent its responsibility by way of informal observations, nor can the subjective opinion of a staff member, such as Ms. Christiansen, dispel Parent's reported suspicion that Student may benefit from augmentative communication services. See *Timothy O.*, 822 F.3d at 1119. Here, as in *Timothy O.*, the District's failure to assess Student in all areas related to his/her disability, specifically communication, deprived Student's IEP team of critical evaluative information about his/her developmental abilities thereby depriving Student of critical educational opportunities and substantially impairing Parent's ability to fully participate in the IEP process during the 2014/2015 academic year. While the initial failure by the District occurred at a point outside the two-year statute of limitations, nothing in the record indicates the District remedied this failure at any point during the academic year in issue. As such, the District denied Student a FAPE during the 2014/2015 academic year, beginning January 26, 2015 and continuing through the end of that academic year, or approximately five months.

Next, this tribunal must address Parent's claim that the District failed to conduct an FBA of Student to determine whether his/her disruptive behavior (i.e., screaming in class) was a manifestation of one or more of Student's disabilities and therefore required a BSP.

In February 2015, Ms. Christiansen and Parent communicated about Student's screaming during class time. Ms. Christiansen expressed concerns that this behavior occurred for unknown reasons and interfered with Student's education. Parent offered several suggestions as to why Student might scream during the day and offered solutions for school personnel to try. At no time during the entirety of the period in issue did any of the District's personnel perform or suggest an FBA for Student. In fact, Ms. McFarland, Student's sixth grade special education teacher and case manager, testified that she was under the impression that screaming was "just * * * [Student's] way of communicating" and that "typically we don't do FBAs * * * on students that make noises or any vocalizations." Tr. Vol. VI at 1250:25 through 1251:5.

It is undisputed that Student exhibited disruptive behavior in the form of intermittent screaming throughout the 2014/2015 academic year (and beyond). It is also undisputed that no one within the District could determine why Student would scream intermittently during class time. It is also undisputed that this behavior impeded his/her learning and likely the learning of others in the general education or special education classroom. As such, the District should have performed an evaluation, in the form of an FBA, to determine, to the greatest extent possible, the reasons for Student's behavior and developed a BSP to address his/her disruptive behavior when it occurred. The District failed to do so and allowed Student's behavior to continue unabated. It is axiomatic that behavior that results from a student's disability and impedes his or her ability to participate in educational activities results in a deprivation of educational benefit. The District's failure to address Student's disruptive behaviors therefore deprived him/her of education benefit during the period in issue.

g. District failed to provide Student with an appropriate placement

Next, Parent alleges the District failed to provide Student with an appropriate placement during relevant portions of the 2014/2015 academic year by shortening his/her school day

without adequate justification and reducing Student's placement in the general education classroom to less than 40 percent of each school day without an adequate basis for doing so.

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

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

(Emphasis added.)

Under the IDEA, a school district provides FAPE to a student if the offered program, including placement, "(1) addresses the child's unique needs, (2) provides adequate support services so the child can take advantage of the educational opportunities, and (3) is in accord with the [IEP]." *Capistrano Unified Sch. Dist. v. Wartenberg ex rel. Wartenberg*, 59 F.3d 884, 893 (9th Cir. 1995), citing *Rowley*, 458 U.S. at 188-189. The Ninth Circuit Court of Appeals has adopted a four-factor balancing test to determine whether a school district's placement of a disabled student meets the requirements of the IDEA. Specifically, that test requires courts to consider (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the disabled student may have] on the teacher and children in the regular class; and (4) the costs of mainstreaming [the disabled student]. *Sacramento City Unified School Dist., Bd. of Educ. v. Rachel H. by and through Holland*, 14 F.3d 1398, 1404 (9th Cir. 1994).

