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

IN THE MATTER OF	)	**FINAL ORDER**
	)	
Student and Salem-Keizer School District	)	Case No: DP 08-110
	)	

HISTORY OF THE CASE

On April 9, 2008, Student's parent (Parent) filed with the Superintendent of Public Instruction a complaint and a request for a due process hearing under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1487, or Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (§ 504).

On April 24, 2008, the Salem-Keizer School District (District) filed a challenge to the sufficiency of Parent's complaint. On April 28, 2008 an Order was issued finding the complaint sufficient.

On June 2, 2008 the District filed a Motion for Summary Determination. Parent's Response was due June 20, 2008. On June 19, 2008 Parent requested an extension for the response to July 30, 2008. That request was granted on June 20, 2008. Parent's Response to the Motion was received on July 30, 2008. On August 19, 2008 an Order on the District's Motion for Summary Judgment was issued.

On November 3 and 14, 2008, Parent filed motions to compel discovery. Pre-hearing conferences to discuss, among other things, those discovery requests, were held on November 14 and 19, 2008. On November 25, 2008, a Ruling was issued on those motions.

On December 6, 2008, prior to the December 8, 2008 commencement of the hearing in this matter, Parent filed "Motions for Reconsideration in Response to Various Orders of the ALJ." The District submitted a response to those motions on December 19, 2008 to which Parent responded later that day. On January 13, 2009 an Order was issued on Parent's motions of December 6, 2008.

On January 20, 2009 the parent submitted 5 additional motions. On January 26, 2009 an Order was issued on those motions of January 20, 2009.

The hearing was initially scheduled for September 15-19, 2008, the due date for the Final Order having been extended at the parties' joint request. At Parent's request, the hearing was rescheduled to December 8-12, 2008, with the Final Order due date as February 9, 2008.

The hearing was held at Office of Administrative Hearings facilities in Salem, Oregon before Administrative Law Judge Darrell D. Walker on December 8 through 12, 2008 and, at Parent's request, continued on January 27 through 30, 2009. At Parent's request, the hearing was continued by teleconference on February 10, 2009. At the close of the hearing on February 10, 2009, at the

joint request of the parties, April 7, 2009 was set as the due date for the post mark on any closing brief and the Final Order due date was extended to May 4, 2009. Pursuant to Parent's subsequent requests, the due date for closing briefs was ultimately extended to May 18, 2009, with the Final Order due date extended to July 7, 2009. The ALJ transmitted a question to the Oregon Department of Education (Department or ODE) on May 27, 2009. The Department responded on June 19, 2009. The District submitted its argument, with Exhibit 1, to the Department's response on June 26, 2009. Parent submitted a response, with Exhibits A through K, on June 29, 2009. On July 6, 2009 the District moved to strike Exhibits E through K of Parent's response. That motion was denied on July 7, 2009. The Final Order due date was moved to July 29, 2007 upon the ALJ's own motion due to an unexpected family medical occurrence.

Jeris Clark was the court reporter.

Parent appeared, gave testimony, and represented his/herself and Student. The following witnesses were called by Parent and gave testimony

Jay Lucker, Ph.D., Associate Professor, Howard University.
Deanne Bass, Special Education Teacher.
Sandra Husk, Ph.D., District Superintendent.
Kathryn Nove, District Director of Employee Relations.
Louisa Moats, Ph.D., Educational consultant.
Kay Baker, Ph.D., former District Superintendent.
Kelly Evans, Student Services Coordinator.
Margaret Kay, Ed.D. School Psychologist.
Mary Hinson, M.S., Assistive Technology Specialist.
Charles Haynes, Ed.D., Associate Professor, MGH Institute of Health Professions.
Joseph Torgesen, Ph.D., Emeritus Professor, Florida State University.
Jan Hasbrouck, Ph.D., Educational Consultant.
Nancy Bryant, Ph.D., Psychologist.

Ruth Gelbrich, Director of Student Services, was present on behalf of the District throughout the hearing. Mark Comstock represented the District. The following witnesses were called by the District and gave testimony:

Shawna Moran, Reading Specialist and Reading Coach.
Linda Felber, District Coordinator for the Student Services Department, Special Education.
Jennifer Hale, Classroom Teacher.
Betty Madsen, Special Education Program Assistant.
John Hanks, Speech and Language Pathologist.
Sophia Brundige, Speech and Language Pathologist.
Ken Zegar, Testing Specialist.
Lowell Smith, Ph.D., School Psychologist.
Peter Carey, Ph.D., Licensed Clinical Psychologist.
Stephanie Martin, Ph.D., Audiologist and Speech and Language Pathologist.
Carol Blea, Speech and Language Pathologist.
Amanda Smith, Ph.D., District Special Education Coordinator,
Salia Wilson, Student Dispute Resolution Coordinator,

Deanne Bass, District Special Education Teacher

ISSUES

I. Shall the remaining allegations of parent's complaint dealing with acts or omissions occurring prior to April 9, 2006 be dismissed?

II. Did the District:

A. Retaliate against Parent for protected activities or otherwise attempt to inhibit Parent's participation in the IDEA processes or exhibit animus against Parent,

B. During the 2006 Individualized Education Plan (IEP) and eligibility process:

1. Fail to provide a timely eligibility decision,

2. Fail to have appropriate participants at the meetings,

3. Fail to conduct and adequately interpret necessary and appropriate evaluations,

4. Fail to allow adequate participation by Parent or Parent's expert,

5. Incorrectly identify Student as not eligible for special education and related services, or

6. Fail to properly implement the interim IEP,

C. Violate the IDEA's stay-put provision during the *Student I* proceedings[1],

D. Fail to adequately respond to Parent's August 7, 2006 request for an Independent Educational Evaluation (IEE),

E. Fail to provide adequate Prior Written Notices (PWNs) on May 1 and May 26, 2006 or April 30, May 3, May 24, June 13, June 15, and June 29, 2007,

F. Fail to implement the final order in *Student I,* and/or

G. During the 2007 eligibility determination process:

1. Fail to have appropriate participants at the meetings,

2. Fail to conduct and adequately consider necessary and appropriate evaluations,

3. Fail to allow adequate participation by Parent or Parent's attorney, or

[1] Parent requested a due process hearing on May 1, 2006. That matter resulted in a Final Order in February 2007. *See*, e.g., Finding #42, below.

4. Incorrectly identify Student as not eligible for special education and related services, and

H. And, if so, what remedy(ies) should be awarded?

EVIDENTIARY RULINGS

Exhibits D1 through D108 and 1 were admitted without objection.

Exhibits ALJ1 and ALJ2 were admitted without objection.

The following exhibits were admitted without objection: Exhibits P1 through P5,P7 through P10, P13 through P20, P22 through P52, P59 through P70, P71 through P86, P89 through P93, P95 through P96, P98 through P99, P101 through P104, P106 through P108, P110 through P111, P113 through P115, P119 through P125, P127 through P157, P159 through P160, P162 through P164, P166 through P171, P173, through P191, P193 through P194, P197, P202, P211, P220 through P233, P238 through P241, P257, P291, P293, P296 through P297, P303, P307, P311, and A through D.

The following exhibits were admitted over the District's objections: P6, P21, P58, P71, P88, P117, P158, P192, P195 (without pages 4&5 which were excluded), P196, P199, P200, P203 through P208, P210, P214(only those portions on pp5-6 labeled "language samples"), P218, P236(pp 8-16 only), P237, P246, P251 through 256, P270, P273 through P274, P281, P283 through P285, P286 (pp5-6, 34, 41, 48-49, 162,163, 169-172, 178, 180, 182, 184-186, 211-215, and 247 only), P287 through P288, , P290(pp3-4 only), P292 P294, P296, P300[2], P328, and E through K. Exhibit P234 is now admitted over the District's objections.

The following exhibits were excluded upon the District's objections: P11, P12, P53, P54 through P57, P87, P74, P97, P100, P105, P109, P112, P116, P118, P126, P161, P165, P172, P198, P201, P209, P212 through P213, P215 through P217, P219, P242, P248, P271 through P272, P275 through P280, P282, P289, P292(only those portions on pp5-6 labeled "language samples"), P295, P302, P304 through P306, P308 through P310, and P312 through P327. Exhibit P301 is now excluded upon the District's objections.

FINDINGS OF FACT

(1) In 2000 Student entered kindergarten in the District at age 5. Student's teacher and Parent thought Student was immature for his/her age. Parent chose to retain Student in kindergarten. When Student's second year of kindergarten began in 2001, Student was not happy and Parent thought the class was less structured than it should be. Parent removed Student after approximately three weeks. That was Student's last participation in regular education in the District. Parent home schooled Student for the rest of Student's 2nd year of kindergarten (2001-02) and for the first grade (2002-03). (Testimony of Parent, T1702-03.)

(2) Parent has a bachelor of science degree in education and is a licensed Oregon teacher

[2] On the disk labeled, "June 2007 IEP meetings," in Exhibit P300, the file labeled "June 8 pt. 3" is really Part 4 of that meeting and "June 8 pt. 4" is really Part 3 of that meeting.

for pre-primary through grade 9. Parent is well read and conversant in the subjects of the learning disabilities and communication disorders which may affect Student. Parent has spoken at length with a score or more experts in those fields. Parent believes s/he should qualify as an expert witness in those fields. (Testimony of Parent, T1798.)

(3) While home schooling Student during the 2002-03 school year, Parent became concerned about Student's development. In March 2003 Parent asked the District to conduct testing of Student. The District evaluated Student, then age 7, for special education eligibility in May 2003. Wechsler Intelligence Scale for Children – Third Edition (WISC-III) testing showed Student to have an overall IQ of 104, strong average abilities. Achievement testing showed Student to have some reading and writing skills severely discrepant with his/her tested abilities, i.e., some achievement scores were more than one and one-half standard deviations below the IQ score. Student was found eligible for special education as a child with specific learning disabilities (SLD) in the areas of written expression and reading comprehension. An Individualized Education Program (IEP) was developed in June 2003. (Testimony of Parent, T 1703-05, Exhibit D71, D108 at 7, ALJ1.)

