

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

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| IN THE MATTER OF:THE |) | FINAL ORDER |
| EDUCATION OF |) | |
| |) | OAH Case No. 2017-ABC-00347 |
| STUDENT AND EUGENE SCHOOL |) | Agency Case No. DP 17-105 |
| DISTRICT 4J |) | |

HISTORY OF THE CASE

On February 22, 2017, Parents filed a Request for a Due Process Hearing (Complaint) with the Oregon Department of Education on behalf of KW (Student) alleging the Eugene 4J School District (the District) violated federal and state statutes, regulations, and administrative rules during the 2015-2016 and 2016-2017 school years (the period in issue).

On February 22, 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 March 28, 2017, Senior ALJ Allen presided over a telephonic prehearing conference. Mother of Student participated in the conference *pro se*. Joel Hungerford, attorney at law, appeared and represented the District. The parties agreed to the issue statements for hearing. Also, during the conference, Parents requested and the District agreed to extend the final order due date to June 12, 2017 pursuant to ORS 343.167(5). The parties also agreed to an in-person hearing on April 17 through 19, 2017 in Eugene, Oregon.

On March 28, 2017, the District filed a partial motion for summary determination (MSD). The District filed a Motion to Compel Discovery (MTC) on April 4, 2017. Parents filed a response to the MSD on April 11, 2017 and a response to the MTC on April 17, 2017. Also on April 11, 2017, Parents filed Student's Motion to Compel District Answer to Due Process Complaint. Also on that date, Senior ALJ Allen heard oral argument from both parties on Parents' motion. After oral argument, the ALJ granted Parent's motion and ordered the District to provide a written answer to the Due Process Complaint no later than April 14, 2017. During oral argument, Parents requested the hearing dates and Final Order due date in this case be extended to allow for receipt and review of the District's answer. The ALJ granted Parents' request and reset the hearing to May 16-18, 2017. The District filed a Reply to Parents' response to the MTC on April 25, 2017 and an Amended Reply on April 27, 2017. The parties appeared to argue the motions on May 12, 2017. At that time, Senior ALJ Allen denied the District's MSD and MTC through an oral ruling from the bench.

The hearing was held on May 16 through 18, and May 22, 2017 before Senior ALJ Allen at the District's offices in Eugene, Oregon. Mother appeared on behalf of the Parents and

Student. Attorney Joel Hungerford represented the District. The District provided a court reporter for the hearing. Naegeli Reporting (Naegeli) prepared written transcripts of the hearing sessions. The following individuals testified on behalf of the District: Barbara Keyworth, school psychologist for the District; Tobias Rickard, autism consultant for the District; Craig Wiebe, Student's French Immersion classroom teacher; Joane Butler, student services department administrator for the District; and Cheryl Linder, Ph.D., Director of Special Education for the District.¹ In addition, the following individuals appeared and testified on behalf of Student: Casey Tiemann, school counselor for the District; Christopher Mitchell, Principal for Roosevelt Middle School (RMS) in the District; Michael Yocum, Assistant Principal for RMS; Megan Sorensen, D.N.P.; Karen Apgar, school psychologist for the District; and Father of Student.²

At the close of the hearing, the record was left open for receipt of the hearing transcript and the parties' written closing arguments. Naegeli provided the complete transcript of the May proceedings on June 1, 2017.³ The District's written closing brief was received on June 30, 2017. Parents' written closing brief was received on July 3, 2017 and the hearing record closed on that date.

A status conference was held on August 1, 2017 to address potential deficiencies in the hearing record. At that time, Mother requested the hearing record be reopened to allow for an Independent Educational Evaluation (IEE), an eligibility team meeting following the IEE, and supplemental documents and testimony necessary to permit the ALJ to address all claims in the Due Process Complaint. Mother also requested an extension of the Final Order due date in this matter. The ALJ granted the request over the District's objections and, on August 8, 2017, issued an Interim Order for Independent Educational Evaluation and Order Reopening the Evidentiary Record pursuant to OAR 581-015-2305(8) and 34 CFR 300.502(d).

The interim order found the District failed to properly evaluate Student in all areas of suspected disability. Specifically, as discussed more fully in this order, the ALJ determined the evidence demonstrated that Parents notified the District that Student was diagnosed with anxiety disorder, major depressive disorder, and concussion syndrome and requested Student be evaluated for special education eligibility.⁴ The record at the initial hearing revealed that the District elected to evaluate Student for Autism Spectrum Disorder (ASD) and Other Health

¹ Ms. Keyworth, Ms. Butler, and Dr. Linder were each designated as experts in the field of special education. Mr. Rickard was designated as an expert in autism. Parents did not object to the expert designations of these individuals.

² Megan Sorensen hold a doctorate in nursing practice and is therefore addressed throughout this order as "Dr. Sorensen." Dr. Sorensen was designated as an expert in child and adolescent psychology. Karen Apgar was designated as an expert in the evaluation of students for eligibility under IDEA. The District did not object to these expert designations.

³ Transcripts for hearing dates May 16 through 22, 2017 are marked as Volume 1 through Volume 4, respectively. Transcripts for later hearing dates do not follow this consecutive numbering format. See fn7 below.

⁴ Father's initial request for evaluation indicated his belief that Student needed to be evaluated for autism spectrum disorder and anxiety.

Impairment (OHI), despite evidence that Student's depression, anxiety, and concussion resulted in prolonged symptoms including physical illness, a significant decrease in attendance, and declining academic performance. The interim order found that, based on the evidence in the record, the District had sufficient information to suspect Student should have been evaluated under the eligibility categories of Traumatic Brain Injury (TBI) and Emotional Disturbance (ED). Nonetheless, the District elected only to evaluate Student only in the areas of ASD and OHI.

According to the interim order, Parents were ordered to make Student available for an IEE, in the areas of TBI and ED, according to the criteria set forth in OARs 581-015-2145 (ED) and 581-015-2175 (TBI). The interim order set a deadline for completion of the IEE of November 2, 2017. The District was ordered to cover the cost of the IEE in accordance with 34 CFR §300.502 and OAR 581-015-2305. The District was further ordered to convene an eligibility team meeting and make a determination regarding Student's eligibility under the categories of TBI and ED no later than December 4, 2017 or within 30 calendar days of receiving the IEE, whichever occurred first. The interim order also set further hearing for December 11, 2017 with supplemental written closing arguments due no later than December 22, 2017. Finally, the interim order set the record close date in this matter as December 22, 2017 with the Final Order due no later than January 22, 2018.

On or about September 7, 2017, Parents informed the ALJ that, due to an unexpectedly high patient load, Parents' chosen evaluator would not be able to complete the IEE until November 24, 2017. Parents requested that the date the IEE be extended until November 27, 2017, to provide time for the results to be obtained by the Parents and forwarded to the District. On September 11, 2017, Parents requested that the Final Order due date in this matter be extended to correspond to the change in IEE and eligibility team meeting dates. The District did not object to either request. On September 12, 2017, Senior ALJ Allen issued a ruling granting the extension and amending the due date for the IEE to November 24, 2017, the deadline for the eligibility team meeting to December 29, 2017, and requiring supplemental exhibits and witness lists to be filed no later than January 5, 2018. Senior ALJ Allen also reset the additional hearing date to January 8, 2018, with supplemental closing arguments due not later than January 22, 2018. According to these amendments to the schedule, the Final Order due date was set to February 22, 2018.

On December 8, 2017, the District filed a Motion for Extension seeking to extend the deadline to hold the eligibility team meeting to January 5, 2018 based on the facts that Parents had not provided the IEE to the District until December 5, 2017 and District staff were unavailable, due to winter break, between December 16, 2017 and January 1, 2018. Parents objected to the requested one week extension.

A status conference was held December 8, 2017. Mr. Hungerford appeared on behalf of the District. Mother appeared on behalf of Parents and Student. After hearing argument from both parties, Senior ALJ Allen granted the District's motion and extended the relevant dates. Accordingly, the eligibility meeting due date was moved to January 5, 2018. Further hearing was set for January 16, 2018, with supplemental closing arguments due by January 29, 2018. The Final Order due date was set for March 1, 2018.

On December 12, 2017, the OAH received notice that Parents had secured counsel, Kim Sherman, to represent them throughout the remainder of the proceedings in this matter. Ms. Sherman requested a status conference on January 12, 2018 to address her objections to the District's eligibility meeting. A status conference was held on January 12, 2018 with Senior ALJ Allen presiding. After argument from both parties, the ALJ reserved questions related to the adequacy of the eligibility meeting for hearing.

Further hearing in this matter was held January 16 and 18, 2018, at the District offices in Eugene, Oregon. Mr. Hungerford represented the District and Ms. Sherman represented Student. Justin Potts⁵, school psychologist, Chava Beinin, regular education teacher for the District, and Dr. Linder appeared and testified on behalf of the District. Father of Student, Kathleen Panaccione, Ed.D., Raegan Smith, Ph.D., and Mother of Student appeared and testified for Student.⁶ Naegeli again provided court reporting services at the hearing and provided a complete written transcript of the January proceedings on January 24, 2018.⁷ The parties submitted simultaneous written supplemental closing arguments on January 29, 2018. The record closed upon receipt of the parties supplemental closing arguments.

ISSUES

1. Whether the District denied Student a free appropriate public education (FAPE) during portions of the period in issue by failing to properly evaluate Student in all areas of suspected disability so as to identify the Student's need for specially designed instruction and related services and the provision of such instruction and services.
2. Whether the District denied Student a FAPE, during portions of the period in issue, by failing to provide Parents with adequate prior written notice (PWN) regarding the eligibility team's decision finding Student ineligible for specially designed instruction and related services.

EVIDENTIARY RULING

Exhibits D1, D3 through D23, D26 through D28, D30 through D34, D36 through D41, and D43 through D45, offered by the District, were admitted into the record without objection. Exhibits D2, D24, D29, D35, and D42 were admitted into the record over Parents' objection. The District withdrew Exhibit D25 at the hearing.

Exhibits S3 through S14, and S16 through S23, offered by the Parents, were admitted without objection. Exhibits S1, S2, and S15 were admitted over the District's objections. In addition, supplemental Exhibits Supp. S1, Supp. S2, Supp. S5 through Supp. S7, Supp. S8, and

⁵ Justin Potts was designated as an expert in school psychology.

⁶ Dr. Panaccione was designated as an expert in special education. Dr. Smith was designated as an expert in clinical psychology.

⁷ Transcripts for January 16 and 18, 2018 are marked as Volume I and Volume II, respectively.

Supp. S14 and Supp. S15 were admitted into the record without objection.⁸ Exhibits Supp. S4, Supp. S8, Supp. S10 through Supp. S13, and Supp. S16 were admitted into the record over the Districts objections. Parents withdrew Exhibit Supp. S3.

FINDINGS OF FACT

Early educational problems for Student.

1. Student was born in 2002 in Portland, Maine. Initially, Student began attending school at age seven in Ithaca, New York. (Complaint at 3.)
2. Student was held back in first grade after he/she exhibited behavioral problems including inappropriate aggression towards staff and teachers which included hitting and throwing desks or chairs. (Tr. Vol. 3 at 86:9 through 12.)
3. By the time Student moved to second grade, his/her externalizing behaviors had subsided. Instead, Student began to internalize his/her negative feelings causing him/her to experience panic attacks. (Tr. Vol. 3 at 90:22 through 25, 91:1 through 4.)
4. Student was the victim of sexual abuse by the older brother of a personal friend, while residing in Ithaca, New York. (Ex. S1 at 9.)

Student's academic performance within the District.