Thus, in collaboration with the parents, a school district must make a threshold determination as to what special education and related services a disabled student needs and then must determine whether those needs can be met within the matrix of a regular classroom setting with the provision of supplementary aids and services. *Oberti v. Bd. of Educ.*, 801 F. Supp. 1392, 1401 (D.N.J. 1992), *aff'd*, 995 F.2d 1204 (3d Cir. 1993). Accordingly, courts have stated, "[t]he preference or presumption in favor of inclusion will not be rebutted unless the school district shows either that the child's disabilities are so severe that he or she will receive little or no benefit from inclusion; that he or she is 'so disruptive as to significantly impair the education of other children' in the class; or that the cost of providing an inclusive education 'will significantly affect other children in the district.'" *Oberti*, 801 F.Supp. at 1402, citing, *Board of Education, Sacramento City Unified School District v Holland*, 786 F.Supp. at 874 (E.D.Cal. 1992). Thus, at hearing, school districts carry the burden of justifying challenged placements. 801 F.Supp at 1402, citing, *Davis v. District of Columbia Board of Education*, 530 F.Supp. 1209, 1211-12 (D.D.C.1982); and *Lascari v. Board of Education of the Ramapo Indian Hills Regional High School District*, 116 N.J. 30, 44, 560 A.2d 1180, 1188 (1989). Accordingly, in order to overcome the presumption in favor of inclusion of Student in the general education setting to the

greatest extent possible, the District bears the burden of justifying its decision to reduce Student's school day and his/her time in the general education setting.

This analysis is complicated by the fact that, for each academic year in issue, Student's annual IEP meeting was held in March of the previous year. Accordingly, the IEP meant to serve Student for the 2014/2015 academic year was actually drafted and implemented beginning in March 2013, during the 2013/2014 academic year. Further complicating the analysis is the number of IEPs and revisions for each academic year. Nonetheless, this order endeavors to provide some clarity.

The record shows Student, despite being deafblind, non-verbal, and confined to a wheelchair, enjoys school, particularly in grades kindergarten through third grade when he/she spent significant time in the general education environment, and benefits from social interactions with his/her non-disabled peers. While the District presented a significant amount of evidence regarding the difficulties experienced by staff in keeping Student awake and alert during school hours, Parent put forth equally compelling evidence demonstrating Student remains awake and alert for extended periods when he/she is engaged and participating with peers. Further, the District's best evidence is that staff is unable to determine how much Student can see, hear, and/or comprehend in the school environment. Accordingly, it cannot be said that Student receives no academic benefit from inclusion in the regular education classroom. It can, however, be determined that, more likely than not, Student obtains non-academic benefits from the socialization with non-disabled peers in general education settings.

First, it must be determined whether the District's reduction in Student's school day was justified. At hearing, the District asserted that Student's school day was shortened to coincide with the number of hours per day it allocated to his/her 1:1 nurse, Ms. Oace. The District also claimed that Ms. Oace was hired only for those hours Parent wanted Student to attend. The District claimed that the five and one-half hours allocated to Ms. Oace each school day coincided with Parent's request for a reduced schedule. That evidence was contradicted by evidence at hearing showing that Parent contacted Ms. Galbraith in June 2014 noting that Student's 1:1 nurse appeared to be employed less than a full school day and asking what the District planned to do to provide coverage for Student's needs during the time he/she was at school beyond the nurse's scheduled work day. Further, the evidence shows that Parent did not contact the District concerning a late start for Student until August 2014, at least two months after Ms. Oace was hired.

At hearing, the District failed to provide any evidence that Student's disabilities generally, or his/her increased medical needs specifically, were so severe that he/she would receive little or no benefit from inclusion in a full day program, whether in the general or special education settings. Rather, the District's evidence consisted of vague statements alleging Student's medical needs were increasing during this time. Those statements notwithstanding, the District's solution of adding a 1:1 nurse to accompany Student throughout the day appears to have addressed Student's increased medical needs and nothing indicates that Student was unable to participate and receive at least some educational benefit in a full day educational program. Nor does the District's evidence demonstrate that Student's medical or other needs were so disruptive as to significantly impair the education of other children if he/she were to attend a full

day of school.

Instead, the evidence in the record supports the conclusion that the District reduced the overall length of Student's school day based on its preferred scheduling of nursing staff. While it is understandable that the District, working with finite resources, would seek to maximize those resources to serve as many students as possible, the District failed to put forth any evidence to show that the cost of providing a 1:1 nurse for the entire school day in order to guarantee an inclusive education would significantly affect other children in the District. Therefore, the District's placement decision limiting Student's available school day, through the limitation of available hours for his/her 1:1 nurse, was impermissible.