(4) Student's June 2003 IEP for reading and writing was to be implemented in a Learning Resource Center (LRC) classroom in District School A for one hour per day, four days per week. Parent home schooled Student for the remainder of each school day. In the fall of 2003, at the beginning of what would be normally be Student's 2nd grade (3rd grade if s/he had not been held back for a second year of kindergarten) Student expressed reluctance to go to school to receive special education services. Student cried when Parent left Student at school. Parent would not leave Student crying. Parent remained at school in the classroom while Student was in class. Parent observed some teaching methods and personal characteristics of the special education teacher Parent did not believe were helping Student. Parent sent the teacher an e-mail detailing her concerns about the teacher's writing style, vowel pronunciation (e.g., allegedly saying "wint" rather than "went"), and clarity of writing assignments.

(5) During the same brief period, Student's special education teacher perceived that Student was "different" when Student was aware of Parent's presence, tensing up whenever Student saw or heard Parent. The teacher reported this to the principal who, after Student had been in attendance for a total of ten hours, told Parent that Parent could no longer be in the classroom with Student. Parent responded by pulling Student from the school and, on September 23, 2003, sending the teacher a four-page, single-spaced e-mail in which Parent, among other things, stated, "Ms. Bass, the [Student] you see is totally different than the [Student] at home who exhibits symptoms of ADHD most of the time." (Testimony of Parent, T1706-0, Testimony of Ms. Bass, T925-26, Exhibit P328.)

(6) In October 2003, Parent had Student evaluated by the Easter Seals Children's Guild (Guild). The Guild evaluation noted "moderate disorders in receptive and expressive language" and auditory perceptual skills within normal limits. The receptive and expressive language standard scores, 82 and 75, were in the moderately disordered range, 22 and 29 points below Student's May 2003 WISC-III overall IQ standard score of 104. The evaluation also noted, "[Student] had difficulty separating from [Parent] for the first hour;" and recommended mental health services to assess Student's difficulty separating from Parent in various settings as reported by Parent. (Exhibit P121.)

(7) In October 2003 Parent contacted an administrator in the District and asked about other possible elementary schools at which Student's IEP special education services could be implemented. The administrator recommended School B. In October 2003 Student began attending

School B's LRC one hour per day, four days per week for his/her special education services.

(8) Sometime during October through December 2003, Student's IEP was amended based upon additional evaluations obtained by the District.[3] The amended IEP added 40 minutes per week of speech and language therapy to Student's special education services at School B. Student was ill and his/her attendance was sporadic at School B. Parent was allowed to accompany Student to the classroom each day but would usually then wait across the hall while Student received services. Sometimes parent would remain in the classroom. (Testimony of Parent T1708-12, 1872-76; ALJ1.)

(9) In February 2004, Parent had Student undergo an auditory processing evaluation by Denise Kossover-Wechter, an audiologist. Student's performance suggested "areas of difficulty on tasks involving attention, sequencing, temporal patterning, speech in noise, dichotic listening, and memory." The evaluator opined that the Student's low scores may not be a product of Student's auditory processing alone and that evidence of difficulty across most areas tested raised suspicions of "something larger than auditory processing disorders, i.e., something more global involving higher-level cognitive functioning ***." Parent disagreed with the evaluation and did not share the evaluation with the District. (Exhibit P239, pp 26-33.) During the Kossover-Wechter evaluation Parent insisted upon accompanying and remaining with Student in the sound booth, contrary to testing protocols and the audiologist's instructions. (Exhibits D46, pp 46-47, P239, p 26.)

(10) Parent and the District developed irreconcilable differences during the April 2004 IEP process. Parent did not believe the resulting IEP was properly developed or adequate for Student. Among other things, the new IEP provided that Parent could not accompany Student into the school. That April 30, 2004 IEP expired in May 2005. (Testimony of Parent, T1716-18.)

(11) Parent is quite concerned with Student's education and has had many questions and strongly held notions about Student's educational needs, the IDEA, and Student's IEP. Parent is quick to comment at great length in writing and in person to Student's teachers, service providers, and school administrators about those notions and to ask numerous detailed questions and make multiple, convoluted requests/demands within days of each other of those persons about those subjects. Some District staff found Parent's barrage of comments and queries to be inefficient and a burden on their scarce time. Some staff found that responding to the comments and queries was often counterproductive. Some time between November 2003 and April 2004, the District assigned Parent a "single point of contact," Ms. Wilson, to whom Parent was to address all comments and queries. Parent was, and remains, appalled that s/he was "cut off" from Student's special education providers. (Testimony of Parent, T1716-18, Testimony of Wilson, T825; Exhibits D77, P12, P13, ALJ-1.)

(12) After April 30, 2004, although school was available to Student through June 6, 2004, Student attended only 7 more days. (Testimony of Parent, T1717-18; Exhibit ALJ-1, FF#149.)

(13) On or about June 9, 2004, Parent had an appointment with Ms. Wilson to review Student's educational records. During that appointment, Ms. Wilson believed that Parent was writing on the records and asked parent to cease. Parent may have refused to cease. The District called the police. Parent left before the police arrived. (Exhibit P12.)

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[3] Parent was not cooperative in this process - sharing only redacted portions of privately obtained evaluations, attempting to control testing conditions by the District, and canceling meetings. (Exhibit D77.)

(14) Parent continued to home school Student throughout the 2004-05 school year. Student was chronologically at least at the 3rd grade level at that time. Parent instructed Student at the first grade level using a reading program purchased at the recommendation of University of Oregon staff. Parent refused services from the District for Student offered under the April 2004 IEP. (Testimony of Parent, T1714-16; Exhibit D6.)

(15) In September 2005, Parent wished to enroll Student in School C, a charter school in another school district in a nearby city. The highest grade-level available in School C at that time was 3rd grade in a 2nd – 3rd grade combined classroom. Parent enrolled Student in that classroom although Student was at that time at least of 4th grade age (5th grade age if one considers the two years of kindergarten.) Although Student was classified as a 3rd grade student, Student was instructed in a 2nd grade level reading program through the first semester. Student was then advanced to a 3rd grade reading program. Student began the year in a 3rd grade math program, went to a 2nd grade math program in the second 9 weeks, and back to the 3rd grade math program for the second semester. Even when the teacher intended to instruct Student at the 3rd grade level most of the instruction to the class was at the 2nd grade level because the majority of the class was 2nd graders. (Exhibits D7, D8, P-300; Testimony of Hale, T249-54, 375-76.)

(16) The District had had no contact with Student since May 2004. On December 7, 2005, School C submitted a request to the District for Student's educational records. Ms. Felber, the District's coordinator of Student Services and the administrator assigned to Parent, learned of the records request and telephoned Parent on January 10, 2006 and reiterated the District's continuing position that it was ready, willing and able to provide special education services to Student. Parent responded that s/he might be interested but wished to first speak with School C staff, after which s/he would get back to Ms. Felber.

(17) On February 9, 2006, Ms. Felber wrote Parent confirming the District's position, reminding Parent of their January 10th conversation, and enclosing an IDEA parental rights and procedural safeguards pamphlet. (Exhibit D6.)

(18) On February 16, 2006 Parent e-mailed Ms. Felber requesting an IEP meeting, the immediate initiation of speech and language pathology (SLP) services for Student, an interim IEP for SLP services, the administration to Student of the Leiter International Performance Scale-Revised (Leiter-R) non-verbal intelligence assessment, and the following speech and language assessments: Comprehensive Assessment of Spoken Language (CASL), the Clinical Evaluation of Language Fundamentals (CELF), the Test of Word-Finding (TWF-2), and the Comprehensive Test of Phonological Processing (CTOPP); the invitation of six specified persons to the IEP meetings, the commencement of the triennial evaluation process, several specific testing conditions, that the IEP meeting be two hours long beginning at 4:00 p.m., and other things. (Exhibit P1, P2, P3; Testimony of Ms. Felber, T1096-1106.)

(19) An IEP meeting was held on April 3, 2006. Attending the meeting were: Parent; Ms. Hale, Student's classroom teacher and the assistant administrator at School C; the director of School C; the superintendent of School C's school district; Ms. Brundidge, a speech and language pathologist for the ESD serving School C; Mr. Hanks, speech and language pathologist for the District; Ms. Bass, Student's former special education teacher; Ms. Madsen, whose stated role was District representative and facilitator, who signed the IEP as District representative, and who functioned as facilitator and scrivener; and Ms. Felber, a District administrator whose stated role

was "to answer questions and provide guidance," and who functioned as the de facto District representative. In Parent's February 16, 2006 e-mail, Parent had mentioned Debbie King as some one who should be at the meeting. Ms. Felber had invited Ms. King, Ms. Brundidge's supervisor, but Ms. King declined to attend. (Exhibits D21, P300, Testimony of Felber, T 1107.)

(20) Ms. Hale has a teaching license with no special education endorsement. She has taught at least eight years in elementary schools. (Testimony of Hale, T339-40.)

(21) Mr. Hanks is a licensed speech and language pathologist in Oregon. He has a teaching license with a communication disorder endorsement and an administrator license. He has an undergraduate degree in communication disorders and a master's degree in education and has completed all requirements other than his thesis for a graduate degree in communication disorders. Mr. Hanks has received his certificate of clinical competence from the American Speech-Language-Hearing Association. He has ten years experience as a speech and language pathologist for the District. (Testimony of Hanks, T459-60.)

(22) Ms. Brundidge is a licensed speech and language pathologist in Oregon. She has her bachelor's and master's degrees plus some 30 hours credit toward her doctorate. She has twenty-eight years experience as a speech and language pathologist with the ESD serving school C. Ms. Brundidge participated fully in the IEP meeting, including answering Parent's questions. (Exhibit P300; Testimony of Brundidge, T497-500.)