5. Student began attending school within the District in fourth grade. Student entered the District's French Immersion Program at Charlemagne Elementary School in fifth grade. (Ex. S23 at 1.) Student continued in the District's French Immersion Program throughout middle school. (Tr. Vol. 1 at 200:8 through 18; Ex. S17.)
6. As of the date of the May 2017 hearing, Student was a fourteen-year-old resident of the District. Student has resided within the District boundaries since at least fourth grade. Student was enrolled in and lived within the geographic boundaries of Roosevelt Middle School (RMS) within the District during the period in issue. (Tr. Vol. 3 at 82:23 through 24; Ex. S17 at 8.)
7. Student experienced anxiety and panic attacks throughout early childhood. (Tr. Vol. 3 at 90:22 through 91:9.) Student has also experienced depression since at least age 11. (Tr. Vol 2 at 93:13 through 95:4; Ex. S1 at 7.)
8. During the summer of 2014, Student reported a significant increase in his/her anxiety and depression. (Tr. Vol. 3 at 91:10 through 12 and 94:23 through 96:7.)
9. During the 2014/2015 school year (sixth grade), Student's grades, with the

⁸ Rather than continuing consecutive numbering of exhibits from the original hearing dates, counsel for Parents elected to mark all supplemental exhibits as "Ex. Supp. S" followed by a number designation starting over at 1 and continuing through 16.

exception of math, ranged from A+ to B. During the third term of sixth grade, Student obtained one A+, four A's, and one A- grade. (Ex. S17 at 8.) Student consistently received A's in French language and culture. *Id.*

10. Student did not display disciplinary or attendance problems in sixth grade. (Tr. Vol. 2 at 64:17 through 20; Ex. S16:1 and 2.)

11. During the first term of the 2015/2016 school year (seventh grade year), Student's attendance began to decline abruptly. Student obtained one A, one B+, one D, one F, and three NPs (Not Proficient) grades for that term. (Ex. S17 at 1.) During the second term of his/her seventh grade year, Student received one A+, one B, one F, one I (Incomplete), and two NP grades. (Ex. S17 at 3.) Student received no grades for the third term after the RMS disenrolled him/her for lack of attendance. Ex. S17 at 8.

Student's changing emotional and mental health.

12. On August 14, 2015, just prior to beginning seventh grade, Student saw his/her pediatrician, Angela Zallen, M.D., for "worsening depression symptoms." (Ex. S1 at 7.) Dr. Zallen diagnosed Student with depression and suicidal ideation, and referred him/her to psychiatric counseling at Thrive Behavioral Health. (Ex. S1 at 9.)

13. Much of Student's anxiety was caused by his/her academic experiences, which increased panic attacks at school. (Tr. Vol. 3 at 91:18 through 22.) Student experienced panic attacks more frequently while outside the family home. (Tr. Vol. 3 at 92:19 through 23.)

14. During the summer following sixth grade, Student's anxiety and depression led to intrusive thoughts which in turn led Student to engage in acts of self-harm. (Tr. Vol. 3 at 95: 1 through 8.)

15. Student experiences difficulty remaining in a classroom during a panic attack. Student feels that his/her panic attacks do not allow him/her to "function properly to do normal activities." Student feels he/she "cannot focus before, during, or after having a panic attack." (Tr. Vol. 3 at 98:1-7.)

16. Student's anxiety and depression also began to manifest in physical symptoms including nausea and vomiting. Student also began experiencing a preoccupation with academic failure. (Tr. Vol. 3 at 98:8 through 99:5.)

17. On November 3, 2015, Dr. Zallen consulted with Kathy Fiegel, M.D., a member of the Oregon Psychiatric Access Line about Kids (OPAL-K), regarding Dr. Zallen's concerns over Student's deteriorating mental health. Dr. Zallen communicated that Student expressed to her that he/she had developed a fully formed plan to commit suicide by hanging him/herself. Dr. Fiegel recommended medications for Student's mental health symptoms. (Ex. S1 at 13 and 14.)

18. On November 6, 2015, in response to her consultation with OPAL:-K, Dr. Zallen prescribed Student Clonidine for anxiety and Lexapro for depression. (Ex. S1 at 15 through 18.)

19. Between the beginning of seventh grade, on September 10, 2015, and November 13, 2015, Student was absent from school due to “sickness” a total of eight full days and three partial days. (Ex. S16 at 9.)

Student’s concussion on RMS grounds and related attendance issues.

20. On November 13, 2015, while at school, Student began experiencing a panic attack. Student went to the bathroom in an attempt to calm him/herself. Student lost his/her balance and struck his/her head on a wall in the bathroom. (Tr. Vol. 3 at 99:19 through 100:10.)

21. Student sustained a head injury when he/she struck his/her head on the bathroom wall, and sought assistance from the front office at RMS. Student informed office staff about the incident. School staff contacted Student’s father and provided Student with an ice pack for his/her head. (Tr. Vol. 3 at 100:12 through 101:1.)

22. Student’s father picked Student up from school and took Student to his/her primary care physician, Dr. Zallen. Dr. Zallen diagnosed Student with a mild to moderate concussion. (Tr. Vol. 3 at 101:2 through 10; Ex. S1 at 23 through 28.)

23. Student’s concussive symptoms included dizziness, fuzzy thinking, and difficulty concentrating. (Tr. Vol. 3 at 102:5 through 17.) Dr. Zallen advised cerebral rest for Student including a recommendation that he/she avoid any activities requiring concentration for several days. (Ex. S1 at 25; Tr. Vol. 3 at 103:4 through 7.)

24. Father contacted the school on Monday, November 16, 2015, and advised RMS attendance personnel that Student would be absent from school due to a concussion. (Tr. Vol. 4 at 14:24 through 15:1-3. S-14 at 7.)

25. Student returned to Dr. Zallen on November 18, 2015. At that time, Student presented with progressively worsening symptoms, including increased headaches, dizziness, and vomiting. (Ex. S1 at 29.)

26. Student attempted to return to school, but would often call for a parent to retrieve him/her. Following the concussion, Student does not recall being able to return to school for a full day. (Tr. Vol. 3 at 104:22 through 105:4.)

27. Student attended school on November 25, 2015, but requested that Father pick him/her up from school after becoming disoriented during a panic attack. Casey Tiemann, school counselor and §504 coordinator at RMS, found Student disoriented and unable to recall where he/she was headed. (Tr. Vol. 3 at 105:14 through 107:23.) Tiemann had Student sit in his office while he called Student’s father to pick him/her up from school. (Tr. Vol. 3 at 107:17 through 23.)

28. Student believed he/she informed some of his/her teachers and school staff, including Casey Tiemann, that he/she had a concussion. (Tr. Vol. 3 at 104:5-8; 107:24-108:1.)

29. Student also advised Michael Yocum, Assistant Principal at RMS, about his/her concussion. (Tr. Vol. 2 at 77:16 through 23.)

30. On November 25, 2015, Father again contacted RMS to excuse Student's absences due to concussion and vomiting. (Ex. S14 at 8.) Father did not believe he could send Student to school while he/she was vomiting due to a "one day" school rule regarding vomiting. (Tr. Vol. 4 at 16:3 through 14.)

31. RMS Principal Chris Mitchell also knew Student had suffered a concussion while on campus. (Tr. Vol. 2 at 49:16 through 22.) Standard practice at RMS when a student injury was reported to staff was for said staff to notify an administrator, either Mitchell or Yocum. (Tr. Vol. 2 at 50:8 through 12.)

32. Student was absent from school twelve full days and three partials days between November 13, 2016 and December 14, 2015, when the District disenrolled him/her from school. (Exs. S3 at 1 and S16 at 5 and 6.)

33. On December 14, 2015, the Student was disenrolled, by RMS staff, due to more than 10 consecutive absences. (Ex. S3.) RMS Assistant Principal Yocum had concerns over Student's frequent absences prior to receiving notice that Student was disenrolled. (Tr. Vol. 2 at 67:5 through 13.)

34. During the fall semester of seventh grade, Father shared his concerns with Principal Mitchell regarding Student's mental and physical health and the resulting attendance problems. (Tr. Vol. 2 at 41:1 through 42:5 and Vol. 4 at 16:15 through 21.)

Evaluation of Student

35. On January 25, 2016, Father emailed Mitchell, reminding him of previous discussions they had regarding Student's anxiety and associated attendance issues. At that time, Father requested that the District evaluate Student for eligibility under the IDEA and/or §504 of the Rehabilitation Act of 1973 (29 U.S.C. §701). Mitchell responded to Student's father, and included Tiemann in his response. Tiemann, in turn, acknowledged Father's request and added RMS psychologist Barbara Keyworth to the email chain. Tiemann indicated that Keyworth was responsible for IDEA evaluations at RMS. (Ex. S4 at 1 through 3.)

36. At the District's request, the Parents filled out and returned a "Parent Input" sheet as part of the evaluation process. (Ex. S5 at 3 through 5.) Parents checked boxes that indicated the following applied to Student: easily frustrated, disorganized, excessive fears, homework problems, impulsive, often unhappy, over-anxious, socially avoidant, under-active, overreacts when faced with a challenge, and unmotivated. *Id.*

37. The parent input sheet also asked, "[w]hat is your understanding as to why your child is being referred for a possible evaluation?" Parents responded, "[c]annot attend school due to anxiety/panic." (Ex. S5 at 3.) In the medical history portion of the form, Parents also

indicated that Student was taking Clonidine and Sertraline. (Ex. S5 at 4.)

38. The District scheduled an evaluation planning meeting for February 5, 2016. (Exs. D3, D4, D5, and S21.) The Notice of Referral issued by the District on February 5, 2016 indicated the reason for referring Student for evaluation as, “[Student’s] parent suspects that [Student] may have a disability *that prevents [him/her] from attending school.*” (Ex. D3 at 1, emphasis added.)

39. At the evaluation planning meeting, Father informed the team members of his concerns regarding the Student’s diagnosed disabilities, specifically anxiety, depression, and concussion. (Tr. Vol. 4 at 20:23 through 21:3.) Father also advised the team that Student’s conditions manifested through physical symptoms, including weakness, nausea, and vomiting. Father shared that Student began exhibiting increased anxiety and depression the previous summer and reminded the team that Student suffered a concussion in November 2015. (Tr. Vol. 4 at 20:4 through 13.) Keyworth and Butler indicated they were previously unaware of Student’s concussion. (Tr. Vol. 1 at 64:23 through 65:1 and 186:16 through 20.)

40. Joane Butler, student services administrator, acted as the District representative at that meeting and took handwritten notes. Butler’s handwritten notes included the following notations: “struck [his/her] head @ school - concussion,” “[Student] - was disoriented,” “[Student] - said [he/she] had a concussion,” “Dr. Concussion,” and “Barb - TBI?” (Ex. S21 at 1 and 2; Tr. Vol. 1 at 226:5 through 7.) Butler also included the notation “depression” in her notes after Father described Student as suffering from debilitating depression. (Ex. S21 at 1; Tr. Vol. 1 at 235:1 through 7, 236:16 through 20, 240:5 through 8, and 239:1 through 7.)

41. Butler’s notes list the meeting attendees as: Father, Butler, Keyworth, Toby Rickard (District autism consultant), vice-principal Yocum, Linda Coombs (speech and language pathologist), Tiemann, Chava Beinin (Student’s house [homeroom] teacher), and Melissa Ivan (Student’s case manager if found eligible for special education). (Ex. S21 at 1.) Yocum has a background in special education and attends nearly all IEP meetings at RMS. (Tr. Vol. 2 at 55:22 through 56:15 and 62:13 through 19.)

42. The evaluation planning team members from the District advised Father that the appropriate eligibility categories for Student’s evaluations would be Autism Spectrum Disorder (ASD) and Other Health Impairment (OHI). (Tr. Vol. 4 at 28:14 through 22; Ex. D5 at 1.) Based on the explanations provided by the District’s representative, Butler, Father understood OHI to be “catch-all” eligibility category that would assess the impacts of concussion, depression, and anxiety on Student’s education. (Tr. Vol. 4 at 26:8 through 21.) Father accepted the District’s proposed evaluation plan, even though he did not completely understand how the proposed assessments would address Student’s disabilities. (Tr. Vol. 4 at 26:19 through 21 and 27:3 through 14; Ex. D4.)

43. The District’s evaluation plan included classroom observations to evaluate Student’s interactions in the instructional environment. According to the District, such observations are required when considering eligibility for certain categories of disability under federal and state guidelines. (Ex. S-6 at 2.) The District’s team members did not observe

Student in the classroom. (Ex. S11 at 11.)

44. Keyworth has no recollection that depression was discussed at the evaluation planning meeting on February 5, 2016 and did not take notes at that meeting. Keyworth believes she did not learn of the Student's depression diagnosis until Dr. Zallen returned a medical statement to the District on March 31, 2016, as part of the evaluation process. (Tr. Vol. 1 at 104:1 through 3, 113:13 through 17; 149:17 through 25; and 166:18 through 22.)