Next, beginning in September 2014, the District altered Student's placement in the general education environment from 40 to 79 percent¹⁵ (Federal placement code 31), as stated in Student's prior IEPs, to less than 40 percent (Federal placement code 33). At hearing, the District asserted that the change was made to accommodate Student's late start, requested by Parent, for the 2014/2015 academic year. Nonetheless, nothing in the record supports a finding that Student was unavailable to participate in the general education setting more than 40 percent of the school day. To the contrary, as addressed above, Parent expressed concerns over the adequacy of coverage for Student's needs after the 1:1 nurse's shift ended for the day and Student was still at school. Again, Ms. Oace was originally employed for five and one-half hours per day which, according to Ms. Oace, translated to a six hour shift with a 30 minute lunch. Based on this evidence, Student was attending school for nearly a full day. Nothing in the record indicates why, during the approximately six hours Student was scheduled to be at school, he/she was unable to participate in the general education setting. Further, the record is devoid of any evidence to show how the District determined that Student could only participate in the general education setting for less than 40 percent of the school day. More importantly, the District failed to put forth any evidence to show why Student, with appropriate supports and services, was not considered for placement under Federal placement code 30, which allocates 80 to 100 percent of the school day spent in the general education setting. Rather, the IEP simply indicates that this placement, as well as the one previous, was rejected in favor of the stated placement option. It is notable that the placement page shows the District listed the 100 percent inclusion placement option and simply indicated, "[g]eneral ed. teacher will not be able to meet [Student's] educational needs." Ex. S103 at 10. Nothing in the IEP or the meeting notes explain why the general education teacher would not be able to meet Student's needs with appropriate aids and supports, such as an EA and 1:1 nurse for Student. This vague and conclusory statement is insufficient to overcome the presumption in favor of inclusion.

This failure by the District is not only relevant to the 2014/2015 academic year, but to all IEPs drafted in subsequent school years. Based on the evidence in the record, the District did not

¹⁵ No IEP's drafted prior to March 2014 are relevant to the period in issue. Nonetheless, it is worth noting that each of the IEP's in place for Student prior to March 2014 considered Federal Placement Code 30 (80 to 100 percent of the day spent in the general education setting) for Student's placement. (See e.g. Exs. S25 at 7, S44 at 14, S52 at 16, S65 at 12, and S79 at 5.) Those IEP's are similarly devoid of justification sufficient to overcome the presumption in favor of an inclusive education. Nonetheless, they are only addressed to the extent relevant to provide context to the decisions in this order.

consider (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect Student may have on the teacher and children in the regular class; and (4) the costs of mainstreaming Student as required by *Rachel H. by and through Holland*, 14 F.3d at 1404. As such, the District's placement decisions for Student across all academic years during the period in issue violated the IDEA's LRE requirement and, therefore, denied Student a FAPE during the period in issue.

Accordingly, the District failed to put forth evidence sufficient to justify the placement decisions in the September 2014 IEP. Thus, the District failed to establish Student could not be educated within the matrix of the general education classroom setting with the provision of supplementary aids and services. The District failed to offer Student a placement in the LRE during the 2014/2015 academic year and therefore denied him/her a FAPE during the relevant portions of that year; *to wit*, January 26, 2015 through the end of the academic year in June 2015.

h. Denial of FAPE

As addressed more fully above, by holding an IEP meeting without Parent, failing to provide Parent with IEP progress reports, completing an evaluation of Student without Parent's knowledge or consent, failing to provide Parent and/or other members of the IEP team with a copy of that evaluation, and failing to properly evaluate Student in all areas related to his/her disabilities, the District denied Student educational opportunities, infringed upon Parent's right to participate in Student's IEP process (both formulation and enforcement), and deprived Student of educational benefit during the 2014/2015 academic year resulting in a denial of FAPE for that period.

In addition, the District's failure to timely identify Student as eligible under the category of DB resulted in a denial of educational opportunities (SDI and related services) and deprived Student of educational benefit during the period from January 26, 2015, the beginning of the period in issue, through May 6, 2015, when the District ultimately added DB eligibility to Student's IEP. Further, also addressed above, the District denied Student a FAPE by failing to ensure he/she was educated, to the maximum extent possible, in the least restrictive environment when it altered both the length of Student's school day and the amount of time in the general education setting without appropriate justification.¹⁶

2. 2015/2016 school year.