(23) Ms. Bass has a standard teaching license with an endorsement in health education and an endorsement for handicap learner, pre-primary through grade 12. She has a master's degree in education. She teaches learning disabled students in a learning resource classroom (LRC). She has taught for fifteen years. (Testimony of Bass, T921-22, 953.)

(24) At the beginning of the April 3, 2006 IEP meeting, Parent announced that s/he was concerned that they had only two hours for the meeting and s/he wished an interim IEP to be finalized that day dealing with communication services as well as a plan for testing and assessments to develop a final IEP. District staff agreed and explained that assessment and testing were necessary for the three-year eligibility re-evaluation, due for completion by at least June 2006. (Exhibits D21, P300.)

(25) An interim IEP was developed for the period of April 6 though June 15, 2006. It provided for 100 minutes per month of specially designed instruction in communication to be provided in the regular classroom, including resource room. The IEP contained a Present Level of Achievement and Functional Performance Statement and had four goals with evaluation criteria and measurable criteria. Parent stated that s/he was comfortable with the IEP, knowing that it was an interim IEP which would be replaced with a final IEP. The goals were based upon Parent's and Ms. Hale's reports to the rest of team of Student's communication deficits and needs. The goals each provided that Student would "verbally express" a particular language construct or concept with a specific degree of accuracy. (Exhibits D21, P300.)

(26) The IEP specified that Student's placement would be instruction in the regular classroom with instruction and supports provided in a resource room for less than 20% of the student's day. (Exhibit D21.)

(27) Mr. Hanks opined that 25 minutes per week of services was in the mid-range of what

was allocated to children with similar deficits and needs and, without any recent data other than anecdotal, that amount of services should be considered the minimum necessary for Student and would seem reasonable for an interim IEP pending completion of a full evaluation. Parent seemed agreeable, and the rest of the team agreed. (Exhibits D21, P300.)

(28) Parent signed the interim IEP, adding a written disclaimer that s/he disagreed that 100 minutes of service would be sufficient. When other team members noticed the disclaimer and asked him/her what the objection was about, s/he stated that s/he disagreed with the amount of services but was nevertheless agreeing with the IEP because it was only an interim one. As Parent was signing the IEP, the team began discussion of the needed assessment to complete the three-year evaluation and to develop a final IEP. (Exhibit P300.)

(29) Mr. Hanks and Ms. Brundidge were not very familiar with the CTOPP. Mr. Hanks opined that he was quite familiar with the CELF and CASL which he thought were excellent comprehensive speech and language assessments which together would be adequate to help determine Student's eligibility and Student's IEP requirements. Parent was adamant that the CTOPP and TWF-2 also needed to be administered to Student. Mr. Hanks opined that there were better assessment instruments than the TWF-2 , that the TWF-2 was unnecessary if the CASL and CELF were also being administered, but that adding the TWF-2 would not hurt. He opined that the CTOPP was likewise unnecessary if the CASL and CELF were given, that Student might be "over-tested" if all requested tests were administered, and if the CTOPP were decided upon they would likely have to go outside of the District's pool of testers to have it done. After some discussion, Ms. Felber decided the issue on behalf of the District for the time being – the CELF, CASL, and TWF-2 would be administered and the CTOPP question could be revisited when, and if, a final IEP was developed. (Testimony of Hanks, T463-67; Exhibit P300.)

(30) The team agreed, for intelligence assessment, to administer the Leiter-R and WISC-IV to Student, and, for achievement assessment, to administer the Woodcock-Johnson III tests of achievement (WJ-III) to Student. Parent told the team that s/he thought the Leiter-R was superior for assessing Student because it is a completely non-verbal intelligence assessment and that the Leiter-R alone would be sufficient, but s/he agreed to all as long as the Leiter-R was administered before the other two assessments. The team agreed. Parent signed a form entitled, "Prior Notice About Evaluation/Consent to Evaluation." That form had, among other things, the box for "reevaluation" checked and not the box for "initial evaluation." It also had the box checked beside the statement, "This evaluation will include intelligence or personality testing. The form specified that the WISC IV and Leiter-R would be the intelligence assessments used. (Exhibits D17, D21, P22, P300.).

(31) At the close of the April 3, 2006 meeting Parent requested that, if the assessments were going to take longer than three weeks, another IEP meeting to develop an interim IEP for reading be scheduled within three weeks. Ms. Felber replied for the District that the assessment process could take up to 60 school days and that no further IEP would be developed until the assessment and eligibility process had been completed. (Exhibits D21, P300.)

(32) *April 9, 2006 – two years prior to the date of request for hearing in this matter.*

(33) On April 10, 2006 Parent sent Ms. Felber a three-page, single-spaced e-mail of demands regarding the conditions of Student's assessment testing, including such minutia as which staff persons (depending on which room in which building *might* be available to conduct a test)

might be allowed to transport Student to an assessment location. In the letter Parent also threatened to withdraw his/her consent to testing if the demands were not met and demanded IDEA prior written notice (PWN) if the District planned not to honor each of his/her requests which were numbered or marked with an asterisk in the e-mail. (Exhibit P25.)

(34) Mr. Hanks had discussed assessment dates of April 12 and 19 with Parent. Parent did not think any date had been confirmed. Mr. Hanks administered the CASL to Student on April 12, 2006. He administered the core tests for Student's age group. Student received standard scores of 98 in antonyms, 94 in syntax construction, 91 in paragraph comprehension, 99 in non-literal language, and 82 in pragmatic judgment. Student's composite standard score was 91, in the normal range, as were all the scores, other than the 82 in pragmatic judgment. The pragmatic judgment portion of the CASL measures the understanding of social language, social language cues, and socially appropriate responses in different situations. (Testimony of Hanks, T468-471 and Dr. Lucker, T105-5.)

(35) Parent e-mailed Ms. Felber on April 13, 21, and 26, 2006. Parent was upset about what s/he believed to be the surprise testing of Student on April 12, had many questions about the April 12th testing and about future testing of Student. Parent demanded a PWN about the CTOPP testing which she had requested during the IEP meeting and which the District had declined to immediately administer. Parent also requested a copy of the District's audio tape (Parent had made his/her own audio tape) of the April 3, 2006 IEP meeting and made several records requests. (Exhibits P27, 28, 29, 32.)

(36) Mr. Zegar has a bachelor's degree with a minor in psychology. He has a master's degree in special education, including coursework in intelligence testing and advanced intelligence testing as recommended by the Leiter-R publisher, has a teaching license for regular and special education, has taught in an LRC in the District for 12 years, and has been a testing specialist for the District for 18 years. One of his specialties within the District is the administration of nonverbal intelligence tests. He administers the Leiter-R to approximately 4 students a year. He administered the Leiter-R to Student on April 14, 2006 between 9:00 and 9:50 a.m. He offered Student two breaks during testing, which Student declined. Student achieved a full-scale I.Q. standard score of 81 and fluid reasoning score of 82. (Testimony of Zegar, T529-33, T549-52; Exhibits D25 and P24.)

(37) On April 14, 2006, from 10:00 to 10:45 a.m., Mr. Zegar administered the WJ-III achievement tests to Student. Scores were normed for Student's age, 10 years 8 months. Student was considered to be in grade 3.7 at School C for baseline purposes. Student had a total achievement standard score of 79, consistent with Student's Leiter-R standard scores of 81 and 82. Student's cluster test standard scores were: Broad Reading 76, Broad Math 92, Broad Written Language 85, Math Calculation Skills 95, Written Expression 96, Academic Skills 83, and Academic Fluency 85. Student's achievement tests standard scores were: Letter-Word Identification 77, Reading Fluency 80, Calculation 96, Math Fluency 94, Spelling 77, Writing Fluency 94, Passage Comprehension 82, Applied Problems 89, and Writing Samples 99. Student's strengths were in math and writing. Student's other achievement scores were consistent with his/her Leiter-R scores. (Exhibit D24, Testimony of Zegar, T532-39.)

(38) Student's reading fluency was at the level of grade 2.6. (Exhibit D-24, pp 2 & 6.)

(39) Dr. Smith is a licensed school psychologist who has been employed as a school

psychologist for approximately twenty-five years, the past nineteen by the District. On April 25, 2006 Dr. Smith administered the WISC-IV to Student. Student obtained a full scale standard IQ score of 86, a verbal comprehension index of 83, a perceptual reasoning index of 100, a written memory index of 91, and a processing speed index of 80. Student's WISC-IV full scale IQ(FSIQ) score of 86 is congruent with Student's Leiter-R standard scores of 81 and 82. The severe discrepancy between the 2003 WISC-III score of 104 and the 2006 WISC-IV and Leiter-R scores is, without any apparent intervening event, unusual. Dr. Smith reviewed all of Student's records, including the 2003 intelligence testing, and completed a summary of assessment on May 12, 2006. (Exhibits D26, D34; Testimony of Dr. Smith, T579-82, 591-95; Dr. Haynes, T1514; and Mr. Zegar, T546.) On the 2006 WISC-IV Student's general ability scale (GAI) score was 91. Some professionals in the field believe the GAI rather than the FSIQ should be used for discrepancy finding purposes, if the FSIQ and GAI score difference is statistically significant.. Others do not. (Testimony of Dr. Kay T1352 and Dr. Carey, T1989.) The five point difference between Student's 2006 WISC-IV FSIQ and GAI was not statistically significant. (Exhibit P-297, p 6.)

(40) The 2006 WISC-IV and Leiter-R scores are an accurate reflection of Student's intellectual ability and consistent with subsequent testing. (Exhibit D108; Testimony of Dr. Carey, T614-617, 6628-635, 1995; Testimony of Dr. Kay, T1403-04; Dr. Torgesen, T1586, 1600-1601; and Dr. Haynes, T1513-1514.)