45. The evaluation planning team did not advise Father that ED was a category they could consider for eligibility, nor did the team review the criteria required for eligibility under the category of ED. (Tr. Vol. 1 at 143:3 through 6.)

46. At the February 5, 2016 meeting, the evaluation planning team did not mention to Father the category of TBI as a possibility for eligibility. Nor did the team discuss evaluating Student under the category of TBI. (Tr. Vol. 1 at 65:2 through 5.)

47. Keyworth was reluctant to add TBI to the eligibility categories the team was considering. Keyworth believes there is a distinction between a traumatic brain injury and a concussion, and that a medical statement indicating a concussion would not trigger a TBI evaluation. Nonetheless, at hearing Keyworth was unable provide a definition of traumatic brain injury for purposes of determining eligibility for special education. (Tr. Vol. 1 at 66:6 through 11, 69:7 through 29, and 152:16 through 23.)

48. Keyworth believes that, to consider a student eligible under the category of TBI, the District would need a medical statement that used the terminology "traumatic brain injury." (Tr. Vol. 1 at 65:22 through 66:3.)

Evaluation of Student and Eligibility Determination Meeting of May 6, 2016.

49. The Student returned to school sporadically following the February 5, 2016 evaluation planning meeting. Between February 10 and March 2, 2016, Student was on campus at RMS nine full or at least partial days. (Ex. D32 at 2.)

50. On February 16, 2016, Keyworth sent a Medical Statement or Health Assessment Statement to Eugene Pediatrics along with a letter that informed Student's pediatrician that the form was necessary to evaluate Student for special education services. (Ex. D7 at 3 and 5.) The District's medical statement included instructions which reads, in relevant part:

In order for an Eligibility Team to determine that a child is eligible for special education, specific information must be obtained, by category. The information that follows describes which question must be answered for each category of disability.

* * * * *

- **Other Health Impairment, Orthopedic Impairment:** Question #4

- **Traumatic Brain Injury:** Question # 5
- **Emotional Disturbance, Intellectual Disability, Learning Disability (optional), or Autism Spectrum Disorder:** Question #7

(Ex. D7 at 6, bold original.)

51. Keyworth first contacted Parents regarding assessments for Student on March 16, 2016, after Student had again stopped attending classes at RMS. (Ex. S9 at 1.) The District disenrolled Student on March 16, 2016 due to excessive absences. (Ex. S11 at 2; see also Ex. D18 at 1.)

52. On March 28, 2016, Rickard emailed Keyworth and stated he was unable to observe Student in the classroom “given [Student] had been out with a concussion leading up the meeting we had and subsequently.” (Ex. D19 at 1 through 2.) Keyworth and Rickard observed Student during administration of certain assessments used as part of the evaluation process and one time informally off campus. (Ex. S11 at 11.)

53. Mother emailed Keyworth on March 29, 2016 and explained that Student’s depression and anxiety medication type and/or dosage had been changed by his/her pediatrician the previous day. (Ex. S10 at 1.)

54. On or about March 31, 2016, Dr. Zallen returned the medical statement to the District. Dr. Zallen answered “Yes” to the following questions regarding Student and included the following written responses (**in bold**):

5. The child has a health impairment orthopedic impairment motor impairment that is permanent or expected to last more than 60 days. If yes, please provide a diagnosis or description of the impairment: **Major depressive disorder**

6. The child has an acquired injury to the brain, caused by an external force that is expected to last at least 60 days. If yes, please provide a diagnosis or description of the impairment: **Concussion- Vertigo**

7. There are physical or sensory factors that may affect the child’s educational performance. If yes, please describe: **depression/anxiety**[.]

(Ex. D7 at 5.)

55. On April 22, 2016, Keyworth administered the Comprehensive Executive Functioning Inventory (CEFI) to Student as part of the ASD evaluation. Student completed a self-report as part of the CEFI. (Tr. Vol. 1 at 67:5 through 18; Ex. D9 at 1.) Keyworth did not request that either parent or any of Student’s teachers complete reports for the CEFI. (Tr. Vol. 1 at 160:17 through 22.) The CEFI is an evaluation of executive function strengths and weaknesses in children aged 5 to 18 years. The CEFI is used to measure a wide spectrum of behaviors associated with executive functioning. (Ex. S6 at 2.) The CEFI results help calibrate a

student's level of executive functioning in the following areas: attention, emotion regulation, flexibility, inhibitory control, initiation, organization, planning, self-monitoring, and working memory. (Ex. D9 at 6.)

56. Keyworth administered the Kaufman Test of Education Achievement, Third Edition (KTEA-3) to Student on April 1, 22, and 29, 2016. The KTEA-3 is a comprehensive tool used to measure a student's skills in reading, writing, and math. In April, 2016, Student was 13 years, 10 months of age. (Ex. D9 at 1 through 3.)

57. According to the KTEA-3 results, Student scored above average in reading, with scores ranging from the 92nd to 99th percentile. Student also scored in the 99th percentile in writing. Student's composite math score indicated that he/she ranked on the bottom 39th percentile with scores in math computation in the 23rd percentile and math concepts and applications in the 63rd percentile. Student's score in math computation indicated an age equivalent of 11.2 years. (Ex. S11 at 3.)

58. Keyworth does not perform assessments on students with depression because she believes depression is a strictly medical diagnosis. (Tr. Vol. 1 at 133:23 through 134:7.) During her evaluation of Student, Keyworth did not use any assessment tools that could determine the impact of Student's major depressive disorder on his/her educational performance. (Tr. Vol. 1 at 135:20 through 23.) None of the assessments Keyworth chose to utilize during the evaluation of Student for ASD would address or identify the impact of anxiety or depression on Student's academic performance. (Tr. Vol. 1 at 140:15 through 19.)

59. Keyworth has limited experience assessing or evaluating students for special education eligibility under the category of ED. (Tr. Vol. 1 at 133:13 through 17.) If necessary, Keyworth utilizes the Behavior Assessment Skills for Children (BASC) tool to assess students for eligibility under the category of ED. She does not use the BASC to assess students' eligibility under OHI. (Tr. Vol. 1 at 128:19 through 21 and 129:9 through 20.) Keyworth has limited experience using the BASC and therefore is unclear whether the BASC would assess the impact of anxiety or depression upon educational performance. (Tr. Vol. 1 at 133:10 through 17.)

60. The team did not consider ED as an added eligibility category, upon receiving Dr. Zallen's medical statement, because Keyworth considered the Student's depression to be a new diagnosis and therefore believed it would not meet the requirements that the condition exist to a marked degree over an extended period of time. (Tr. Vol. 1 at 147:18 through 148:10.)

61. The District convened an eligibility determination meeting on May 6, 2016. The meeting attendees included all team members from Student's evaluation planning meeting of February 5, 2016. In addition, Catherine Wiebe (Student's French immersion teacher) also attended the meeting. (Exs. D10 at 1 and S21 at 1.)

62. At the eligibility meeting, Keyworth provided a Psycho-educational Assessment Report (report) dated April 29, 2016. (Ex. D9.) According to the report, Keyworth performed a review of Student's file on April 29, 2016. (*Id.* at 1.) Keyworth's report summarized the results

from each of the assessments administered to Student as part of the evaluation process, including the KTEA-3 and the CEFI. (Ex. D9 at 2 through 10.)

63. A student's grades and attendance records are part of his or her cumulative file. (Tr. Vol. 4 at 128:2 through 11.) In making an eligibility decision, eligibility teams for the District utilize an Eligibility Summary Statement which includes certain disclosures, including what information was reviewed and relied upon by the eligibility team in reaching its decision. (Ex. S13 at 1 and 2.) The Eligibility Summary Statement includes a section titled, "Documentation used as basis for current eligibility determination[.]" (*Id.* at 1.) The Eligibility Summary Statement generated after the May 6, 2016 eligibility meeting indicated the team used two documents as the basis for its determination; Keyworth's "Psychoeducational Evaluation dated 04/29/2016" and a "Functional Communication Report dated 5/6/16." (Ex. S13 at 1.)

64. The Eligibility Summary Statement generated May 6, 2016 also indicates that the eligibility team reviewed certain existing information including Student's cumulative record. (Tr. Vol. 4 at 128:11 through 20; Ex. S13 at 2.)

65. As part of her routine process in completing psycho-educational assessment reports for students, Keyworth regularly reviews a student's attendance records and academic report cards. Keyworth then typically summarizes that information in her report for the eligibility team to review and consider. In this instance, Keyworth's report contains no references to Student's attendance or academic grades. (Tr. Vol. 3 at 163:20 through 164:23 and 167:5 through 12; see also, Ex. D9.)

66. Keyworth's report did not address Student's diagnosed conditions of major depressive disorder or concussion. (Ex. D9.) Keyworth's report makes only a passing mention to Student's diagnosed anxiety disorder. (*Id.* at 11)

67. Keyworth's report contains a section titled, "Medical Statement." In this section, Keyworth included the following information:

Dr. Angela Zallen completed and returned the Medical Statement on 031/31/2016 (sic). Dr. Zallen indicated the following information: The child has a health impairment that is permanent or expected to last more than 60 days (Major depressive disorder, [t]he child has acquired an injury to the brain, caused by an external physical force that is expected to last at least 60 days (Concussion-Vertigo), [t]here are physical or sensory factors that may affect the child's educational performance (Depression/Anxiety).

(Ex. D9 at 10 and 11.)

68. The eligibility determination team did not review Student's attendance records or academic grades at the meeting. (Tr. Vol. 3 at 228:13 through 21 and Vol. 4 at 128:21 through 24.) The District's representative at the eligibility determination meeting, Butler, believed that the school psychologist, Keyworth, would review Student's cumulative file and put the relevant attendance and grading information in her report for the team to review and discuss at the meeting. (Tr. Vol. 4 at 129:1 through 19.)

69. As part of the evaluation process, Keyworth maintained certain records in a working file. Among these documents was a file review document indicating Keyworth's review of Student's cumulative file. That document, dated April 29, 2016, indicated that Keyworth reviewed Student's academic grades for second through fifth grades and attendance records for first through third grades. (Tr. Vol. 1 at 91:15 through 20; Ex. S23 at 1.)

70. Because it did not compare pre and post-concussion data, the results of the CEFI assessment administered to Student would not provide information to assist in determining eligibility under the category of TBI. (Tr. Vol 1 at 67:12 through 68:3.)

71. In the evaluation process, Keyworth did not compare standardized test results for Student administered post-concussion. (Tr. Vol. 1 at 122:23 through 123:24.) Instead, Keyworth believed she could compare the standardized tests taken before Student's concussion with the results of the KTEA-3 administered to Student post-concussion. (Tr. Vol. 1 at 162:10 through 163:13.)

72. Student's results for the CEFI found weaknesses in multiple areas of executive functioning including, attention, initiation, organization, planning, self-monitoring, and working memory. In each of these areas, Student scored in the low average range. Student's CEFI scores in these areas ranged between the 10th and 23rd percentile. In addition, Student scored below average in the area of emotional regulation, with a resulting rank in the bottom fifth percentile. (Ex. S11 at 6 and 7.)

73. Student's overall percentile rank for the CEFI executive functioning measurement was 13%, with a Standard Score of 83. Scores under 90 are considered executive function weaknesses. (Tr. Vol. 1 at 157:2 through 158:5; Ex. S11 at 7.) During the eligibility determination meeting, Keyworth indicated that Student obtained low average scores in certain areas but failed to address Student's scores in the area of emotional regulation. (Ex. S12 at 2.)

74. Keyworth believed the CEFI results, in the areas measuring executive functioning, for Student were irrelevant because the CEFI did not include both pre and post-concussion data. (Tr. Vol. 1 at 67:12 through 68:3.)

75. At the eligibility meeting, Wiebe, Student's French immersion teacher, described Student as bright, social, pleasant, and able to communicate well with peers and teachers. In addition, Wiebe noted that she and had no academic concerns for Student *when he/she is able to attend classes*. (Ex. S12 at 2, emphasis added.)

76. Also at the eligibility meeting, Beinin, Student's home room advisor, described Student as empathetic, with the ability to listen and give feedback to peers. Beinin also noted Student seemed to have a strong group of friends. Beinin indicated that Student had some absences for the 2014-2015 school year "but not to the extreme as this year [2015/2016 school year]." (Ex. S12 at 2.)