As discussed more fully above, the District failed to provide progress reports for the 2014/2015 academic year. The IEP team, including Parent, met on September 27, 2015 to develop an IEP for Student meant to serve him/her through the 2015/2016 academic year. The District's failure to provide IEP progress reports to Parent and/or other IEP team members at, or

¹⁶ Based on the deficiencies in the District's identification, evaluation, and IEP formulation processes during the 2014/2015 academic year, this order determines Student was denied a FAPE during the entirety of that period. As such, it is unnecessary to discuss additional alleged deficiencies with the IEP(s) created to serve Student during the 2014/2015 academic year. To the extent that any such IEP deficiencies are relevant to subsequent academic years, the IEP(s) are addressed below in the portion of this opinion addressing the academic year in issue.

prior to, the September 27, 2015 IEP meeting deprived the team of information necessary to develop an educational program reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances. Without information regarding Student's past progress, it is unlikely that the IEP team could develop an educational program appropriately ambitious for Student in light of his/her unique needs and circumstances.

In addition, failure to provide such reports violates the requirements of OAR 581-015-2300(2) and (3) which require school districts to provide parents access to a child's educational records regarding evaluation, placement, or the provision of FAPE prior to an IEP. This is a procedural violation that denied Parent meaningful participation in formulating Student's IEP. Therefore, the District denied Student a FAPE. Because the District's denial of parental participation, by itself, constitutes a denial of FAPE, it is unnecessary to address whether the IEP was reasonably calculated to enable the child to receive educational benefit. *Doug C. 720 F.3d. at 1043, citing Shapiro, 317, F.3d. at 1079.*

Further, the record demonstrates that the IEP simply carried over Student's AGs and STOs from year to year without examining any relevant data on his/her Present Levels. As such, the District compounded the problems presented in its already deficient IEPs for Student. In this instance, it is highly improbable that the team could craft an IEP reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances without data showing his/her progress toward prior IEP AGs and STOs.

a. District failed to properly evaluate Student

As discussed above, the District has failed to properly and timely evaluate Student in multiple areas related to his/her disabilities. Some of those failures on the part of the District carried over from year to year. As identified above, it is undisputed that Student exhibited disruptive behavior in the form of intermittent screaming beginning in the 2014/2015 academic year. It is also undisputed that no one within the District, or Parent, could determine why Student would scream intermittently during class time. It is also undisputed that this behavior impeded Student's learning and likely the learning of other children in the general education or special education classroom.

As identified in detail above, the District should have performed an evaluation, in the form of an FBA, to determine, to the greatest extent possible, the reasons for Student's behavior and developed a BSP to address his/her disruptive behavior when it occurred. The District failed to do so in the 2015/2016 school year and allowed Student's behavior to continue unabated. The District's failure to address Student's disruptive behaviors therefore deprived him/her of education benefit during the period in issue.

b. District failed to provide Student with an appropriate placement

As discussed in detail above, throughout the period in issue the District failed to provide Student a placement in the LRE as required by the IDEA. Specifically, for the 2015/2016 academic year, The IEP team maintained Student's placement at less than 40 percent of the day in the general education setting. A review of the relevant IEPs, in this instance the September

and November 2015 IEP Revisions, reveals that the District only considered the selected placement and placement of Student in the self-contained classroom. Again, the District failed to consider more inclusive options along the placement continuum, including the option to place Student in the general education class 80 to 100 percent of the school day. It may be that such a placement is insufficient to meet Student's academic and other needs. Nonetheless, because the IEP team never considered it, the justification for such a determination is absent from the record.