(41) On May 1, 2006, Ms. Felber replied to Parent's e-mails of April 13, 21, and 26, 2006. Enclosed with Ms. Felber's reply of May 1, 2006 to Parent was a PWN dated May 1, 2006, signed by Ms. Madsen, denying Parent's request for a CTOPP assessment because, "It is supplemental to the [CELF] and [CASL] which are comprehensive and will be administered for the eligibility for speech services as well as the [TWF-2]." The PWN further explained that the option of conducting yet a fourth assessment [the CTOPP] had been rejected because, "the CTOPP is supplemental and three assessments in the area of speech are being administered." (Exhibits P33, P34; Testimony of Felber T294-95.)

(42) On May 1, 2006, Parent filed a request for a due process hearing with Oregon's Superintendent of Public Instruction disputing the provision of FAPE to Student during the 2003-2004 school year under the June 2003 IEP, the offer of FAPE to Student for the 2004-2005 school year under the April 30, 2004 IEP, and the District's response to records requests in 2003-2004. Parent did not raise any issue about any act or omission after the 2004-2005 school year. Nor did Parent make any mention of "stay-put" during the 2006 due process (*Student I)* proceedings. (Exhibit ALJ-1; Testimony of Parent, T1819-20.)

(43) Parent's due process complaints about the 2003 IEP were stricken as untimely by the ALJ in *Student I.* Parent then filed a complaint about the 2003 IEP with the Oregon Department of Education (Department), whose time limit on complaints was three years rather than two. (Exhibit ALJ-1 and D 77.)

(44) Ms. Felber determined that Parent's hearing request did not stay the District's obligation to conduct the triennial reevaluation of Student. (Testimony of Felber, T1267-72.)

(45) Mr. Hanks administered the Clinical Evaluation of Language Fundamentals 3 (CELF) to Student on May 5, 2006. Student had a receptive language score of 82, an expressive language score of 72 and a total, composite score of 75. These scores were comparable to Student's CELF

scores in October 2003 obtained by Parent through the Easter Seals Children's Guild: receptive language – 82, expressive language – 75, and total score – 77. (Exhibits D29, D46, P220.)

(46) On May 9, 2006, Mr. Hanks administered the TWF-2 to Student. Student obtained a standard score of 79, which falls within the 8th percentile and is classed by the test booklet in the "weak" range of scores of 70-80 rather than in the "below average" range of 80-90. (Exhibit D33, Testimony of Hanks, T483-84.)

(47) Ms. Madsen, a licensed teacher with a master's degree in special education and over twenty years teaching experience, observed Student in a small group reading class in School C on May 10, 2006. Ms Madsen observed that Student was on task and behaved appropriately throughout the twenty-five minute observation. Student appeared to be properly placed in the reading program. Ms. Madsen completed an observation report which was considered by the eligibility/IEP team on May 26, 2006. (Exhibit D31, Testimony of Madsen, T395-99, T406-08.)

(48) During the 50 day period of April 6 through May 25, 2006, Ms. Brundidge provided Student 178 minutes of services, 89 minutes in April and 89 minutes in May. Ms. Brundidge periodically probed Student's abilities in the skills covered by the April 3, 2006 IEP's goals, found Student to be more proficient in some skills than had been indicated in the April 3, 2006 IEP meeting, and found Student to be more deficient in some other skills than had been indicated in that meeting. She worked on the skills in which Student was deficient. During the instruction Student was required both to verbally express him/herself and to complete written work sheets. Services were provided in a resource room. (Exhibit D390, Testimony of Brundidge T1470-84.)

(49) Parent e-mailed and telephoned Ms. Felber and Ms. Wilson regarding records requests, file reviews, assessment matters, and IDEA compliance concerns several times during the May 1 through 25 period. They replied to all of Parent's contacts. Parent reviewed Student's records on May 17, 2006 and submitted a written request for copies of certain records. Those were provided on May 19, 2006. (Exhibits P35 through P39, D35; Testimony of Wilson, T824-825 and Parent, T1887-88.)

(50) On May 1, 2006 the District sent Parent a Notice of Team Meeting to be held on May 26, 2006 to determine Student's continuing eligibility for special education and develop an IEP. (Exhibit P41.)

(51) Prior to April 2006, Parent had become a licensed teacher in Oregon, had been placed on the District's substitute teacher list, and had occasionally been employed as a substitute teacher by the District. In March or April 2006 Parent obtained a long-term substitute teaching position with an education service district. In April 2006, Parent telephoned the District's human resources department and informed staff that she would not be available for substitute teaching assignments and should be taken off the list. (Testimony of Parent, T971-2.)

(52) On May 25, 2006 the District's human resources department sent Parent a form letter advising Parent that, "the District will no longer retain your services as a substitute teacher." (Testimony of Nove, T957-71; Exhibit P52.)

(53) Parent invited Dr. Lucker to participate in the May 26, 2006 IEP meeting. Dr. Lucker is certified and licensed both as a speech and language pathologist and as an audiologist. He specializes in central auditory processing deficits and language processing deficits. Dr. Lucker is a

professor at Howard University and has a private practice as an audiologist, consultant, and speaker. He has published numerous articles, including one co-authored with Ms. Kossover-Wechter (*See*, FF#8, above.). (Exhibits P239, P252, and P257; Testimony of Lucker, T96-98, 144-45.)

(54) An eligibility and IEP meeting was held on May 26, 2006. Attending the meeting were: Parent; Ms. Hale, Student's classroom teacher and assistant administrator at School C; the director of School C; Ms. Brundidge, a speech and language pathologist for the ESD serving School C; Mr. Hanks, speech and language pathologist for the District; Ms. Bass, Student's former special education teacher; Mr. Zegar, District testing specialist; Dr. Smith, school psychologist; Amanda Smith, a special education administrator with the District and scrivener for the meeting; Dr. Lucker, who participated by telephone; and Ms. Felber, a District administrator and the District's representative for the meeting. (Exhibits D36 and P300; Testimony of Felber, T 1107.)

(55) By the time of that meeting, Parent had reviewed most, if not all, of the assessments completed since April 3, 2006. As Parent explained toward the close of the May 26 meeting, Parent realized that Student's new, lower IQ scores likely meant that Student did not have the discrepancies between ability and achievement which had previously made Student eligible for special education under Oregon's rules and the District's guidelines. Parent firmly believed that Student's IQ was much closer to 104 than 86. Parent suspected the lower scores might have been assigned by the District as retaliation for Parent's filing for a due process hearing. Parent thoroughly grilled District staff on the testing methodologies used with Student and persistently tried to get a definitive answer as to why there was the significant discrepancy between Student's 2003 and 2006 IQ scores. No one had, or has, a definitive answer, but all participants, with the exception of Parent and Dr. Lucker, at the May 26, 2006 meeting believed the more recent scores to be the more reliable because, among other reasons, they were more recent, they were the results of tests administered when Student was older, and they were consistent with each other. (Exhibits P-300, D-36.)

(56) Throughout the meeting Ms. Felber persisted, despite several remonstrances by Dr. Lucker, in calling split decisions - in which the Parent and Dr. Lucker disagreed with the rest of the team and in which Ms. Felber, as the District's representative, made the ultimate decision – "team decisions[4]." She also occasionally attempted to cut Dr. Lucker off when he was making cogent and relevant comments with a, "We appreciate your point of view." Dr. Lucker raised his voice only once and not unreasonably. Ms. Felber once inexplicably chastised him for his "tone." Nevertheless, both Parent and Dr. Lucker were able to, and did, participate fully in the meeting. (Exhibit P-300.)

(57) The District's criteria in 2006 and 2007 regarding eligibility for special education for a student with a specific learning disability included, among other things:

> A severe discrepancy between ability and achievement. A severe

[4] Perhaps Ms. Felber was conflating the decision making team, which includes the parent(s), with the "group of qualified professionals" who, along with the parent(s), constitute the decision making team. Any member of the group of qualified professionals who disagrees with the ultimate eligibility decision for specific learning disability must file a separate statement presenting his or her conclusions. 300 CFR §§ 300.306 through 300.311. This is has become slightly less confusing with the 2006 regulatory amendments which changed *former* 300 CFR 300.540's "team of qualified professionals" to the current regulations' "group of qualified professionals." *See, Letter to Baglin,* 40 IDELR 127 (2003); 71 FR 46649, August 14, 2006. Ms. Gentili-Ambrust, who facilitated the 2007 meetings discussed below, employed the best practice by continually explaining to the participants that when the team can not reach consensus, the District representative is the decider.

> discrepancy between ability and achievement is determined by the existence of a discrepancy of **1.5** standard deviations (**23 points**) between ability and achievement, i.e., achievement scores must be at least 23 points lower than the full scale IQ score.

(Emphasis in original.)

(Exhibit D2, p. 54.)

(58) The severe discrepancy criterion was in common usage at this time nationally but was the subject of debate in the educational and psychological communities. (E.g., testimony of Dr. Kay, T1387-1390.)

(59) In academic achievement and intelligence testing a "discrepancy" is generally considered to exist between actual scores greater than one standard deviation, 15 points, apart. This is sometimes known as the "simple difference model." (Testimony of Felber, T302; Carey, T1987; Dr. Kay, T1400-01.) However, some in the field believe cognizable discrepancies between ability and achievement scores need to be calculated using regression-toward-the-mean formulas to account for differences in the ability and the achievement tests. Use of such regression results, for example, with Student's 2008 testing by Dr. Kay showed some discrepancies existing with differences between predicted and actual performances on the achievement subtest and composite scores which Dr. Kay considered significant. There is debate within the field as to whether the simple difference model or the regression model is the best. (Testimony of Dr. Kay, T1356, 1400-1402.)

(60) There were no cognizable discrepancies between Student's 2006 academic achievement test scores and his/her 2006, or 2008, WISC-IV FSIQs. (Testimony of Dr. Carey, T619-620, 634-35; Exhibits D24, D26, D108.)