77. During the eligibility meeting, Father described changes in Student from the prior

year including, Student's concussion, body pains, at least two weeks of mental fuzziness, joint pains, and an inability to sleep. Father also described Student as suffering from anxiety and depression, and unable to attend school or even deal with ordinary transactions while in public. (Ex. S12 at 2.)

78. On May 6, 2016, the eligibility team determined that the Student did not meet the criteria for special education services under the category of ASD. (Ex. S13 at 2.) In addition, the team determined that Student met the disability criteria for OHI, based on anxiety, and that this disability had an adverse impact on Student's education. Nonetheless, the team decided Student did not qualify for special education because no specially designed instruction (SDI), that would assist Student address his/her disability and access his/her education, was obvious to the team. (Exs. S13 at 2 and S12 at 2 and 3; Tr. Vol 4 at 37:23 through 38:22.)

79. At the eligibility meeting, Yocum noted that SDI could be targeted at teaching Student to use tools and strategies to overcome barriers to attendance. Yocum questioned whether these should be IEP goals or accommodations. (Ex. S12 at 2.)

80. At the eligibility meeting, the team did not review the characteristics required for an ED eligibility or discuss emotional disturbance as a potential category. (Tr. Vol. 4 at 34:23 through 35:8 and 145:20 through 146:5; Exs. S12 and S13.) The eligibility determination team did not consider the criteria for TBI in determining Student's eligibility for special education and related services. (Exs. S12 and S13.)

81. Since the February 5th, 2016 evaluation planning meeting, the District has not conducted any evaluation of Student's concussion under the eligibility category of TBI. (Tr. Vol. 4 at 148:17 through 25.)

82. Father has been diagnosed with Asperger's Syndrome, an autism spectrum disorder, and has difficulty comprehending complex social situations, such as special education meetings. (Tr. Vol. 4 at 17:19 through 22.) As such, Father did not typically participate in his children's special education meetings. (Tr. Vol. 4 at 17:6 through 8.) Because of his disability, Father felt disadvantaged at the evaluation planning and eligibility meetings. (Tr. Vol. 4 at 20:9 through 15.) The District was aware of Father's disability prior to the meetings in issue. (Tr. Vol. 4 at 18:20 through 19:3.)

83. District provided Parents with a PWN on May 6, 2016. The PWN indicated that Student was not a child with a disability under the categories of ASD and OHI. (Ex. S13 at 7 and 8.)

84. The District's PWN contained a section titled, "Description of each evaluation procedure, assessment, record or report used as a basis for the proposed or refused action[.]" (Ex. S13 at 7.) In this section, the District included the following statement: "Referral information, input from teachers and parent, assessment results and available records." (*Ibid*).

85. In addition, the District's PWN included a section titled, "Description of the factors relevant to the actions proposed or refused are[.]" (Ex. S13 at 7.) In this section, the

District included the following response: “Informal and formal assessment results do not support special education eligibility in the above areas. The team agreed that a 504 plan and/or Health Plan would be appropriate next steps to consider.” (*Ibid.*)

Evaluations and considerations of Student’s treating professionals.

86. Megan Sorensen, D.N.P., (Dr. Sorensen) is Student’s treating psychiatric nurse practitioner focusing on his/her mental health treatment. (Tr. Vol. 2 at 119:15 through 17.) Dr. Zallen, referred Student to Dr. Sorensen due to his/her increasing anxiety, depression, suicidal ideations, and auditory hallucinations caused by severe anxiety. (Tr. Vol. 2 at 119:19 through 20; 142:23 through 143:23.)

87. Dr. Sorensen takes the lead on coordinating among Student’s medical providers for his/her mental health services and care. (Tr. Vol. 2 at 120:11 through 16.) During her treatment of Student, Dr. Sorensen reviewed Student’s medical records back to his/her fourth grade year. In addition, she is familiar with Student’s medical history. (Tr. Vol. 2 at 120:20 through 22 and 123:1 through 2.)

88. Dr. Sorensen determined that, after Student sustained a concussion in November 2015, he/she exhibited symptoms of increasing anxiety and depression, including physical (psychosomatic) symptoms that included vomiting and a noticeable stutter. (Tr. Vol. 2 at 131:6 through 16, 132:16 through 19, and 133:20 through 22.) Dr. Sorensen agreed with Dr. Zallen’s diagnosis that Student suffered a mild to moderate concussion. (Tr. Vol. 2 at 129:13 through 16.)

89. Dr. Sorensen defines the type of concussion sustained by Student as a mild traumatic brain injury. The term concussion is a layman’s term for a traumatic brain injury. (Tr. Vol. 2 at 127:2 through 9.)

90. According to Dr. Sorensen, the Diagnostic and Statistical Manual (DSM) requires that, in order to make a diagnosis of nearly every mental health disorder, the condition must cause impairment in social, educational, and/or occupational function. (Tr. Vol. 2 at 148:5 through 11.) Student’s diagnoses of generalized anxiety disorder and major depressive disorder each require such a finding to be made by the mental health professional rendering the diagnosis. (Tr. Vol. 2 at 148:2 through 14.)

91. In Dr. Sorensen’s opinion, school has always been one of “the big triggers” for Student’s increased anxiety and panic attacks. (Tr. Vol. 2 at 153:9 through 15.)

Karen Apgar, school psychologist for the District.

92. Karen Apgar (Apgar) is a school psychologist currently on sabbatical from the District. Apgar has been a school psychologist for over 23 years. (Tr. Vol. 3 at 10:5 through 11 and 11:19 through 21.)

93. Apgar agrees with Dr. Sorensen’s opinion that a concussion can be a traumatic

brain injury. (Tr. Vol. 3 at 55:5 through 10.) Apgar has experience assessing students to determine whether the effects of a concussion are impacting the student's educational performance. (Tr. Vol. 3 at 14:3 through 7.)

94. Apgar believes that, if she were made aware that a student had suffered a concussion and exhibited impairments listed under the relevant administrative rules for more than 90 days, it would be appropriate to evaluate Student for eligibility under the category of TBI. (Tr. Vol. 3 at 55:20 through 24.) In addition, Apgar believes that, if a student is presented for an evaluation and concussion is brought to the team's attention at any time, it would be appropriate to evaluate the student under the eligibility category of TBI. (Tr. Vol. 3. at 69:20 through 70:4.)

95. In Apgar's opinion, the determination of which categories to consider when evaluating a student for special education eligibility depends upon information provided either prior to or during an evaluation process. (Tr. Vol. 3 at 70:6 through 12.)

96. Apgar also has experience assessing the educational impacts of depression. (Tr. Vol. 3 at 13:24 through 14:2.) Apgar regularly utilizes the BASC-3 and Beck's Depression Inventory when evaluating students for educational impact from depression. (Tr. Vol. 3 at 50:12 through 18.) Apgar believes that depression is a condition that may qualify a student for eligibility under the category of ED. (Tr. Vol. 3 at 58:7 through 10.) Apgar also believes that the development of psychosomatic symptoms associated with school can indicate a possible eligibility under the category of ED. (Tr. Vol. 3 at 58:11 through 14.)

97. Apgar understands that anxiety is not a recognized eligibility category for special education, but believes it can be a contributing factor to eligibility in one or more categories. (Tr. Vol. 3 at 39:16 through 23.) To evaluate the educational impact of a student's anxiety, Apgar typically uses BASC, Third Edition (BASC-3) and combines that with the Multi-Dimensional Anxiety Scale for Children, second edition (MASC-2). (Tr. Vol. 3 at 42:18 through 22.) Apgar believes using the MASC-2 and BASC-3 provides a more comprehensive assessment, in the areas of depression and anxiety, than the CEFI. (*Id.* at 48:9 through 14.)

Interim Order for IEE and evaluation by Dr. Raegan Smith.

98. On August 8, 2017, during the due process hearing in this matter, the ALJ issued an Interim Order for Independent Educational Evaluation (IEE) and Order Reopening the Evidentiary Record pursuant to OAR 581-015-2305(8) and 34 CFR 300.502(d) (Interim Order). (Record.)

99. The interim order found the District failed to properly evaluate Student in all areas of suspected disability. The ALJ determined the evidence demonstrated that Parents notified the District that Student was diagnosed with anxiety disorder, major depressive disorder, and concussion syndrome and requested Student be evaluated for special education eligibility. (Interim Order at 2.)

100. The interim order also found that the District had sufficient information to suspect

Student should have been evaluated under the eligibility categories of TBI and ED. (Interim Order at 2.)

101. The interim order set a deadline for completion of the IEE of November 2, 2017. The District was ordered to convene an eligibility team meeting and make a determination regarding Student's eligibility under the categories of TBI and ED no later than December 4, 2017 or within 30 calendar days of receiving the IEE. (Interim Order at 3.)

102. Parents contacted several medical providers about obtaining an IEE in the area of TBI. Parents were repeatedly informed that such an evaluation was not possible due to the passage of time since the concussion. (Tr. Vol. II at 649:16 through 24.)

103. Raegan Smith, Ph.D., is a licensed clinical psychologist as well as an assistant professor of pediatric psychology at Oregon Health and Science University (OHSU). (Ex. Supp. S2 at 1.) Dr. Smith maintains an office at the Child Development and Rehabilitation Center on the campus of the University of Oregon. (Tr. Vol. II at 610:4 through 10.)

104. Parents contracted with Dr. Smith to perform an independent psycho-educational evaluation of Student in the area of ED. At the time they contacted Dr. Smith, Parents informed her that the purpose of the evaluation was to determine eligibility for special education services. (Tr. Vol. II at 614:23 through 615:11 and 649:25 through 650:10.)

105. In preparation for conducting the evaluation of Student, Dr. Smith reviewed his/her historical medical and therapy records as well as the psycho-educational evaluation report produced by Keyworth on April 29, 2016. (Tr. Vol. II at 616:7 through 617:13.)

106. During the summer of 2017, Student attended a limited number of classes at the University of Oregon, including two remedial math classes, with limited success. (Exs. D42 at 4 and D43 at 3.)

107. Dr. Smith met with Student on October 6, 20, and 27, 2017 as well as November 3 and 5, 2017 for the purposes of administering assessments and conducting clinical interviews of Student. (Ex. D43 at 1.)

108. Dr. Smith administered the following assessments to Student: the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V); the Wechsler Individual Achievement Test-Third Edition (WIAT-III); the Achenbach System of Empirically Based Assessment (ASEBA) Child Behavior Checklist (CBCL) and Youth Self-Report (YSR); the Spencer Children's Anxiety Scale (SCAS); the Children's Depression Inventory-Second Edition (CDI-2); the Leyton Obsessional Inventory; and the My Worst Experience Scale (MWES), which included the School Alienation and Trauma Survey (SATS), the Sensory Profile, and the Personality Inventory for DSM-5 (PID-5). Additionally, Dr. Smith had Mother complete the Adaptive Behavior Assessment System-Third Edition (ABAS-3), the Brief Child Mania Rating Scale (BRIEF CMRS), and the Behavior Rating Inventory of Executive Functioning-Second Edition (BRIEF-2). (Ex. D43 at 7.)

109. Dr. Smith found that Student's composite achievement scores in mathematics and math fluency were significantly below his/her predicted composite scores based on his/her full scale intelligence quotient of 125 as measured by the WISC-V. Dr. Smith noted, in her report, that the differences between predicted and actual scores is clinically significant and unusual for the general population. (Ex. D43 at 7.)

110. At the time of Dr. Smith's evaluation, Student was 15 years of age. (Ex. D43 at 8.) Student's results of the WIAT-III show that, at the time of Dr. Smith's evaluation, his/her math fluency showed an age equivalent of 11.4 years. (Ex. D43 at 14.)

111. Dr. Smith's report noted that Student's assessment results revealed concerns, within the clinical range, in multiple areas including Anxious/Depressed, Somatic Complaints, Thought Problems Syndromes, DSM-Oriented Affective Problems, Anxiety Problems, and Somatic Problems. (Ex. D43 at 7.) In addition, Dr. Smith noted that "[o]bsessive-[c]ompulsive anxiety is most prominent [in Student] and significantly higher than typical for [his/her gender] aged 12-15." (*Id.* at 7.)

112. Dr. Smith's report also noted multiple other areas reported at significantly higher than typical levels including panic attacks, agoraphobia, separation anxiety, social phobia, and generalized anxiety. (Ex. D43 at 8.)