Accordingly, this order simply reiterates that, for each academic year in question, the District failed to put forth any evidence to justify its decision not to consider Student for full inclusion in the general education classroom, with appropriate supports and services. Again, there is no evidence that the District considered any of the factors, relevant to the placement decisions, set forth by the Ninth Circuit in *Rachel H. by and through Holland*. Accordingly, the District cannot overcome the presumption in favor of full inclusion in the general education setting and this tribunal determines that the District's placement decisions for this academic year denied Student a FAPE.

c. Denial of FAPE

Based on the District's failure to provide an IEP reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances, the District denied Student a FAPE. In addition, the District failed to evaluate Student in all areas related to his/her suspected disability. Finally, by failing to consider all factors set forth by the Ninth Circuit in *Rachel H. by and through Holland*, before determining Student's placement during the 2015/2016 school year, the District failed to offer Student a placement in the least restrictive environment, which also denied Student a FAPE.

3. 2016/2017 school year.

Similar to prior academic years, Parent challenges the District's provision of FAPE to Student for the 2016/2017 school year on multiple bases. Each is addressed below.

a. District failed to properly evaluate Student

As discussed above, the District has failed to properly and timely evaluate Student in multiple areas related to his/her disabilities. Some of those failures on the part of the District carried over from year to year. As identified above, it is undisputed that Student exhibited disruptive behavior in the form of intermittent screaming beginning in the 2014/2015 academic year. It is also undisputed that no one within the District, or Parent, could determine why Student would scream intermittently during class time. It is also undisputed that this behavior impeded Student's learning and likely the learning of other children in the general education or special education classroom.

As identified in detail above, the District should have performed an evaluation, in the form of an FBA, to determine, to the greatest extent possible, the reasons for Student's behavior and developed a BSP to address his/her disruptive behavior when it occurred. The District failed to do so in the 2016/2017 school year and allowed Student's behavior to continue unabated. The

District's failure to address Student's disruptive behaviors therefore continued to deprive him/her of education benefit during the period in issue.

b. District failed to provide Student with an appropriate placement

Again, Parent takes issue with the IEP team's placement decision for this academic year. The record demonstrates that, for the 2016/2017 academic year, the IEP was drafted March 2, 2016, during the previous school year. At that meeting, the IEP team agreed to change Student's placement from "[l]ess than 40% of the day in the general education setting" to "40 to 79% of the day in the regular class." (Ex. D164 at 21 and 22.) While, at first blush, that placement may indicate the District was striving to include Student in the general education class, a review of the IEP reveals that the placement options addressed therein were the only two placement options considered at the IEP meeting. (*Id.*) Nothing in the record indicates why or how the District determined that Student could not be placed in the general education classroom, with appropriate supports and services for a greater amount of time. The evidence in the record indicates Student was assigned a full time EA for his/her educational needs and a 1:1 nurse to address his/her medical issues. With this much adult support, the District's failure to consider more inclusive placement options was unreasonable.

Again, as in previous academic years, the record shows that the District failed to provide Student a placement in the LRE as required by the IDEA. Specifically, the District failed to put forth any evidence to justify its decision not to consider Student for full inclusion in the general education classroom, with appropriate supports and services. Again, there is no evidence that the District considered any of the factors, relevant to the placement decisions, set forth by the Ninth Circuit in *Rachel H. by and through Holland*. The District should have, as in prior years of Student's education, considered all possible placements along the continuum; from full inclusion (which, for a student requiring SDI and related services, constitutes 80 to 100 percent inclusion in the general education setting), to a self-contained classroom that provides essentially no mainstreaming for Student. Instead, the record demonstrates that the District failed to consider all but a limited number of placement options. The record is devoid of any justification for the District's failure to consider a more inclusive placement for Student.

Accordingly, for the 2016/2017 academic year, the District cannot overcome the presumption in favor of full inclusion in the general education setting and this tribunal determines that the District's placement decisions for this academic year denied Student a FAPE.

c. Denial of FAPE

As in previous academic years, the District's failure to provide an IEP reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances denied Student a FAPE. Specifically, the March 2016 IEP, designed to serve Student through the end of the 2015/2016 as well as the bulk of the 2016/2017 academic years, failed to address Student's AGs and STOs; many of which he/she had already satisfied. By failing to address Student's AG's, the District failed to offer an IEP appropriately ambitious in light of Student's circumstances that would provide him/her the chance to meet challenging objectives. *See Andrew F.* 137 S.Ct. 988, 1000 (2017.)