(61) District guidelines addressed the provision of *former* OAR 581-015-0074(4) regarding the reevaluation of eligibility for children identified with a specific learning disability,

> A child identified as having a specific learning disability need only have a "discrepancy" and not necessarily a "severe discrepancy" to continue eligibility.

Those guidelines provided:

> Reevaluation of a student with specific learning disabilities should focus on improvement which has been made during the time special education and related services have been provided, instead of stressing the discrepancy between achievement and intellectual ability. The student's need for continued special education and related service should be evaluated.
>
> At the end of three years, the student no longer may meet the original requirements for eligibility; however, the student still may not be able to successfully manage placement in the regular school program without some special education support.

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(Exhibit D2, p. 19.)

(62) The District reasoned that, because Student had received no special education or services related to specific learning disabilities under any IEP for two years prior to May 2006, a "severe discrepancy," rather than a "discrepancy," between ability and achievement would be necessary for Student to be found eligible upon reevaluation under a specific learning disability category. (Testimony of Felber, T1153-1158.)

(63) The District's criteria in 2006 and 2007 regarding eligibility for special education for a student with a communication disorder required a "significant discrepancy" in morphology, semantics, syntax, or pragmatics, as indicated by standardized tests. "Significant discrepancy" was defined for children 8 years and older as:

> More than one standard deviation discrepancy (16 points) between language performance, as measured by one standardized comprehensive language test and at least one additional standardized test, and overall cognitive functioning. Cognitive functioning is to be measured by a standardized Intelligence Test with preference given to a nonverbal IQ test, such as the UNIT.

(Exhibit D2, p. 54.)

(64) At the conclusion of the May 26, 2006 meeting all participants, other than Parent and Dr. Lucker, concluded that Student was not eligible for special education under either the specific learning disability or communication disorder categories because, using the higher of the 2006 IQ scores, 86, Student had no cognizable discrepancy (greater than 15 points) between IQ and achievement or between IQ and language performance. (Testimony of Felber, T1156-59, Dr. Carey T635; Exhibits P-300, D36, D37, and D38.)

(65) Student had no achievement score more than 15 points lower that the WISC-IV FSIQ score of 86. Student had no achievement score more than 15 points lower than her WISC-IV GAI of 91. (Exhibit D24.)

(66) On June 5, 2006, the District sent Parent a PWN dated May 26, 2006 proposing to "change" Student's "identification," "placement (other than initial placement)" and "provision of a free, appropriate public education." It explained that the "team" had found Student did not meet the eligibility criteria for either Specific Learning Disability or Communication Disorder and would therefore discontinue Student's special education services. The notice cited all the tests, observations, sample materials, and evaluations used by the team on May 26, 2006 and noted that Student "appears to be working at [his/her] level of ability." (Exhibits D38, P46.)

(67) On June 28, 2006 Parent faxed the District asking that the PWN of May 26, 2006 be amended to indicate that the decision was a "District" decision and not a "team" decision." Parent asserted an ignorance of what the District meant by "level of ability," requested confirmation that the current IQ score was the driver of the decision, and asked for information about how Student could close the "gap between same age peers and [his/her]self." (Exhibit P46.)

(68) On July 26, 2006, Ms Felber mailed Parent the District's response to the June 28, 2006 fax. The response set out the relevant test scores and explained that the 2006 IQ scores were considered to show Student's level of ability and that, if the 2006 scores were used, Student's achievement scores did not demonstrate sufficient discrepancy with Student's ability[5]. The District also declined to amend the PWN to state "District" rather than "team" because the decision, although not unanimous, was made at what the District believed was a properly constituted team meeting. Ms. Felber suggested to Parent that s/he work to maintain Student's school attendance and work with Student's classroom teacher on curriculum to help close the gap between Student's achievement and chronological age. Copies of relevant District forms for appealing the District's refusal to amend the PWN were enclosed. (Exhibit P50.)

(69) On July 24, 2006, Parent e-mailed the District's human resources department asking why that department had advised Parent on May 25, 2006 that "you will no longer retain my services." (Exhibit P52.)

(70) Providing service to substitute teachers is not high on the District's priority list for use of its resources. Substitute teachers have no job security and no due process rights. The District generally deals with inquiries from substitute teachers with, if at all, one-size-fits-all form letters. Parent's July 24, 2006 inquiry generated a form letter to Parent from the human resources department advising that Parent had been terminated because of Parent's bad performance and work habits.

(71) Not satisfied with the District's response to his/her inquiry, Parent reviewed his/her personnel file at the District in October 2006. Finding nothing adverse, Parent again wrote the District asking why the District had sent the May 2006 notice. This time, Ms. Nove, the human resources department's director made some effort to find out why Parent had been sent the May 2006 notice. Ms. Nove asked around and learned some of the details, but not the date, of the June 9, 2004 incident discussed at Finding of Fact (FF) #13, above, and presumed that the incident must have been around the time of, and the reason for, the May 2006 letter. On May 23, 2007 Ms. Nove sent Parent a letter retracting the allegations of poor performance as a substitute teacher and explaining that the reason for the May 2006 notice was, "interaction with District staff regarding your student." When Parent pointed out to Ms. Nove in this hearing that the May 2006 notice seemed a rather delayed response to a June 2004 incident, Ms. Nove explained that there were no records of, and she had no idea, why the District had sent Parent the May 2006 notice. Parent then revealed Parent's April 2006 phone call requesting removal from the substitute teaching list discussed in FF#46, above. There is no evidence that Parent has ever asked to be put back on the substitute list. (Testimony of Nove and Parent, T955-981; Exhibit P52.)

(72) Ms. Nove was unaware until sometime after October 2006 that Parent had requested a due process hearing in May 2006. (Testimony of Nove, T966.)

(73) On August 7, 2006, Parent faxed Ms. Felber a request for an independent educational evaluation (IEE) at public expense, stating that Parent was not satisfied with the evaluations completed during the recent eligibility determination process and that Parent would, "begin with a complete neuropsychological exam and language processing assessments by a speech-language

[5] As noted in FF #55, above, Parent had explained in the May 26 meeting how the use of the 2006 IQ scores would result in ineligibility for Student under the District's guidelines.

pathologist. Please let me know what the next step is in securing the needed tests for [Student]." (Exhibit P-59.)

(74) On August 24, 2006, Ms. Felber mailed a response, "[The District] will honor your request for an [IEE] in the areas that were assessed regarding eligibility for Specific Learning Disability and for Communication Disorder. We are currently in process of confirming with evaluators regarding their willingness to conduct an IEE. Once we have confirmation from evaluators we will notify you." (Exhibit P62.)

(75) On August 24, 2006, having not received the District's response mailed that same day, Parent faxed Ms. Felber asking for an immediate response to her August 7, 2006 request. (Exhibit P64.)

(76) Sometime prior to August 29, 2006, Parent arranged for an evaluation of Student by Dr. Nancy Bryant, a licensed psychologist. Dr. Bryant tested Student on August 29 and September 13, 25, and 26, 2006. Dr. Bryant submitted her report to Parent on September 28, 2006. (Exhibit D46.)

(77) Dr. Bryant taught psychology as an adjunct instructor at various colleges in Oregon for four years. She has been in private practice, specializing in assessments of learning and cognitive functioning for the past thirteen years. Dr. Bryant reviewed some of Student's prior evaluations. She administered achievement tests to Student in word reading, reading comprehension, pseudo-word reading, and spelling - obtaining results consistent with testing done by the District in April 2006. Student performed below grade-level in word reading and spelling with grade-based scores of 79 and 80. Dr. Bryant also administered several tests of neuropsychological functioning. Dr. Bryant interpreted those to show Student had scattered attention deficits indicative of difficulty with phonological processing typical of dysphonetic dyslexia and significant difficulty in response inhibition, scattered problems with memory tasks, and attention span deficits, severe difficulties shifting between tasks with less trouble multi-tasking once s/he had shifted to a different task. Dr. Bryant diagnosed Student with Receptive/Expressive Language Disorder, Reading Disorder, ADHD, Predominantly Inattentive Type, and Adjustment Disorder, NOS. She also gave Student a "rule out" diagnosis of Tourette's Syndrome, or other tic disorder. Dr. Bryant opined that Student's 2003 IQ score was a more appropriate estimate of his/her innate intellectual potential. (Exhibits D-46[6], P246.)

(78) On September 13, 2006, Ms. Felber wrote Parent clarifying that the District had agreed to an IEE regarding an assessment of intellectual ability and academic achievement for specific learning disability eligibility purposes and assessments for communication disorder eligibility, including language processing assessment by a speech pathologist but had not agreed to a neuropsychological evaluation, because the District believed such an assessment was not relevant[7]. Ms. Felber included the names of two agencies conducting the approved assessments from which Parent could choose. (Exhibit P-67.)

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[6] The extensive handwritten notes on this and other assessments in the record obtained by Parent were made by Parent and not the evaluators.

[7] Parent had not mentioned during the 2006 IEP/eligibility process that at least two professionals had recommended neuropsychological testing for Student, the most recent having been Student's MSW therapist in 2005. (Exhibit D46, p52.)

(79) On September 21, 2006, Parent replied to Ms. Felber that the District's response had been untimely and when Parent had more time, "I will be requesting reimbursement of expenses for [Student's] privately-obtained evaluations." This was the first time Parent had mentioned to the District the possibility that she might privately obtain evaluations. (Exhibit P68.)

(80) On October 19, 2006, Ms. Felber replied that she was still awaiting Parent's selection of one of the evaluators offered in the District's September 13, 2006 letter and noted that Parent's September 21, 2006 letter appeared to be a rejection of the District's offer of an IEE. (Exhibit P69.)

(81) On November 20, 2006, Parent responded that s/he was still quite busy and chastised the District for making IEE offers that were "non-compliant" with the IDEA in substance and procedure. The response also informed the District that Parent had already obtained an IEE which Parent had used in the ongoing *Student I* hearing and that Parent would be filing new due process proceedings to deal with Student's "current needs and eligibility" when the *Student I* proceedings had finished. (Exhibit P70.)