113. Dr. Smith's report noted the following diagnostic impressions for Student: Specific Learning Disorder with Impairment in Mathematics; Other Specified Trauma-Stressor Related Disorder; Major Depressive Disorder-Recurrent; Obsessive-Compulsive Disorder; Generalized Anxiety Disorder; Somatic Symptom Disorder, Pain Type; and Rule-out Panic Disorder. (Ex. D43 at 10.) Dr. Smith also noted in her report that Student reports avoiding school based, in part, on his/her fear of additional panic attacks on campus. (*Id.*)

114. Dr. Smith's report also recommended certain modifications and accommodations for Student, including: a point-person to provide guidance and act as a liaison between Student and teachers to determine appropriate modifications and accommodations; elimination of group work until a therapeutic plan for exposure to such work is established; distraction free testing environments; collaboration with mental health professionals to design supports to address anxiety symptoms as they arise throughout the school day; interventions for targeting tolerance for mistakes; and individualized supports to address planning/organizational issues. (Ex. D43 at 10 and 11.) Dr. Smith also recommended consultation with an occupational therapist through the District to address sensory regulation issues. (*Id.* at 11.)

115. In Dr. Smith's opinion, Student's anxiety disorder is a contributing factor to his/her inability to attend school within the District. (Tr. Vol. II at 632:14 through 19.)

116. Due to delays in the evaluation process, Parents did not provide the IEE to the District until December 5, 2017. Because District staff members were unavailable, due to winter break, between December 16, 2017 and January 1, 2018, the ALJ granted an extension for the eligibility team meeting until January 5, 2018. (Record.)

Eligibility team meeting # 2.

117. The District convened a second eligibility team meeting on January 5, 2018. (Ex. D35 at 1.) The following individuals attended the meeting: Father; Mother; Cheryl Linder, Ph. D., the District's Special Education Director acting as the District representative; Justin Potts, school psychologist designated at the meeting facilitator; Vice-Principal Yocum; Toby Rickard, the District's Autism Consultant; Chava Beinin; Catherine Wiebe; Melissa Ivan, Special Education Teacher; John Sloan, Speech Language Pathologist; Dr. Smith; Joel Hungerford, Counsel for the District; and Kim Sherman, Ph. D., Counsel for Parents/Student. (Ex. D42 at 1; Tr. Vol. II at 454:15 through 22.)

118. At the outset of the meeting, Potts identified the purported purpose of the meeting and instructed the team members that they were there to "consider eligibility in [the] areas of Emotional Disturbance and Traumatic Brain Injury *based solely on the Independent Evaluation Report* submitted by Raegan Smith, PHD." (Ex. D42 at 1, emphasis added.)

119. Upon arriving at the eligibility determination meeting on January 5, 2018, team members were given a copy of Dr. Smith's IEE to review and instructed that the team was to consider only documents presented at the meeting and not to consider data from the February 5 or May 6, 2016 meetings. (Tr. Vol. I at 233:14 through 235:4 and Tr. Vol. II at 461:22 through 462:8.) When team members inquired as to why the team was ignoring prior data from the earlier evaluation planning and edibility determination meetings, Potts indicated that the team was limited by the interim order of the ALJ. (Tr. Vol. II at 463:7 through 464:4; Ex. Supp. S7 at 4; *see also* Ex. D35 at 8.)

120. During the January 5, 2018 meeting, Potts directed the team members that adverse educational impact is only measurable while Student is at school, rather than considering inability to attend school as adverse impact on his/her educational performance. (Tr. Vol. II at 477:17 through 478:11 and 667:14 through 668:6.)

121. The team members utilized disability statement forms provided by the District which included a checklist of criteria for each disability under consideration. (Exs. D37 and D38.)

122. The disability statement provided by the District for TBI indicated certain required sources of data to be considered by the team in reaching its determination, including:

- Review of records[;]
- Medical or health assessment statement. A medical statement or health assessment statement indicating that an event may have resulted in a traumatic brain injury[;]
- Psychological assessment. A comprehensive psychological assessment using a battery of instruments intended to identify deficits associated with traumatic brain injury administered by a licensed school psychologist, a psychologist licensed by a State Board or Psychological Examiners, or other individuals who have the training and experience to administer and interpret the tests within the

battery;

- Other assessments including, but not limited to, motor assessments if the child exhibits motor impairments; communication assessments if the child exhibits communication disorders; and psychological assessments if the child exhibits changed behavior[;]
- Other information relating to the child's suspected disability, including pre-injury performance and a current measure of adaptive ability;
- An observation in the classroom and in at least one other setting;
- Assessment necessary to determine impact[; and]
- Assessments necessary to identify educational needs[.]

(Ex. D37 at 1.) The "Review of records" box was the only box checked on this form. Next to the "Medical or health assessment statement" box, a handwritten asterisk was included. At the bottom of the page, the asterisk was carried over with the following handwritten notation: "IEE did not include remaining required sources of data." (Ex. D37 at 1.)

123. During the meeting, Potts indicated the IEE provided by Dr. Smith was inadequate for the purposes of determining TBI eligibility because it lacked a current medical statement for Student. All team members, including Parents, agreed that, based solely on the IEE before them, there was insufficient data to determine eligibility under the category of TBI. (Tr. Vol. II at 472:1 through 12; Ex. D42 at 6.)

124. The disability statement provided by the District for ED indicated certain required sources of data to be considered by the team in reaching its determination, including:

- Review of records[;]
- Social-emotional evaluation. An evaluation of the child's emotional and behavioral status, including a developmental or social history, when appropriate;
- Medical or health assessment statement. A medical statement or health assessment statement indicating whether there are any physical factors that may be affecting the child's educational performance;
- Behavior rating scales. The completion of at least two behavior-rating scales, at least one of which is a standardized behavior measurement instrument;
- Observation. An observation in the classroom and in at least one other setting by someone other than the child's regular teacher;
- Assessment necessary to determine impact[;]
- Assessments necessary to identify educational needs[.]

(Ex. D38 at 1.) The "Review of records," "Social-emotional evaluation," and "Behavior rating scales" boxes were checked on that form. Next to the "Medical or health assessment statement" box, a handwritten asterisk was included. At the bottom of the page, the asterisk was carried over with the following handwritten notation: "IEE did not include remaining required sources of data." (Ex. D38 at 1.)

125. The District's disability statement for ED also included the following instructions:

To be eligible as a child with an emotional disturbance, the child must meet the following minimum criteria: *(one or more below must be checked for the student to be found eligible)*

- Exhibits an inability to learn that cannot be explained by intellectual, sensory, or health factors;
- Exhibits an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- Exhibits inappropriate types of behavior or feelings under normal circumstances;
- Exhibits a general pervasive mood of unhappiness or depression; or,
- Exhibits a tendency to develop physical symptoms or fears associated with personal or school problems.

(both items below must be checked for the student to be found eligible).

- One or more of the items checked above has been exhibited over a long period of time; and,
- Is exhibited to a marked degree.

(Ex. D38 at 2, emphasis original.) During the meeting, the team reviewed the checklist and each commented on whether he or she disagreed with each item. (Tr. Vol. II at 474:5 through 10 and 659:12 through 25.) The team members reached a consensus that the first two boxes did not apply to Student. District team members and Parents disagreed as to whether Student exhibits inappropriate types of behavior or feelings under normal circumstances and argued cutting and other self-harm behaviors are inappropriate. Dr. Smith argued that panic attacks and school avoidance are inappropriate behaviors under normal circumstances. Parents and District team members also disagreed over whether Student exhibited a general pervasive mood of unhappiness or depression. Parents pointed out that Student has a diagnosis of major depressive disorder. Nonetheless, Potts interjected that, because there is no medical statement contained in the IEE, the team could not consider it. (Tr. Vol. II at 664: 22 through 665:19; Ex. D42 at5.)

126. While discussing the ED criteria contained in the District's disability statement, the team members each agreed that Student exhibits a tendency to develop physical symptoms or fears associated with personal or school problems. Potts indicated his belief that this category is where Student's panic attacks fit best. (Tr. Vol. II at 665:20 through 25; Ex. D38 at 2.) The team members also agreed that these issues had been exhibited over a long period of time and that Student exhibited such tendencies to a marked degree. (Ex. D38 at 2.) Based on these determinations, the team decided that Student met the determination criteria for ED. (*Id.*)

127. Following the team's determination that Student does have the disability of ED, the team discussed whether Student's ED had an adverse impact on his/her education. (Tr. Vol. II at 667:14 through 17.) Dr. Smith argued against Potts interpretation that adverse impact is only measurable when Student is at school. Dr. Smith pointed out that, on days Student can attend school, District personnel are seeing him/her at his/her best. Dr. Smith also argued that,

by failing to consider Student's inability to attend school as adverse impact, the District was disregarding all instances where Student lacks the emotional resources to make it to school. (Tr. Vol. II at 668:7 through 669:10.)

128. When called upon to give their individual opinion on the topic of adverse impact, Yocum, Ivans, and Wiebe, and both Parents each indicated that they believed Student not attending school due to anxiety shows adverse impact on his/her education. The remainder of the team members disagreed based upon Potts statements that the IEE did not show a clear link between anxiety and school avoidance. (Tr. Vol II at 678:14 through 19; Ex. D42 at 6 and 7.) Because the team members could not reach consensus regarding whether Student's ED had an adverse impact on his/her education, the District representative, Dr. Linder, was called upon to make the final decision. Dr. Linder determined no adverse impact was demonstrated. (Ex. D42 at 7.)

129. Despite the determination that Student's ED did not have an adverse impact on his/her education, Potts moved to a discussion of SDI. Several District team members indicated their opinion that Student did not need SDI to access his/her education. (Ex. D42 at 7.) At least one team member, Beinin, indicated her opinion that, because Student was able to attend classes at the University of Oregon, he/she should be able to attend classes within the District. (Tr. Vol. II at 680:14 through 681:4.) Because the team could not reach consensus on the issue, Dr. Linder was again called upon to make the determination as to whether Student needed SDI. Dr. Linder determined he/she did not. (Tr. Vol. II at 683: 12 through 23; Ex. D42 at 8.)

130. The team members at the January 5, 2018 eligibility determination meeting did not review Student's attendance or grade records from his/her time at RMS. (Tr. Vol. II at 470:9 through 24.)

131. During the meeting, Parents felt as if they were unable to discuss several important aspects of Student's educational impact, including his/her declining grades and attendance. 9Tr. Vol II at 683:24 through 684:21.)

132. On at least three occasions during the meeting, Mother heard Rickard ask the group, "why are we here? We already made this determination previously." (Tr. Vol. II at 684:23 through 25.)

133. The PWN provided to the Student after the January 5, 2018 meeting indicated the following:

"The team considered finding that [Student's] emotional struggles did have an adverse impact that required special education, but this was rejected because [Student] has not struggled accessing [his/her] education when [he/she] has attended school and the evidence is that [he/she] is able to regularly attend classes at the University of Oregon without needing special education instruction."

(Ex. D41 at 2.)

Rebuttal evidence regarding SDI.

134. Kathleen Panaccione, Ed. D., is an expert in special education. Dr. Panaccione has facilitated numerous eligibility team meetings and has experience crafting IEP's and SDI for students experiencing adverse impact to education from anxiety disorders. (Tr. Vol II at 527:6 through 528:2 and 542:19 through 543:11.)

135. For students suffering from anxiety that prevents them from attending school, SDI can be crafted to teach the student the necessary skills to tolerate the learning environment and reenter the classroom setting. (Tr. Vol. II at 544:7 through 545:7.)

136. In Dr. Panaccione's opinion, SDI can be crafted to assist Student in the areas of affective regulation and modulation and cognitive coping and processing. (Tr. Vol. II at 550:1 through 551:23.)

137. Dr. Panaccione reviewed Dr. Smith's IEE and believes that many of the recommendations in the IEE would be appropriately addressed through properly crafted SDI, rather than accommodations. (Tr. Vol. II at 554:19 through 23 and 556:17 through 558:4.)

CONCLUSIONS OF LAW

1. The District denied Student a free appropriate public education (FAPE) during portions of the period in issue by failing to properly evaluate Student in all areas of suspected disability.

2. The District did not fail to provide Parents with adequate PWN regarding the eligibility team's decision finding Student ineligible for specially designed instruction and related services.