In addition, by failing to consider all factors set forth by the Ninth Circuit in *Rachel H. by and through Holland*, the District failed to offer Student a placement in the least restrictive environment, which also denied Student a FAPE.

4. Remedies.

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

In this case, Parent appears to have been forthcoming with information and has participated in Student's IEP process to the greatest extent possible when not otherwise limited or excluded by the District. Ms. Lawson and Ms. Galbraith, among others, testified that they were always able to receive whatever information they needed from Parent and Student's private providers when requested. Parent has not concealed any information requested by the District. Nor has Parent ever refused special education or related services for Student during the period in issue.

As a result of the District's failure to comply with the procedural and substantive requirements of the IDEA, the Student has been denied educational opportunities and has been deprived of educational benefit for which he/she is entitled to compensation as addressed below.

Compensatory education and ESY

Under the IDEA's equitable relief provision, compensatory education services can be awarded as appropriate to remedy a denial of FAPE by a school district. 20 U.S.C. §1415(i)(2)(C)(iii) (the court shall grant such relief as the court determines appropriate based on a preponderance of the evidence). *Eugene Sch. Dist.*, 115 LRP 22900 (SEA OR 2015). Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F3d 1489, 1496-97 (9th Cir.1994); *see also Park*, 464 F3d 1025 (9th Cir. 2006).

As set forth throughout this order, to be appropriately educated within the meaning of the IDEA, a school district must offer an IEP reasonably calculated to enable a child to make

progress appropriate in light of the child's circumstances. *Andrew F* 137 S.Ct. at 999 (2017). Where a school district "knows or should know that a child has an inappropriate IEP or is not receiving more than a *de minimis* educational benefit [it] must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3rd Cir.), *cert. denied*, 519 U.S. 866 (1996). Here, the District's special education teachers, who also served as Student's case managers, knew that Student's IEPs did not contain appropriate AGs and STOs and lacked appropriate baseline data on most of the stated AGs necessary to allow Parent to participate in the implementation and enforcement of Student's IEPs. Further, Student's special education teacher for both fourth and fifth grades spent little or no time delivering SDI to Student. Accordingly, the District is required to provide compensatory education for those periods.

In addition, the Ninth Circuit has recently reiterated that procedural violations may justify an award of compensatory education. In addressing a school district's procedural violations that resulted in a deficient IEP, the Ninth Circuit stated, "[t]hese procedural violations deprived [the parent] of her right to participate in the IEP process and made it impossible for her to enforce the IEP and evaluate whether the services [the student] received were adequate. At the very least, plaintiffs are entitled to have the District draft a proper IEP and receive compensatory education to place [the student] in the same position [he] would have occupied but for the school district's violations of [the] IDEA." *Antelope Valley*, 858 F.3d at 1201, citing *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011)(internal citations omitted). Parent was denied the opportunity to participate meaningfully in the IEP formulation and enforcement processes when the District convened an IEP meeting without her participation and failed to provide access to educational records in the form of progress reports and augmentative screening forms.

In this case, Student was denied a FAPE during approximately five months of the 2014/2015 academic year, the entirety of the 2015/2016 and 2016/2017 academic years, and approximately five months of the 2017/2018 academic years, between the start of school in September 2016 and the end of January 2017 when Parent filed the complaint in issue. Based on deficient IEPs and inappropriate placements, Student was denied appropriate SDI and related services tailored to his/her unique needs and in light of his/her circumstances. The District denied Student a FAPE and must provide compensatory education to "place [the student] in the same position [he/she] would have occupied but for the school district's violations of [the] IDEA." 858 F.3d at 1201.

The record demonstrates that the only SDI provided to Student was to ask him/her questions and wait for responses. That is not SDI for a nonverbal, deafblind child. Most importantly, there was no 'instruction' in what the District considered Student's specially designed instruction. It provided Student no educational benefit, as demonstrated by his/her lack of progress and outright regression in many STOs.

Further, Student was denied appropriate ESY services during at least the 2016/2017 academic year. The District should have recognized Student's significant regression and provided ESY to stem the loss of knowledge and skills in those areas identified on Student's IEP.

The failure to do so entitles Student to compensatory education for the inappropriate denial of ESY services.