(82) On November 21, 2006 Parent submitted a request for mediation to the Oregon Department of Education regarding, among other things, the ongoing IEE dispute. (Exhibit P71.)

(83) On November 21, 2006, Ms. Felber responded to Parent's letter of November 20. She quoted Oregon Administrative Rule (OAR) 581-015-0094(1)(a)(2) and explained that she believed the District had complied with that rule in its letter of August 24, 2006 agreeing to an IEE and asking Parent to choose one of the offered evaluators and that, therefore, she believed Parent was withdrawing the request for an IEE. She also asked for a copy of the evaluations Parent had mentioned in the November 20, 2006 letter so that the District could convene an IEP team to consider them. Although not apparent on the face of the letter, Ms. Felber intended to have Parent clarify if s/he wanted the District to fund an additional IEE and/or wanted the District to reimburse the costs of the privately-obtained evaluation. Although Parent had not yet requested reimbursement, Parent interpreted the letter to mean the District was refusing to pay for the privately-obtained evaluation. (Testimony of Felber and Parent, T1215-1237; Exhibit P72.)

(84) Parent did not provide a copy of the evaluation as requested. Parent responded on December 1, 2006 by sending Ms. Felber a faxed request for a copy of the District's criteria applicable to an IEE, and stating her disagreement with Ms. Felber's conclusions in the November 21 letter. Parent also reiterated her belief that the District was out of compliance with the IDEA and stated that she might, in due time, provide copies of the evaluations she had obtained. (Exhibit P73.)

(85) After much correspondence between the parties over the next eight months, Parent finally submitted a copy of the evaluation on April 17, 2007 and, later, a copy of the billing. The District then reimbursed Parent for the costs of the evaluation. (Testimony of Felber, T1213-1237 and Parent, T1889-90; Exhibits P74, 75, 76, 77, 78, 79, 86, D44, 46, 92 and 95.)

(86) Prior to the April 3, 2006 IEP meeting the District had provided Parent with notice of the IDEA's stay-put provision, that "during the pendency of any due process hearing or judicial appeal, the child shall remain in the present educational placement unless [circumstances not relevant here exist.]" Prior to the first session of the hearing in *Student I* on August 8, 2006, the Office of Administrative Hearings provided Parent with notice of the same right. Parent did not raise the issue of the stay-put provision during the *Student I* proceedings. Ms Felber and Parent at the time

believed that the stay-put provision would apply, if at all, only to require Student to remain in regular education at School C, where she did remain. (Testimony of Farmer, T1267 and Parent, T1819-20); Exhibit ALJ1; *former* OARs 581-015-0079 and 581-015-0080, ORS 40.135(1)(j)and(m).)

(87) During the *Student I* proceedings, the due process proceedings regarding the April 2004 IEP arising from Parent's May 1, 2006 hearing request, Parent called as a witness a university professor. While that witness was testifying, the District's representative, Ms. Gelbrich, sent him an e-mail chastising him for giving testimony critical of the work product of several District teachers who had graduated from his department. She copied the witness' Department head with the e-mail. The witness reported the e-mail to the ALJ, and Ms. Gelbrich was removed by the ALJ as the District's representative for the remainder of *Student I.* Parent filed a complaint with the Teachers' Practices and Standards Commission (TPSC). As a result of Parent's complaint, TPSC has served Ms. Gelbrich with a disciplinary order from which Ms. Gelbrich has requested a contested case hearing. The hearing regarding TPSC's proposed disciplinary action was pending at the time of this hearing. (Exhibit *ALJ I*, footnote 20; Testimony of Parent.)

(88) The *Student I* proceedings lasted through February 13, 2007. Nevertheless, the April 3, 2006 IEP, the April-May 2006 evaluation process, and the May 26, 2006 eligibility decision and termination of services were mentioned during those proceedings only by Dr. Bryant during her testimony, and then only in passing. They were not raised in a due process context until Parent's April 9, 2008 hearing request. (Exhibit ALJ-1, P253.)

(89) Dr. Peter Carey is licensed clinical psychologist with a private practice which includes consulting contracts in pediatric neurology with Kaiser Permanente Northwest and Oregon Health Sciences University. He has at least fifteen years experience in assessment, diagnosis, and treatment of children's psychological problems. Dr. Carey appeared as an expert witness for the District in the *Student I* proceedings and in these proceedings. During the *Student I* proceedings Dr. Carey opined that Student was eligible as a child with specific learning disabilities. This opinion was based upon the 2003 WISC-III IQ results. Neither the District nor Parent apprised him of the 2006 WISC-IV results during the *Student I* proceedings. (Testimony of Carey, T646-647; Exhibit D104.)

(90) On February 13, 2007, a Corrected Final Order (Order) was issued in *Student I*, the due process hearing requested by Parent on May 1, 2006. That order concluded among other things that the IEP of April 30, 2004 did not offer Student a FAPE because it had numerous deficiencies, the most important being that it was based upon the "whole language" methodology, and offered Student "no more than minimal, trivial benefit – if that[.]" The Parent had requested compensatory education as a remedy for the 2003-04 school year (only) as a remedy for any denial of FAPE. The Final Order, among other things, provided that the District offer Student 9 hours and 20 minutes of compensatory reading instruction and 11 hours and 20 minutes of language communication services. Parent requested enforcement of that portion of the order in the hearing request of April 9, 2008. That request was dismissed as not within the jurisdiction of a due process hearing officer in Oregon. Parent and the District are disputing in other forum(s) whether or not the District has complied with the *Student I* Order. (Exhibits ALJ1 and 2; Testimony of Parent.)

(91) The Order of February 13, 2007 also directed:

> The District shall offer the parent an opportunity to participate with other members of an IEP team to develop a new IEP for Student with

> the assistance of a mediator or facilitator not regularly employed by the District ***, a reading specialist or other qualified person familiar with scientific research-based methods as described in the report of the national Reading Panel, and a speech-language pathologist who specializes in oral language development. *** each participant shall receive and review copies of the testimony of Dr. Lucker, Dr. Chard, Dr. Moats, Dr. Torgesen, Dr. Carey, Dr. Bryant and Ms. Shawna Moran in this hearing.

(Exhibit ALJ1.)

(92) The order further required Parent to provide the District with the evaluations of Student s/he had obtained from 2004 on and had not shared with the District. Parent complied. (Exhibit ALJ1; P-300.)

(93) On March 20, 2007, the Department issued a Final Order regarding Parent's complaints, time barred from consideration in *Student I*, about Student's June 2003 and December 2003 IEPs[8]. The Department issued corrections to its Final Order on June 8, 2007. The Department found that the June 2003 IEP had deficiencies but those did not result in a denial of a FAPE to Student. However, it found that the December 2003 IEP was not reasonably calculated to enable Student to benefit from the reading portion of the IEP. The Department ordered the District to offer Student 24.5 hours of compensatory education services in the area of reading based upon Student's IEP in effect at the time services are provided or, if no IEP is in effect at that time, services as agreed to by the District and Parent. (Exhibit D77; *DOE final Order 06-054-042.*)

(94) The District contacted the Department and obtained a list of three possible neutral facilitators. Parent and the District agreed upon Ms. Genteli-Ambrust. (Testimony of Felber, T308-09.)

(95) On April 12, 20, and 23, 2007 the District sent notices to Parent of a team meeting to be held April 24, 2007. In addition to Ms. Genteli-Ambrust, Ms Madsen; Dr. Smith; Mr. Zegar; Ms. Bass; Ms. Hale; Ms. Felber; Parent; Parent's attorney, Ms. Broadhurst; the District's attorney, Mr. Comstock; Ms. Blea; and Ms. Moran attended the meeting. Ms. Felber was the District's representative. (Exhibits D43, 47, 48, and 49.)

(96) Ms. Moran is employed by the District as an "instructional coach." She teaches other teachers how to teach reading. She has held that position for 9 years. She was a classroom teacher for 5 years before that. She has her master's degree and a standard teaching license. Ms. Moran has worked part-time for the District for the past 3 years during which she has also worked for a private consulting firm assisting school districts in implementing new reading programs. (Testimony of Moran, T206-08, 214-15.)

(97) Carol Blea is a licensed speech and language pathologist with a teaching license in the area of communication disorders and with a clinical certificate of competence. She has a master's degree in speech and language pathology. She has accrued 185 hours of continuing education credits after her master's degree. Ms. Blea has been employed as a speech and language pathologist for six

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[8] *See*, FF #41 and #42, above.

years and is a lead worker among the District's speech and language pathologists. She teaches in a self-contained class room as well as regular education classes. She also evaluates students' special education needs and participates in many IEP and eligibility meetings. Approximately 75 percent of the students she serves have predominantly language needs, 20 percent speech needs, and 5 percent have stuttering disorders. Prior to the 2007 eligibility meetings, Ms. Blea reviewed the testimony mentioned in the Order portion of the *Student I* Final Order. (Exhibit D61; Testimony of Blea, T750-757, 1045-46.)

(98) At the beginning of the April 24, 2007 meeting Ms. Felber explained that the District believed that an IEP could not be developed unless Student had been found eligible for special education and, therefore, the meeting notices had noted the meeting was to "review existing information about your child, and decide whether your child is eligible for or continues to be eligible for special education." On the notice, the box beside "Develop or review an [IEP] and placement for your child," had not been checked. (Exhibits D48, P300.)

(99) The District's team members dissected Dr. Bryant's assessment, particularly her analysis and comparison of Student's 2003 and 2006 IQ test results, including how those results did or did not conform to other test results. (Exhibit D46, P300.) The team discussed Dr. Bryant's dyslexia diagnosis in relation to its effects on Student's reading and writing and communication. Ms. Blea opined that: 1) the DSM-IV required an IQ score obtained within the last two years and a non-verbal IQ score to compare with achievement scores; 2) Dr. Bryant did CASL supplementary tests and combined them with Mr. Hanks' core test scores – contrary to acceptable methodology; 3) Student, who was 2 years older than the rest of the classroom, had normal or above communication skills per Ms. Hale's ADD evaluation;, and 4) Student can adequately use language to access his/her current curriculum. (Exhibit P300.)