OPINION

In due process proceedings alleging violations of the IDEA, 20 U.S.C § 1400 *et seq.*, the party seeking relief has the burden of proof. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter, the Parents filed a due process complaint on February 22, 2017, alleging procedural and substantive violations of the IDEA resulting in a denial of FAPE for their child during portions of the 2015/2016 and 2016/2017 school years. Specifically, the complaint covers the period from January 2016 through the end of the academic year in June 2017. Parents seek the following remedies: An IEE at District expense;⁹ compensatory education for the six months of the 2015/2016 school year and five months of the 2016/2017 school year during which Student was unable to attend school due to disability; tuition reimbursement for courses at the University of Oregon paid for by Parents in order to mitigate Student's loss of educational instruction; SDI

⁹ Parents' requested remedy was provided through an interim order of the ALJ dated August 1, 2017. Therefore, Parents' request for an IEE is not addressed in the portion of this order discussing appropriate remedies.

for Student in unspecified areas; text books and related materials necessary for compensatory education, and transportation to and from compensatory education classes.¹⁰ (Complaint at 1 and 2.) The burden rests on the Parents to prove the violations alleged in the amended complaint and the appropriateness of the remedies sought.

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

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).

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) (*Rowley*). 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. *Andrew F. v. Douglas County School District*, 580 U.S. ____ (2017).

In this case, Parents allege procedural and substantive violations of the IDEA. They assert that the District failed to properly evaluate Student in all areas of suspected disability and failed to provide Parents with adequate PWN regarding the eligibility team's decision to find Student ineligible for specially designed instruction and related services.

OAR 581-015-2000 provides definitions applicable to due process proceedings and reads, in relevant part:

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

¹⁰ Parents' due process complaint also contains a request for "Provisions for an aide to accompany the Student to classes should the IEP team include such an accommodation in the Student's IEP." (Complaint at 2.) This remedy is far too speculative to be included in an enforceable final order and is therefore not addressed in this order.

* * * * *

(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.

* * * * *

(d) “Emotional Disturbance” means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (C) Inappropriate types of behavior or feelings under normal circumstances;
- (D) A general pervasive mood of unhappiness or depression; or
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems;
- (F) The term includes schizophrenia but does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

* * * * *

(h) “Other Health Impairment” means limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that:

- (A) Is due to chronic or acute health problems (e.g. a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, attention deficit disorder, attention deficit hyperactivity disorder, leukemia, Tourette’s syndrome or diabetes); and
- (B) Adversely affects a child’s educational performance.

* * * * *

(j) “Traumatic Brain Injury” means an *acquired injury to the brain caused by an external physical force resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child’s educational performance.* The term includes open or closed head injuries resulting in impairments in one or more areas, including cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not include brain injuries that are congenital or degenerative, or brain injuries induced by birth trauma.

* * * * *

(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.

* * * * *

(14) “Identification” means the process of determining a child’s disability and eligibility for special education and related services.

* * * * *

(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.

(Emphasis added.)

OAR 581-015-2080 Child Find

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

(2) Pursuant to ORS 338, 339, OAR 581-021-0019, or open enrollment under section 9, chapter 718, Oregon Laws 2011 school districts must identify, locate and evaluate all children with disabilities for whom they are responsible, regardless of the severity of the disability, who are in need of early intervention, early childhood special education, or special education services, including:

* * * * *

(d) *Children who are suspected of having a disability even though they are advancing from grade to grade;*

* * * * *

(f) Children who are home schooled[.]

* * * * *

(3) For purposes of this rule, residency is determined in accordance with ORS Chapter 339, except for children enrolled in charter schools. Residency for children enrolled in charter schools is determined in accordance with ORS Chapter 338. The district in which the charter school is located is responsible for child find for students enrolled in the charter school regardless of parental resident district.

(Emphasis added.)

The IDEA was enacted to require state educational agencies receiving federal funds to provide special education services for students with qualifying disabilities. See 20 U.S.C. § 1400(d)(1)(A). To meet its substantive obligation under the IDEA, a school must offer an “individualized education program” reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Andrew F. v. Douglas County School District*, 580 ___ U.S.(2017).

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 regard to the student’s particular needs resulting from his or her disability. Within a student’s

IEP are 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.

1. *Identification of Student as a student with a disability (evaluation and eligibility determination).*

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 eligibility decision is judged based whether it took all relevant information from the snapshot period into account. *L.J.*, 835 F.3d at 1175.

a. *Evaluation of Student*

In January 2016, Father of Student contact District personnel and informed them that Student was experiencing increasing difficulties getting to and remaining at school. At that time, Father indicated his belief that Student’s anxiety and other possible issues were interfering with Student’s attendance. Father also reminded school staff at that time that Student has suffered a concussion on school grounds the previous November during a panic attack. Father requested that Student be evaluated for special education in the areas of anxiety and ASD. Father had experience with the ASD diagnosis because he has been diagnosed with ASD along with at least two of his children.

Parents contend that Father’s disclosures, including his belief that Student experiences anxiety and suffered a concussion at school during a panic attack, triggered the District’s obligation to evaluate the Student in all areas of suspected disability, specifically TBI and ED. I agree.

OAR 581-015-2100 identifies responsibility for evaluations and eligibility determinations and provides, in relevant part:

(1) For school-age children, school districts and juvenile and adult corrections education programs 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.

In addition, OAR 581-015-2105 provides evaluation and reevaluation requirements and reads, in relevant 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.

OAR 581-015-2110 provides general evaluation and reevaluation procedures and reads, in pertinent part:

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

(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:

* * * * *

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

* * * * *

(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.

(Emphasis added.)

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). Further, at least one court has held that a school district's knowledge of a student's anxiety and absences required the school district to arrange an evaluation of student. *Independent Sch. Dist. No. 413, Marshall v. H. M. J. by A.J. and M. N.*, 66 IDELR 41 (D. Minn. 2015).

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.*

The Court in *Timothy O* court relied upon its earlier decision in *N.B. v. Hellgate Elementary School District*, 541 F.3d 1202 (9th Cir. 2008), wherein the court established that the requirement to evaluate is activated by the informed opinions of outside experts, such as doctors and therapists at the time that information is shared with the school district. 822 F.3d at 1120.

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)

Here, Father emailed the Student's principal at RMS, Mitchell, to seek an evaluation based on concerns he had previously shared with Mitchell. Father shared that the Student had been unable to attend school due to a diagnosed anxiety disorder, a recent concussion, and possible ASD. To his credit, Mitchell began the process of setting up the evaluation planning meeting in short order, contacting the District's special education administrators and staff to follow up by scheduling an evaluation planning meeting.

The District arranged the evaluation planning meeting for February 5, 2016. Father attended to meeting. However, due to other commitments, Mother was unable to attend. At the meeting, Father shared information with the team regarding Student's medically diagnosed conditions, including anxiety with panic attacks, depression, and concussion, along with associated symptoms, such as vomiting, disorientation, weakness, and dizziness. This was not the first instance that Father had informed school personnel about Student's concussion, suffered on campus in November 2015.

Father was unfamiliar with the special education eligibility categories as they appear in federal regulations and corresponding state administrative rules. Nonetheless, Father was familiar with the category of ASD because at least two of his other children have been diagnosed with ASD. Father requested the District evaluate Student in the areas of anxiety and ASD. Father disclosed the names of the Student's treating medical providers. Father was under the impression that the District would evaluate all of Student's disclosed medical conditions to determine under which categories he/she might be eligible for special education and related services. Father signed consent and authorization documents to release educational and medical information and begin the appropriate assessments.

At the February 5, 2016 evaluation planning meeting and prior, Father shared with the District that Student had suffered a concussion from a fall at school in November 2015 while experiencing a panic attack. Vice-Principal Yocum and RMS counselor Tiemann were members of the evaluation team. Both of these individuals were previously informed that Student suffered a concussion and that Student had been absent multiple times due to the concussion. In addition, Father informed the team members that Student had been diagnosed by his/her pediatrician with a mild to moderate concussion. At the time of the meeting, Student's concussion related symptoms had been ongoing for nearly 90 days.

The District's representative at the meeting, Butler, recorded notations regarding Student's concussion and associated symptoms. Ms. Butler's notes contain multiple entries regarding Student's concussion in November, 2015, including, "struck [his/her] head at school," "everyday vomiting," "[Student] was disoriented," "day of injury— parent took [him/her] to Dr.," and "Barb – TBI." (Ex. S21 at 1 and 2.) Oddly, at hearing Keyworth testified that she had no recollection of any discussion of Student's concussion and therefore did not consider evaluating Student under the eligibility category of TBI. It is unclear why District members of the evaluation planning team generally, and the school psychologist specifically, failed to take note of the multiple references to Student's concussion and related symptoms in order to make the

determination that TBI should be added as a suspected disability category requiring evaluation. This is particularly evident in light of the testimony of Apgar, also a District school psychologist, who indicated that if a student is presented for an evaluation for special education and concussion is mentioned as a concern, then it is appropriate to evaluate for the criteria of TBI as a possible eligibility category.

At hearing, Keyworth testified that she did not consider the term “concussion” to be synonymous with the term “traumatic brain injury.” Notably, Keyworth was unable to offer a definition of either term that would support her conclusion that the two are distinct. Keyworth’s opinion was rebutted by that of Dr. Sorensen, who testified that the term concussion is simply a layman’s term for traumatic brain injury. In addition, Keyworth indicated at hearing that, in order to consider TBI as an eligibility category, the team would need a medical statement indicating Student suffered a traumatic brain injury. Nonetheless, even after receiving a medical statement from Dr. Zallen indicating Student suffered a traumatic brain injury and specifying Student suffered an acquired injury to the brain, caused by an external force that was expected to last at least 60 days and included the diagnosis of concussion, Keyworth still refused to add TBI to the possible eligibility categories.

The Parents assert that the evaluation planning team had sufficient information to suspect that the Student should have been evaluated for eligibility under the category of TBI at the time of the evaluation planning meeting or shortly thereafter. I agree with Parents. Father requested the evaluation planning meeting in writing. At that time, Father disclosed that the Student had an acquired injury to the brain that had occurred more than sixty days prior to his request, to wit a concussion suffered at school on November 13, 2015. Father also disclosed that the concussion resulted in ongoing physical symptoms, such as vomiting and weakness, which impaired Student’s ability to attend school.

Father’s suspicions can be considered “informed” because Father took Student to his/her pediatrician on the day of the incident whereupon Student was diagnosed with a mild to moderate concussion. At least some team members for the District were aware that, subsequent to the November 13, 2015 concussion, Student’s attendance declined dramatically to the point that the District disenrolled him/her for missing ten consecutive days approximately one month after the evaluation planning meeting but before any evaluations or assessments of Student had been completed. The District had adequate information to suspect that Student’s concussion was either the cause, or at least a contributing factor, of Student’s declining attendance and diminished academic performance. For these reasons, I find the District failed to properly evaluate Student in all areas of suspected disability when Keyworth and other District team members neglected to identify TBI as a category for evaluation. This failure is a violation of the evaluation requirements contained in OAR 581-015-2105(3)(a).

At hearing, the District argued that Father never disputed the selected evaluation categories and never requested that Student be evaluated under the category of TBI. This argument is unsupported by the record. To accept the District’s position would attribute to Parents the expertise that is required of District team members by the IDEA and the corresponding rules and regulations. Parents cannot be expected to possess the same familiarity and expertise in the areas of possible eligibility that District personnel, specializing in

identification and evaluation of students with suspected disabilities, are expected to have by virtue of their education, training, and experience. For these reasons, the District's argument is rejected.

Next, Parents take issue with the District's decision to evaluate Student under the category of OHI, rather than ED, after receiving information indicating Student was suffering from anxiety, depression, and panic attacks that were interfering with his/her attendance at RMS. Again, I agree with Parents that the District failed to properly evaluate Student when it elected to use the catch-all provision of OHI rather than the more specific and appropriate category of ED.

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).

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.

In the present case, the District's evaluator, Keyworth, selected a limited number of assessments, specifically, the KTEA-3, an academic assessment, the ASDS, a measurement tool for autism spectrum disorder, and the CEFI, a series of personality and executive functioning inventories. Keyworth chose the ASDS and the CEFI specifically for the ASD eligibility evaluation. Keyworth selected one standardized assessment to measure Student's suspected disabilities or adverse impact under the category of OHI eligibility, to wit the KTEA-3. By contrast, at hearing, Apgar testified that she regularly uses broad behavior scales, such as the BASC-3, and targeted behavior scales, such as the MASC, when evaluating students for eligibility due to emotional issues such as depression and anxiety. Keyworth elected not include behavior scales specific to Student's diagnosed conditions of depression and anxiety despite ample evidence that Student's negative behaviors and symptoms, including school avoidance and panic attacks, had a direct impact on his/her academic performance.