School districts must develop criteria for determining the need for extended school year services. That criteria must include regression and recoupment time based on documented evidence or, if no documented evidence, on predictions according to the professional judgment of the team. OAR 581-015-2065(5). According to OAR 581-015-2065(6)(a), “regression” means significant loss of skills or behaviors in any area specified on the IEP as a result of an interruption in education services. Here, Student’s loss of skill and behaviors he/she was previously able to demonstrate could not have been more evident to the District. Nonetheless, the District provided no evidence that it considered Student’s needs for ESY under any criteria as required by OAR 581-015-2065(5).

Student is entitled to compensatory education to make up for the denial of FAPE during five months each of the 2014/2015 and 2017/2018 academic years and the entirety of the 2015/2016 and 2016/2017 academic years. Further, Student is entitled to compensatory education to make up for the lack of ESY services for the 2016/2017 academic years.

Calculation of the amount of hours necessary to place Student in the same position he/she would have occupied but for the District’s violations is left to be determined at the facilitated IEP meeting ordered below. That IEP meeting should include a determination of appropriate AGs and STOs and a determination of the amount of SDI necessary to allow Student to make progress in light of his/her circumstances. Based on that determination of SDI, Student is entitled to compensatory education, in each area of need, equivalent to 28 months of deprivation determined by this order. The necessary hours should be determined by converting the appropriate amount of SDI (in minutes or hours) in each area to its monthly equivalent and multiplying the result by 28.

Evaluations in all areas of suspected disability.

Next, Parent asks that the District be ordered to conduct appropriate evaluations of Student in all areas of suspected disability, including assessing Student’s needs in those discrete areas related to his/her identified disabilities addressed in this order. As addressed in detail above, the District had an obligation to evaluate Student in all areas of suspected disability under the IDEA. As a part of that obligation, the District was required to evaluate and assess Student’s needs *including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities*. OAR 251-015-2110(4)(c). By failing to evaluate Student in all areas of disability during the period in issue, the District denied Student a FAPE.

In accordance with the findings above, the District is ordered to conduct appropriate evaluations and assessments, in all areas related to diagnosed or suspected disabilities to determine Student’s educational needs; to be completed before the end of the 2017/2018 academic year. Most significantly, these area include an FBA to determine whether Student’s screaming behaviors require a BSP to assist him/her in controlling such outbursts, and an appropriate evaluation of Student’s needs as a deafblind Student. In addition, the District shall

hold an eligibility planning meeting with Parent, prior to conducting evaluations, to determine whether Student requires additional evaluations in the area of deafblindness or assessment(s) in areas related to Student's disabilities; including health, social and communicative status as required by OAR 581-015-2110(4)(c). That planning meeting must occur within 15 calendar days of this order, unless Parent agrees in writing to extend that meeting to a later date. The District's assumptions that Student required no further evaluations or assessments in the area of deafblind, because he/she was already receiving HI and VI services, was clearly erroneous. The evidence in the record demonstrates that the needs of deafblind student's cannot be adequately addressed through these services alone.

Facilitated IEP.

Next, Parent asserts that a facilitated IEP meeting to develop an appropriate IEP with accurate and adequate present levels is necessary. I agree. Based on the record, none of Student's IEPs during the period in issue have been appropriate for Student under the IDEA and the FAPE standard set forth by the Court in *Andrew F.* From the March 2014 IEP, which was developed without Parent's participation or input, to Student's current IEP during the 2017/2018 academic year, District has failed to develop an IEP that was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances.

As addressed above, the District failed to include baseline data related to Student's AGs and STOs. Further, the District failed to create AGs and STO that were reasonable, measurable, and appropriate in light of Student's circumstances and abilities. District has failed to provide appropriate SDI, modified general education curriculum, and related services to allow Student to obtain educational benefit. Further, the District failed to provide Present Level data necessary to create an IEP appropriate for Student's unique needs.

The District is hereby ordered to convene an independently facilitated IEP meeting, within 30 days of completing the evaluations and assessments ordered above, to draft an appropriate IEP, with SDI and related services, for Student in all areas appropriate for Student's needs, unless Parent agreed in writing to extend the IEP meeting to a later date. The facilitator shall be one acceptable to both parties and shall be paid for by the District. Should the parties be unable to agree on a facilitator for the IEP meeting, each party shall retain their preferred facilitator, at District expense, to meet solely for the purposes of selecting a neutral third party facilitator.