(100) Dr. Smith noted that Dr. Bryant had calculated Student's "expected scores" on achievement tests that Dr. Bryant had administered by using Student' 2003 IQ score of 104, a methodology Dr. Smith thought erroneous. Parent opined that Dr. Bryant's was the best assessment of Student's ability. Parent explained this was because IQ tests are age-normed, not grade normed. Parent believed that, because Student was currently placed with 3rd and 4th grade students receiving most of his/her instruction at the 3rd grade level and had the previous year been in a combined 2nd and 3rd grade class receiving most instruction at the 2nd grade level, Student had not been exposed to the same, advanced information that Student's age peers had been exposed to. Therefore Parent agreed with Dr. Bryant that the 2003 IQ scores were more meaningful. Parent did note that Student was performing well at the 3rd grade level s/he was being instructed at. (P300.)

(101) Parent opined that the Kossover-Wechter auditory processing evaluation of 2004 (*See,* FF #9, above) was poorly written and "disappointing" because it did not clearly state what type, if any, auditory processing disorder Student suffered. Ms. Blea noted that evaluation's comment about, "suspect higher level cognitive functioning" as the cause of Student's achievement deficits. (P300, D46.)

(102) Parent pointed out *former* OAR 581-015-0074(4)'s provision regarding the requirement for a "discrepancy" rather than a "severe discrepancy" for eligibility at reevaluation under the specific learning disability category. Ms. Felber responded that Student had not been enrolled in the District or receiving special education services for over a year. Therefore, the team began processing the specific learning disability eligibility forms as had been completed in 2006

regarding a severe discrepancy. (Exhibit P-300.)

(103) During the meeting Parent also challenged the 2006 Leiter-R results because she believed the test had to be scored by a psychologist, which Mr. Zegar was not. (Exhibits P24 and P-300.)

(104) During the 2006-07 school year Student had remained at School C in Ms. Hale's classroom which became a combined 3rd and 4th grade classroom. Student took the nationally normed Stanford achievements tests in September 2006 and obtained the following grade-level equivalencies: Total reading - 4.2; word study skills – 2.7; reading vocabulary – 3.7; reading comprehension – 6.2; total mathematics – 3.6; mathematics problem solving – 3.6; and mathematics procedures – 3.6. Student was generally at or very near Student's beginning 4th grade-level. Student scored average or above on all reading subtests except on the test dealing with phonetic analysis and vowels. Because of Student's problem with word study skills and phonetic awareness, Student was assigned a 3rd grade-level reader at the beginning of the 2006-07 school year. (Testimony of Ms. Moran, T216, 226-228; Exhibit D70, P-300.)

(105) At the April 24, 2007 eligibility meeting Ms. Hale discussed at length Student's current performance in class. She confirmed that the majority of instruction to the class was given at the lower, 3rd, grade level because the majority of the class was 3rd graders. Ms. Hale provided work samples and assessments of Student which were reviewed at this and subsequent meetings. She reported that at the end of the 2005-06 school-year Student had met the 3rd grade statewide assessment standard in math but had not met the 3rd grade assessment standard in reading/literature. In spring 2007 Student had met the 4th grade level statewide assessment for writing, including spelling, and had the highest score on that assessment of all the 4th grade students in Ms. Hale's class.[9] During the 2006-07 school year Student had received all A's on his/her report cards. Student was reading previously read passages out loud at 110 words per minute without error. Ms. Hale opined that Student had made progress over the year and had closed the gap with his/her age peers in reading/writing, having advanced at that time, April 2007, to reading at the beginning 4th grade level, and maintained the gap in math. The District team members agreed that Student was progressing adequately at the level of the materials s/he had been presented with during the 2005-07 time s/he had been under Ms. Hale's instruction. The District members of the team also thought Student was working adequately and progressing at his/her ability level in those areas. (Exhibits D70, P300)

(106) The team decided to also look at eligibility under the Other Health Impaired category regarding Student's possible ADD. (Exhibit P-300.)

(107) The Department repealed, amended, re-numbered, and promulgated numerous rules effective April 25, 2007 to implement the federal regulations effective October 13, 2006 implementing the IDEA as amended by the Individuals with Disabilities Education Improvement Act of 2004 including significant changes to eligibility criteria for specific learning disability. (OAR 581-015-2170.)

(108) On April 30, 2007 Ms. Felber sent Parent a PWN, with a cover letter and other explanatory forms, advising Parent that the team had decided to evaluate Student and to do so the District needed to obtain a hearing screening, an ADD evaluation, and classroom observations.

[9] Student received a score of 32, the lowest possible score to meet the benchmark. (Exhibits D-7, P-H.)

Parent was asked to sign a consent form for initial evaluation authorizing a hearing screening and ADD evaluations. On May 3, 2007, Ms. Madsen also sent Parent a PWN explaining the need for the same requested assessments and observations. On May 21, 2007 parent signed the form after crossing out everything but "ADD evaluations." (Exhibits D52, D53, D54.)

(109) The team met again on May 21, 2007. In the addition to the participants who were at the April 24, 2007 meeting, Amanda Smith, a District administrator, attended. Ms. Felber was again acting as the District representative. The team continued the eligibility determination under the severe discrepancy model, debating whether to use the 2003 IQ score or the two 2006 IQ scores. Dr. Smith explained that the more recent scores are generally the more reliable, particularly when there are two recent scores, one produced from a nonverbal test, which are consistent. Simply averaging the 2003 and 2006 scores, as suggested by Ms. Broadhurst during the discussion, would be without any basis in science. Parent was given the opportunity to, and did, explain in detail her reasons for believing the 2003 score was the more, if not the only, reliable IQ score. Ms. Blea pointed out that the Leiter-R scores were commensurate with Student's language scores on the CELF 2006 score. Parent pointed out that Student's CELF scores in 2003 were commensurate with the 2006 CELF scores as well as the 2006 IQ score. Dr. Smith and Mr. Zegar explained that similarity strongly indicted that it was the 2003 IQ score that was anomalous. After discussion, there was still not consensus, the team split – Ms. Hale abstaining, Parent and Ms. Broadhurst favoring use of the 2003 IQ score, and the rest of the team favoring the 2006 IQ scores. Ms .Felber, as the District's representative, decided the matter in favor of the 2006 scores. (Exhibit P300.)

(110) After much discussion by the team about whether there were discrepancies between Student's ability and achievement and, if so, what the magnitude of those discrepancies were, everyone but Parent and Ms. Broadhurst had agreed that Student had no severe discrepancy between ability and achievement. Before a vote could be taken on the severe discrepancy issue, Ms. Broadhurst and Parent pointed out that they understood that new OARs regarding SLD were in effect. Ms. Felber then revealed that new OARs were indeed in effect and the District had new eligibility forms. Ms. Felber explained that, based on the rule changes, another observation of Student would be required. At the facilitator's suggestion, the eligibility determination was pended until after the observations had been completed. Ms. Felber then collected and destroyed the old eligibility forms which team members had been completing. Parent suggested that Student was having a physical examination in few days and Student's doctor could opine about Student's possible ADHD and any hearing difficulties. (Exhibit P300.)

(111) The team met again on June 8, 2007 with the same members except that Ms. Felber was absent and had been replaced by Ms. Smith as the District's representative. Ms. Smith handed out the new[10] specific learning disability eligibility forms but suggested finishing the determination of eligibility under the old forms. The rest of the team convinced her that was unnecessary. The team began completing the new forms. The team discussed the four observations completed by Ms. Madsen (Exhibit D72) and Ms. Hale's report (Exhibit D70). The team acknowledged that the 2006 WISC-IV, Leiter-R, and WJ-III results along with Dr. Bryant's 2006 WIAT II results would be used and had already been exhaustively discussed. The team agreed that a medical evaluation was unnecessary. (Exhibit P-300.)

[10] Ms. Smith testified that, although the June 8, 2007 meeting was the first time the forms had been used, the forms had, as their date at the bottom of each page indicates, been on the District's computer as templates available for use since March 2006. This was noted by Ms. Broadhurst during the May 21, 2007 meeting. (Exhibit P-300.)

(112) Question #1 on the District's specific learning disability eligibility form, consistent with the new OAR 581-015-2170(3)(a), asked the team to determine whether or not: "The student does not achieve adequately for the child's age or to meet Oregon grade-level standards in of or more of the following areas when provided with learning experiences and instruction appropriate for the child's age or state-approved grade level standards." Ms. Smith suggested that Oregon grade-level standards rather than Student's age be used to determine the adequacy of Student's achievements. All team members agreed to at least begin the analysis using grade-level rather than age. Ms Hale explained that Student had been placed in the 2nd-3rd grade rather than 5th grade classroom in the fall of 2005 at Parent's choice. She further explained that, even though in a 2nd-3rd grade classroom, Student would have been provided instruction at his/her ability and achievement level if Student had been capable of working at that level. (Exhibit P300.)

(113) Parent passed around several samples of the Student's school work and a copy of Student's state writing assessment and explained what s/he believed they demonstrated. Parent explained why Parent believed Student's work on the 4th grade writing assessment showed significant writing deficits despite Student's work on the assessment having demonstrated that Student met state writing standards for the 4th grade. Parent summarized her concerns as: "[Student] struggles with spelling and punctuation, verb tenses, capitalization, sentence agreement, and complete sentences. [Student] does well in math but at the 3rd or 4th grade level." Parent was particularly concerned that Student had not crossed two t's and had misspelled "world" as "wold" on a Mother's Day card made in school. Parent thought such errors could cause severe peer ridicule. However, Parent did opine that Student was doing well at grade level, 3rd or 4th grade. (Exhibit P-300.)