Student scored below average, in the 5th percentile, in the area of emotional regulation on

the CEFI, with a clinically significant deviation from normative results. Parents contend that the failure to seek additional information as to the effects of the Student's deficits in executive function indicated that the evaluations under OHI were not sufficiently comprehensive to identify all of Student's special education and related services needs. I agree. OAR 581-015-2000(4)(d) defines ED and provides a list of characteristics including, inappropriate types of behavior or feelings under normal circumstances, a general pervasive mood of unhappiness or depression, or a tendency to develop physical symptoms or fears associated with personal or school problems. OAR 581-015-2000(4)(d)(C) through (E). Student's panic attacks, school avoidance, and depression each fit squarely within the characteristics defined by the aforementioned rule. By contrast, OHI is defined in the same rule as limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems (e.g. a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, attention deficit disorder, attention deficit hyperactivity disorder, leukemia, Tourette's syndrome or diabetes), and adversely affects a child's educational performance. OAR 581-015-2000(4)(h)(A) and (B). Given the diagnoses provided and symptoms reported, it is unclear why the District's IEP team members selected OHI over ED for Student's evaluations.

Compounding the District's failure to identify all area of suspected disability, Keyworth and Rickard failed to schedule the required observations while the Student was attending school in the weeks following the February 5, 2016 evaluation planning meeting. Instead, Keyworth and Rickard delayed attempts to observe Student until April 22, 2016, two weeks before the expiration of the 60 day period when evaluations and assessment were required to be completed under OAR 581-015-2110(5)(a). The evaluation plan that the Parents consented to on February 5, 2016, required that classroom observations would be included in the evaluation. Because the District delayed the observations until April, they lost the opportunity to evaluate the Student's interactions in his/her typical instructional environment, and instead the Student was observed either during administration of assessments by Keyworth or in an informal setting with Father in the community.

The District had the opportunity and the obligation to perform classroom observations as part of the evaluation process. The fact that District personnel delayed such observations until Student was disenrolled for non-attendance does not negate that obligation. The information obtained from the informal observations, while potentially useful, did not replace the formal observations required by the evaluation plan, state, and federal law. This failure further deprived the team of information essential to determining all areas of suspected disability.

By Keyworth's own admission, the assessments selected by the District were insufficient to elicit information regarding the effects of the Student's anxiety, depression, and panic attacks on his/her educational performance. At the hearing, Dr. Sorensen testified that Student has experienced anxiety and panic attacks since before the concussion. In addition, Dr. Sorensen indicated that school has long triggered increased anxiety and provoked Student's panic attacks. A variety of assessments targeted at Student's emotional and mental health issues likely would have revealed to the team the extent of Student's disability and its impact on his/her educational performance. Based on the evidence in the record, I find the evaluation and assessment tools

selected by the District were insufficient and inappropriate to measure the effect of Student's anxiety, depression, and panic attacks, and all areas related to those disabilities, on his/her educational performance, particularly his/her ability to attend school and his/her academic performance in the classroom.

b. May 6, 2016 eligibility determination meeting.

On May 6, 2016, the District held an eligibility determination meeting to review all evaluation and assessment data. At that meeting, Keyworth provided her report which contained the results of the KTEA-3, CEFI, and ASDS assessment tools. Nonetheless, the report contained no classroom observations as required by the evaluation plan agreed to on February 5, 2016. In addition, while Keyworth's report indicated that she reviewed Student's cumulative records, the report contained no information pertaining to attendance or academic grades. At hearing, Keyworth could not explain why such information was absent from the report and admitted that such information is necessary and typically summarized in the report. During the May 6, 2016 meeting, no member of the eligibility determination team presented Student's attendance records or current grade reports. Interestingly, while Keyworth testified that she did review all relevant records for Student prior to drafting her report, documents from her own working file reveal that her review of Student's academic grades was limited to second through fifth grades and her review of Student's attendance records was similarly limited to first through third grades. Student's emotional, physical, and academic difficulties began after his/her sixth grade year.

OAR 581-015-2120 provides instructions for determination of eligibility and reads, in relevant 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.

In its eligibility determination, the team determined that while the Student had anxiety, a disability that met the criteria for OHI. The team also determined that Student's anxiety had an adverse impact on the Student's educational performance. Nonetheless, the team determined that Student did not need special education services as a result of the disability. This determination was based on the fact that no SDI was apparent to District team members and, when queried on the subject, Father was unaware of any SDI that would be appropriate for Student. This position attempts to shift the responsibility for identification, evaluation, and the provision of FAPE from the District to Parents. This is impermissible.

The District failed to review, or produce for review, the Student's attendance records and academic transcripts, both of which indicated that the Student was experiencing significant impacts from his/her disabilities on his/her educational performance. Keyworth also failed to address significant discrepancies in the CEFI results showing Student exhibited weaknesses in most executive function areas, and a clinically significant deficiency in emotional regulation. Had this information been presented to the eligibility team, it is likely that at least some team members would recognize that Student might need SDI in the areas related to emotional regulation, at the very least. Depriving the team of such crucial information limited the team member's consideration of possible solutions for Student.

As an alternative to special education and related services for Student, the District suggested that a §504 plan would be the least restrictive for Student and should be pursued rather than develop an IEP tailored to Student's unique needs. This was an impermissible election between two statutory schemes. "Both [§]504 and the IDEA have been interpreted as requiring states to provide a free appropriate public education to qualified handicapped persons, but only IDEA requires development of an IEP and specifically provides for transition services to assist students [to] prepare for a post-high school environment." *W.H. v. Clovis Unified School District*, Case No. CV F 08-0374 LJO at *34 (E.D. Cal. Jun. 8, 2009) (citing 20 USC § 1401(a)(20)). Under the statutory scheme of the IDEA, the District was not free to choose which statute it prefers. *Yankton School District v. Schramm*, 93 F.3d 1369, 1376 (8th Cir. 1996). Rather, "[t]he District should have devised an IEP to meet [the student's] unique needs in compliance with the provisions of the IDEA, and its proposed plan under § 504 of the Rehabilitation Act was not an adequate substitute." *Muller ex rel. Muller v. Committee on Special Educ.*, 145 F.3d 95, 105 (2d Cir. 1998); see also *Clovis Unified School District*, Case No. CV F 08-0374 LJO at *34. (E.D. Cal. Jun. 8, 2009). The similarities between the District's election of §504 over the IDEA and those of the school district's in the above cases cannot be ignored. As identified by multiple courts across the country, such an election of statutory schemes is impermissible. In addition, the District's argument that election of §504 would provide the least restrictive environment ignores the fact that the requirement that a child be educated in the least restrictive environment is found in the IDEA and its corresponding rules and regulations.

For the foregoing reasons, Parents have proven Student needs special education and

related services, and his/her impairment requires specially designed instruction, services, or both, that cannot be provided with modification of or accommodations in the regular school program. Student has limited alertness due to his/her anxiety disorder, depression, and panic attacks, and Student's educational performance was adversely impacted, during the period in issue, by his/her anxiety disorder and major depressive disorder because he/she was unable to attend school. Further, even assuming OHI was an acceptable eligibility category for Student, the District erred in finding Student ineligible because his/her anxiety affects his/her attendance, as well as his/her executive functioning, particularly in the area of emotional regulation, and must be addressed through SDI and related services. The District's failure to identify Student as eligible for special education, and failure to develop an appropriate IEP for Student, denied Student a FAPE. *Dept. of Educ. v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1196-97 (D. Haw. 2001).

January 5, 2018 eligibility team meeting.

In response to evidence presented at hearing, the District was order to pay for an IEE for Student in the areas of TBI and ED and, upon receiving that report, schedule an additional eligibility determination meeting to consider that IEE along with information from the prior evaluation planning and eligibility determination meetings.

Despite their best efforts, Parents were unable to find a medical provider who could provide and IEE of Student in the area of TBI, due mainly to the passage of time between Student's concussion in November 2016 and the interim order for IEE issued August 1, 2017.

With regard to the IEE in the area of ED, Parents contract with Dr. Smith and obtained a lengthy psychoeducational evaluation which they provided to the District on December 3, 2017. Thereafter, the District convened a second eligibility determination meeting for January 5, 2018. Unfortunately, that meeting was fraught with errors from the outset.

At the beginning of the meeting, the District's selected facilitator, Potts¹¹, impermissibly informed the team members that the eligibility decision had to based solely on the IEE presented by Dr. Smith, to the exclusion of all prior records. Potts further stated that the judge had instructed the parties to limit their review and consideration to the IEE. This was plainly incorrect. Nothing in the interim order granting the IEE and order an additional eligibility team meeting, or elsewhere in the record, hinted at any such limitation. Potts direction to the team members impermissibly restricted to information under consideration by eliminating other sources of information required by statute and rule to be considered when making eligibility determinations. I find this unauthorized limitation imposed by the District tainted to remainder of the eligibility determination meeting, including the ultimate determinations of eligibility under the categories of ED and TBI.

In addition, Potts, as the District's facilitator, erroneously instructed team members that adverse impact on educational performance could only be measured on those days Student was on campus attending classes. Nothing in the statute, rules, or relevant case law constrains the definition of adverse impact to such a definition. As the meeting facilitator, Potts was in a

¹¹ Interestingly, while invited to the meeting, Keyworth was notably absent from the January 5, 2018 meeting, as was any reference to her earlier report.

position to exert influence over other team members, especially those from the District. His erroneous instructions regarding the measurement of adverse impact further tainted the eligibility team meeting so as to render any decisions made unreliable.

Further, during the meeting, Potts indicated that the IEE was insufficient because it did not contain classroom observations required by the relevant administrative rules. Interestingly, Potts arguments ignore the fact that, according to Parents and Dr. Smith, Student was not attending school within the District due to his/her disabilities. Similarly interesting is the fact that, despite Student's attendance following the February 5, 2016 evaluation planning meeting, District personnel did not perform the required classroom observations yet Keyworth's report was used as the basis for finding Student ineligible for special education and related services. The District's contradictory position that its own evaluation report is sufficient but Parent's IEE is not when both suffer from similar deficiencies is untenable.

Finally, several District team members based their determination on Student's eligibility for special education and related services on Student's recent success in a limited number of classes at the University of Oregon. This argument is unpersuasive. The assumption of District personnel, that the University of Oregon is a school, and Student can attend the University of Oregon, therefore Student can attend any school including those within the District fails to take into account the differences in format, rigor, time constraints, and subject matter. At the eligibility team meeting, no evidence was presented regarding similarities or differences between the University of Oregon and schools within the District. The District team members' reliance upon Student's attendance at a local university was in error. Accordingly, after providing the team two bites at the apple, it falls to this tribunal to make the determination of eligibility for Student.

OAR 581-015-2145 provides criteria for eligibility under the category of Emotional Disturbance and provides in relevant part:

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

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

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

* * * * *

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

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

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

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

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

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

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

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

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

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

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

In this case, Student has been diagnosed with anxiety disorder, panic attacks, major depressive disorder and was diagnosed with a concussion in November 2016, the effects of which persisted for at least five months. While Keyworth's assessments contained no tools specifically designed to measure the adverse impact of depression or anxiety on Student's education, Dr. Smith's IEE utilized a variety of assessments designed to measure Student's emotional and behavioral status, including a developmental and social history, an analysis of Dr. Zallen's medical statement provided as part of the initial evaluation of Student, and several behavior rating scales for Student. The only element required by OAR 581-015-2145 is a

classroom observation, which cannot be held to invalidate the IEE where such observation is impossible due to non-attendance. On the whole, I find Dr. Smith's IEE to be far more comprehensive and well-reasoned than Keyworth's report of April 29, 2016. Of note is the fact that Dr. Smith's comprehensive evaluation of the Student revealed that a significant amount of his/her anxiety is caused by obsessive-compulsive disorder, something the District may have discovered had Keyworth selected appropriate measurement tools for Student.