Deafblind Intervener.

Next, Parent asks that the District be required to provide a deafblind intervener to Student. While, staffing issues are generally within the discretion of the District, the determination of the type of related service provider necessary to meet Student's needs is not strictly a staffing decision. Further, the evidence shows that the District has struggled to find and retain EAs and nursing staff that can handle the unique needs of Student. Under the District's staffing model, Student's education has stalled and regressed. Based on the evidence at hearing, it appears Student's best option for achieving reasonable progress in his/her educational program is the addition of a deafblind intervener. It is clear from this record that the District's staff

members have been overwhelmed by Student's unique communication barriers and require a new approach to provide educational benefit to Student.

From the record, it appears a deafblind intervener is Student's best option for obtaining benefit from an otherwise stagnant educational program. Unfortunately, the provision of a deafblind intervener in this state presents a logistical problem as there is not a local program providing intervener credentials or certification. There is no way for the District or this tribunal to ensure that, once those credentials were obtained (at District expense), the newly credentialed deafblind intervenor would elect to remain employed with the District. Accordingly, this order attempts to strike an appropriate balance through the training ordered for District employees ordered below.

Appropriate placement and LRE.

Throughout Student's time in the District, he/she has been provided inappropriate placements because the District failed to consider mainstreaming of Student to the maximum extent possible. For each of the academic years in issue, the District failed to consider Student's placements according to the factors established by the Ninth Circuit in *Rachel H by and through Holland*. Accordingly, the District is hereby ordered to consider Student's placement in light of the factors set forth in this order and determine the maximum extent to which Student can be educated in the general education setting with appropriate supports and services. Anything less constitutes an inappropriate placement

Training of District staff.

Parent next argues that the District's lack of appropriate training during the period in issue led to a denial of FAPE for Student. As a consequence, Parent asks for staff training in the following areas: proper identification procedures under the IDEA; proper eligibility procedures under the IDEA; proper evaluation procedures under the IDEA, proper development and implementation of IEPs; LRE and methods of inclusion; inclusion of students with disabilities on field trips; IEP progress note requirements under the IDEA; parental participation and procedural requirements under the IDEA; instruction and protocol for Student's communication device; the needs of a Student who experiences deafblindness; ESY determinations and services; and data collection.

While the deficiencies in Student's IEPs and overall education within the District are evidence throughout this order, I do not find such problems to be systemic throughout the District. The training requested by Parent is extensive and broad sweeping. It might, however, be appropriate if the problems within the District were pervasive and widespread. This record is insufficient to establish that fact. Rather, the evidence in the record shows that District staff were overwhelmed and unprepared for Student's unique needs. Those problems appear to have increased exponentially as Student's needs increased and he/she progressed from grade to grade. Nonetheless, many of the deficiencies identified in the complaint likely can be addressed through the additional training, identified below, for District staff interacting with Student. Accordingly, I decline to invitation to order the expansive training suggested by Parents.

That being said, the evidence reveals that staff assigned to work with Student failed to take full advantage of the training, specific to Student's unique needs as a deafblind child; *to wit*, the intervener training modules provided by Dr. Ayer and the Oregon Deafblind Project. Accordingly, I find it is appropriate to order that all District staff who work with Student (i.e., Student's 1:1 nurse(s), EA(s), and special education teacher(s) must complete the available training modules within 90 calendar days of this order or 90 calendar days of their hire date, whichever is later.

Based on the length of each module (approximately nine hours) and the number of modules available (27 at the time of hearing), that training should take approximately 243 hours to complete. According to the timeline set in this order, staff should be required to spend no more than three hours per day on this training. That time, however, must not occur when staff is responsible for attending to Student's academic or medical needs and should not be counted as SDI or other related service time.

ORDER

The District denied Student a FAPE during the entirety of the period in issue and is hereby ordered to evaluate Student, convene a facilitated IEP, calculate and provide compensatory education, and train staff as required by this order.

Joe L. Allen

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 5th day of April, 2018, with copies mailed to:

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