Dr. Smith's IEE demonstrates that Student displays inappropriate types of behavior or feelings under normal circumstances including, self-harm, school avoidance, and panic attacks as a result of his/her anxiety, a general pervasive mood of unhappiness or depression as evidenced by his/her diagnosis of major depressive disorder, and that Student has a tendency to develop physical symptoms, or fears associated with personal, or school problems, including nausea, vomiting, and fears about school attendance. Further, Dr. Smith's IEE demonstrates that Student has experienced such symptoms over an extended period of time (at least two years) and to a marked degree. Accordingly, the evidence demonstrates Student meets at least three of the criteria for eligibility set forth in OAR 581-015-2145(2). For eligibility under the category of ED, Student need only meet one category.

While it is difficult to measure the adverse impact of the Student's absences and mental health disorders on the his/her academic performance due to his/her absence from school during the period in issue, the standardized assessments performed by Keyworth and Dr. Smith indicate that the Student's performance in math was below both grade and age level and not otherwise in line with his/her cognitive ability. In areas of math fluency, the Student's progress was stagnant over the 18 month between assessments. These testing results may be reasonably interpreted as evidence that Student's disabilities, whether directly or because of absence from the classroom, had an adverse impact on his/her educational performance.

The evidence at hearing demonstrates that Student's emotional disabilities prevent him/her from attending school within the District and have done so since the 2015/2016 school year. This inability to attend school results in a complete inability of Student to access his/her education. As such, I find Student has suffered adverse impact on his/her educational performance as a result of his/her depression, anxiety, and panic attacks.

Finally, despite disagreements among team members, the evidence demonstrates that Student requires SDI in the areas of affective regulation and modulation and cognitive coping and processing, at the very least. The evidence at hearing demonstrates that accommodations are insufficient to teach Student to skills necessary to cope with and overcome the paralyzing anxiety that prevents him/her from attending school within the District. The District erred in finding Student was ineligible for special education and related services.

Next, it must be considered whether Student qualifies for special education and related services under the category of TBI. This analysis is complicated by the passage of time between Student's concussion and the District's evaluation of Student. This complication is underscored by the fact that Parents were unable to find a medical provider willing to perform an IEE in this area due to the passage of time. Nonetheless, this order is based on the best evidence in the record.

OAR 581-015-2175 provides eligibility criteria for the category of traumatic brain injury and reads, in pertinent part:

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

(a) Medical or health assessment statement. A medical statement or a health assessment statement indicating that an event may have resulted in a traumatic brain injury as defined in subsection (2)(A);

(b) Psychological assessment. A comprehensive psychological assessment using a battery of instruments intended to identify deficits associated with a traumatic brain injury administered by a licensed school psychologist, a psychologist licensed by a State Board of Psychological Examiners, or other individuals who have the training and experience to administer and interpret the tests within the battery;

(c) Other.

(A) Other assessments including, but not limited to, motor assessments if the child exhibits motor impairments; communication assessments if the child exhibits communication disorders; and psychosocial assessments if the child exhibits changed behavior. These assessments must be completed by educators knowledgeable in the specific area being assessed;

(B) Other information relating to the child's suspected disability, including pre-injury performance and a current measure of adaptive ability;

(C) An observation in the classroom and in at least one other setting;

(D) 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

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

(2) To be eligible as a child with a traumatic brain injury, the child must meet all of the following minimum criteria:

(a) The child has an acquired injury to the brain caused by an external physical force;

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

(c) The child's injury results in an impairment of one or more of the following areas:

(A) Communication;

(B) Behavior;

(C) Cognition, memory, attention, abstract thinking, judgment, problem-solving, reasoning, and/or information processing;

(D) Sensory, perceptual, motor and/or physical abilities.

(3) For a child to be eligible for special education services as a child with a traumatic brain injury, 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.

As the evaluator for the District, Keyworth or another licensed psychologist, was required to conduct a "comprehensive psychological assessment using a battery of instruments intended to identify deficits associated with a traumatic brain injury." Nonetheless, as discussed above, Keyworth elected to perform no assessment to gauge the possible impact of Student's concussion on his/her education. The evidence in the record shows Student suffered an acquired injury to the brain caused by an external physical force when he/she lost consciousness during a panic attack at school and struck his/her head on a wall. The evidence also demonstrates that, at the time of the eligibility team meeting and eligibility determination meeting in February 2016, Student's condition was expected to last for more than 60 calendar days. In addition, the evidence demonstrates Student's injury resulted in impairments to his/her behavior by increasing his/her anxiety and fear of school and to his/her physical abilities because he/she suffered prolonged dizziness, nausea, and vomiting as a result of the concussion. Finally, the evidence shows Student's concussion had an adverse impact on his/her educational performance because it interfered with his/her ability to attend school for an extended period. The remaining question of whether Student needs special education services as a result of the disability is more difficult due to the District's failure to address Student's concussion. Nonetheless, based on the evidence in the record that Student's anxiety and panic attacks required SDI, and that Student's concussion exacerbated his/her anxiety and panic attacks, it is not unreasonable to infer from the evidence that Student required SDI for his/her disability. Accordingly, Parents have demonstrated that Student meets all necessary criteria for TBI presented in OAR 581-015-2175(2) and (3).

The District's decisions with regard to Student's evaluations denied Student an IEP

designed to meet the unique needs of Student and as such denied Student a FAPE during the period in issue.

2. *Adequacy of the District's prior written notice(s).*

A school district must provide written prior notice (PWN) to the parents of a child whenever the school district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. 20 U.S.C. §1415(b)(3); 34 C.F.R. §300.503(a), OAR 581-015-2310.

OAR 581-015-2310 provides requirements for timing and contents of a prior written notice from a school district and provides, 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 * * * 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.

(Emphasis added.)

The procedures relating to PWN are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to those decisions. *C.H. v. Cape Henlopen School Dist.*, 606 F.3d 59, 70 (3rd Cir. 2010). Parents contend that the District failed to provide prior written notice when it refused to evaluate the Student for other known or suspected disabilities, including TBI and ED. On May 6, 2016, the District provided the Parents with a PWN of the eligibility team decision. The action described on the PWN was noted: "The Evaluation Team has found that (Student) is not a child with a disability as defined in the IDEA within the categories of: An Autism Spectrum Disorder or an Other Health Impairment." *Id.* Under the description of evaluation procedures, assessments, records, or reports used as a basis for the proposed or refused action, the District listed, "[r]eferral information, input from teachers and parent, assessment results and available records." *Id.*

The Parents challenge the adequacy of the contents of the PWN provided by the District because they allege the PWN did not fulfill the duty of the District to provide sufficient information as to the reason Student's identified disability did not warrant special education despite having an adverse effect on his/her education. In addition, the Parents assert that the District was required to provide a full description of the assessments used to make an eligibility determination under Other Health Impairment. Parents argue the District did not list the Medical Statement that was provided by Dr. Zallen, leading the Parents to suspect that Dr. Zallen's diagnoses were disregarded by the eligibility determination team. Further, Parents argue the District did not provide them with PWN regarding its decision not to evaluate the Student in the areas of ED and TBI, despite receiving sufficient notice before the May 6, 2016 eligibility meeting to suspect the Student had disabilities in both areas. In this instance, I do not agree with Parents.

Parents' arguments regarding the PWN issued by the District assumes that District personnel made conscious decisions not to evaluate Student in certain areas of disability. This order stops short of drawing such conclusions. Instead, the evidence in the record demonstrates the District failed to perform certain evaluations, but did not consciously reject the eligibility categories argued for by Parents at hearing. The deficiency appears to be the result of a lack of understanding of their obligations under the IDEA, rather than a conscious decision by District personnel to reject categories of eligibility proposed by Parents. I find the PWNs, as drafted, contained the necessary information regarding the team's decisions to evaluate Student in the areas of OHI and ASD and, ultimately, the team's rejection of Student's eligibility under those categories. The fact that certain documents were omitted from the PWN speaks more to the District's failure to properly consider those documents in the evaluation and eligibility determination process, rather than deficiencies in the PWN itself.

3. 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). Hearing officers in special education cases have similar broad equitable powers. *Forest Grove School Dist. v. T.A.*, 557 U.S. 230 (2009). In determining the equitable remedy, the hearing officer 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).

Parents request that the ALJ use this equitable authority to overturn the District's determination that the Student's emotional disturbance disabilities did not adversely impact his/her educational performance, and that he/she was thus not in need of specially designed instruction and related services. As addressed more fully above, that request has been granted and the District's determination of eligibility in the categories of ED and TBI is superseded by this order

In addition, Parents seek compensatory education for the period Student was unable to attend school during the period in issue. The purpose of compensatory education is to place the Student where he/she would have been but for the denial of FAPE. The specific services provided must be tailored to the student's needs. The District's failure to properly evaluate the student and thereafter provide an appropriate education resulted in the Student's absence from the educational environment for approximately six months during the 2015-2016 school year and eight months during the 2016- 2017 school year. Parents assert that, in order for the Student to be returned to the position he/she reasonably would have occupied had the District identified him/her as a student eligible for special education, the District must provide a compensatory education scheme that allows for the recovery of academic credit and the provision of specially designed instruction and related services. Parents ask that such a scheme include:

- Tuition or tuition reimbursement at public and private schools, including any online school, charter school, and institutions of higher learning for the equivalent of the time the Student was unable to attend general education classes in French language, French culture and language arts, history, science, algebra, geometry, musical instruction, choir, theater, physical education, and health. If the Student is not able to find an appropriate class, course, or program, the District shall provide reimbursement for 200 hours of tutoring in the subjects by a qualified, private tutor, accredited in the area of study and approved by Parents.
- Provisions for an aide to accompany the Student to classes should the IEP team include such an accommodation in the Student's IEP.
- Provision of specially designed instruction in the areas of Student need as determined by the IEP team such that would place the Student in the position he/she would have occupied but for the failure to determine eligibility and provide instruction and services.

- Appropriate technology necessary to access online or in-person coursework, including desktop and/or laptop computer, modem, printer, and internet access.
- Textbooks and software required for credit recovery coursework and special education instruction; and
- Transportation to and from any compensatory education classes, tutoring or programs.

(Complaint at 1 and 2.)

As discussed above, Parents bear the burden of proof to demonstrate the appropriateness of each remedy requested. Unfortunately, the record is devoid of evidence to support the majority of Parents' requested remedies, including compensatory education and tuition reimbursement. The record lacks any evidence upon which to calculate or craft compensatory education. Likewise, the record is bereft of any evidence indicating the amount Parents have expended on outside educational providers. Thus, there is no basis upon which to calculate tuition reimbursement. Nonetheless, based on the deficiencies on the evaluation and eligibility determination processes, the record is sufficient to allow this tribunal to order certain remedies designed to provide Student a FAPE.

According to the evidence in the record, Student should have been evaluated and found eligible for special education and related services under the eligibility categories of ED and TBI. Accordingly, the District should have convened an IEP meeting for Student sometime in the 2015/2016 school year. The District's failure to do so denied Student a FAPE and must now be remedied. As such, the District is hereby ordered to convene an independently facilitated IEP meeting within 30 days of this order to draft an appropriate IEP, with SDI and related services, for Student in the area of ED. The facilitator shall be one acceptable to both parties, not under contract with the District, 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(s) to meet and select a neutral third party facilitator. Further, the facilitator will consider whether the adverse impact of Student's TBI is capable of redress through the IEP and, if so, shall include appropriate SDI for Student in that area.

Based on the evidence at hearing, the District would also be well advised to consider all other areas of suspected disability identified in the medical records and/or IEE provided by Dr. Smith.

4. Conclusion.

In conclusion, I find the District did failed to properly and timely evaluate Student in all areas of suspected disability and failed to find Student eligible for special education and related services in the areas of emotional disturbance and traumatic brain injury. Further, I find these failures denied Student a FAPE during the period in issue.

ORDER

The District denied Student a FAPE during the 2015/2016 and 2016/2017 school years by failing to properly and timely evaluate Student in all areas of suspected disability. By this order, Student is deemed eligible for special education and related services in the areas of emotional disturbance and traumatic brain injury. The District is ordered to convene an independently facilitated IEP meeting within 30 days of this order to draft an appropriate IEP, with SDI and related services, for Student in the area of emotional disturbance and traumatic brain injury.

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 1st day of March, 2018, with copies mailed to:

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