(114) Parent also shared charts s/he had maintained of Student's performance on DIBELS tests of reading fluency throughout the 2005-07 school year which Parent had administered to Student at home. Mr. Zegar questioned the efficacy of a Parent testing his/her own child. Ms. Moran opined that Student should have been probed only at Student's instructional level, 3rd grade, and not at 3rd, 4th, and 5th grade levels as Parent had done. District staff handed out copies of state-approved grade-level standards in language arts for grades 4 and 6. The state 4th grade reading fluency benchmark standard is 115-140 word correct per minute (wcpm) on unpracticed 4th grade material at the end of 4th grade. Student was just beginning the 4th grade reader. Ms. Blea opined that Student was decoding well at the 4th grade level but that his/her fluency was not strong. (Exhibit P-300, D74

(115) For basic reading skills, Parent argued that because Student had just begun using the 4th grade reader rather than just completing it, Student did not meet basic reading skills for the 4th grade. Every other member of the team thought that Student was achieving adequately by making steady progress toward state grade-level standards. That is, the District members of the team looked at whether Student was making progress, achieving a one year or more increase in achievement in one year, moving ahead at a rate commensurate with her peers – Student went from 3rd grade to 4th grade in reading materials during the 2006-07 school year. (Exhibit P-300.)

(116) There was some concern expressed by District staff in the meeting about how appropriate for Student, either for his/her age or grade-level, Parent's home schooling prior to fall of 2005 may have been. But, however appropriate or inappropriate for Student's age or grade level the learning experiences and instruction Parent may have provide prior to the fall of 2005, Student had been provided with learning experiences and instruction appropriate for grade levels 2-3 during the

2005-06 school year and for grade levels 3-4 during the 2006-07 school year and had never been provided learning experiences and instruction usually appropriate for Student's age. Mr. Zegar pointed out that Student's history – low average IQ, starting kindergarten at an early age, being held back, then home schooled for four years, then placed in the charter school for two years instructed at grade levels 2 and 3 but making adequate yearly achievement progress at those levels those last two years – did not indicate a learning disability. He further noted that on the Stanford exams Student had taken in September 2006, a month in which students' skills are usually rusty, Student achieved adequately and that Student had achieved the state's 4th grade benchmark in writing. Parent took great offense at what she interpreted to be aspersions cast about the home school instruction Student had received during what would normally have been Student's second kindergarten year, 1st grade year, 2nd grade year, and 3rd grade year - after which Student was performing at the beginning 2nd grade level in many areas. (Exhibit P-300.)

(117) District staff[11] opined that existing data on Student's reading fluency was not highly reliable. The 2006 WJ-II results showed Student's reading fluency at a standard score of 80, but did not give a fluency rate in words correct per minute as did Oregon's benchmark. The Oregon benchmark was 115 words correct per minute on grade-appropriate, unpracticed material. Ms. Hale had frequent DIBELS probes administered to Student but had allowed Student to read the passages ahead of time – negating the "unpracticed" requirement of the benchmark. Student had routinely exceeded the benchmark goal on that testing with an opportunity to read the tested passage beforehand. Parent had frequently administered DIBELS testing to Student, and Student had not met the benchmark. Parental administration of such testing is generally suspect, is specifically cautioned against by the DIBELS publisher, and given Student's different behavior around Parent, was not a good idea. After the facilitator had ended the meeting with no decisions reached, Parent suggested Ms. Moran administer DIBELS to Student to ascertain how Student's reading fluency compared with the end-of-year benchmark. Ms. Smith, as the District's representative refused. Parent requested a PWN. The facilitator repeated, "The meeting is over." (Exhibit P-300; Testimony of Hasbrouck, T1633.)

(118) On June 12, 2007, Parent wrote the District clarifying that s/he had intended at the June 8 meeting to request additional DIBELS spring benchmark evaluations at the 3rd, 4th and 5th grade-levels and that s/he wished a PWN regarding the District's refusal to conduct additional DIBELS evaluations. (Exhibit D78.)

(119) On June 13, 2007, the District sent Parent a notice that it had refused to conduct spring benchmark DIBELS evaluations because, "This was the consensus of the IEP team with the exception of the parent and parent's attorney." It cited as basis for the refusal the "WISC IV, WJ-II, Leiter, Observation, WIAT II, OWLS, File Review, and Classroom Performance." In the space provided to complete as the "other options we considered," the District wrote "gathering further information." It further noted that option was rejected because, "This was consensus of the IEP team with exception of the parent and parent's attorney." The District further noted that the team had also considered that "reading skills have been assessed through the WJ II as well as classroom curriculum based measures." (Exhibit D79.)

(120) The team met again on June 15, 2007 with the same participants as the June 8 meeting. The team suspended discussion of special learning disability eligibility and turned to

[11] It is not clear from the recording if it was Ms. Moran or Ms. Blea.

communication disorder eligibility because Ms. Blea was leaving the area for the summer. As Ms. Blea explained in detail, the team had the required data and it showed there was not a significant discrepancy as required for eligibility under the state rules and the District's guidelines which had not changed since 2006. She noted that the CELF test emphasized grammar, one of Student's main weaknesses, whereas the OWLS test, on which Student scored higher, is more global. Student scored at or above average on listening and reading comprehension in her testing. Ms. Blea had carefully reviewed Student's work samples that Parent had submitted in May. (D82)

(121) The team rehashed its prior discussion of 2003-2006 IQ discrepancies and which score to use. It again reached non-consensus with Parent and Ms. Broadhurst dissenting. Student had no language scores that were 16 or more points lower than the 2006 FSIQ of 86. Parent requested new auditory processing testing of Student because Parent believed the evaluator in 2003 was biased. Ms. Blea and the rest of the team believed that the speech and language testing results subsequent to 2003 were more than adequate to evaluate Student's eligibility. All but Parent and parent's attorney found Student not eligible. Ms. Smith, after further team discussion which did not change any minds, made the decision of "not eligible" as the District's representative. All team members signed, either as agreeing or disagreeing with the decision, the eligibility form which clearly stated that it had been determined that Student's language in the areas of concern was not significantly discrepant as measured by standardized testing. (Testimony of Ms. Smith, T808; Exhibits D82, P300.)

(122) The team then returned to the specific learning disability eligibility determination, beginning with the a continuation of the discussion (See, FF#112, above) of the meaning of, "The student does **not** achieve adequately for the child's age or to meet Oregon grade-level standards in one or more of the following areas when provided with learning experiences and instruction appropriate for the child's age or state-approved grade level standards." They debated whether to look at Student in comparison to his/her age peers or his/her grade peers and whether the question was really whether or not Student was making adequate progress toward meeting Oregon grade-level standards for the 4th grade. With the exception of Parent, all team members again thought Student should be compared with grade-level standards rather than age-level standard, and Ms. Smith again made that decision on behalf of the District. (Exhibit P-300.)

(123) Next, the facilitator began to go one-by-one through the list of skill areas set out in OAR 581-015-2170(3)(a)(A)-(H) and the District's SLD eligibility template Question #1. However, the facilitator mis-phrased the question regarding reading fluency, asking "Does [Student] meet the standard for [his/her] age" rather than "grade-level. In response to the question as misphrased, some team members other than Parent and Ms. Broadhurst responded, "No." The facilitator immediately noted her error and announced that they would go through the question and response again but correctly phrased, asking about, as the team had decided, grade-level rather than age. Before the facilitator could ask the correct question, Parent interrupted with a question about the meaning of "achieve adequately to meet grade-level standards." After much discussion of that question, the facilitator continued by asking for persons to raise their hands if they thought Student did not achieve adequately to meet grade-level standards in reading comprehension. The team never went back to discuss, and never determined, whether or not Student achieved adequately to meet grade-level standards in reading fluency. (Exhibits P300, D76.)

(124) The participants, other than Parent and Ms. Broadhurst, did agree that Student was making adequate progress toward meeting grade-level standards in basic reading skills, reading comprehension, mathematics calculation, mathematics problem solving, written expression, oral

expression, and listening comprehension. And, believing that they had also covered the grade-level reading fluency question, the participants, other than Parent and Ms. Broadhurst, determined that Student did not meet the threshold eligibility criterion for specific learning disability, did not fail to meet the relevant Oregon grade-level standards. Because the team did not reach a consensus, Ms. Smith made the decision on behalf of the District. (Exhibit P300, D76.)

(125) Because the District's eligibility form indicated that SLD eligibility determination should end if no box under Question #1 was checked, the team did not proceed to Question #2 on the form dealing with a possible pattern of strengths and weaknesses in performance, achievement, or both relative to, under the District's guidelines, intellectual development or Question #3 dealing with whether, if Student passed Questions #1 and #2, the lack of achievement might be the primary result of factors other than a learning disability, e.g., a lack of appropriate instruction. All team members signed, as either agreeing or disagreeing with the decision, the eligibility form which clearly indicated that it had been determined that Student achieved adequately to meet age or grade-level standards in the critical areas and that Student "does not" qualify for special education under the SLD category. (Exhibits P-300, D76.)

(126) Parent and Ms. Broadhurst once again pointed out that there had been no testing of Student's reading fluency in terms of the state standard of, "read aloud unpracticed grade-level test at a rate of 115-140 wcpm (words correct per minutes)" and again asked for a DIBELS test of Student's current fluency. (Exhibits P-300.)

(127) The team next took up the matter of Student's possible eligibility under the Other Health Impairment category. The team considered information obtained since their last meeting from Ms. Hale's teaching assistant, Ms. Hale, Ms. Madsen, and Parent. All participants other than Parent and Ms. Broadhurst concluded that, although Student had been diagnosed with ADD (inattentive type), Student did not meet eligibility criteria because the ADD had no adverse impact on Student's educational performance - Student exhibited no adverse symptoms or effects of that disorder in school or in his/her schoolwork. Parent did agree that Student's ADD did not have a significant impact in Ms. Hale's 3rd – 4th grade-level educational environment, but Parent thought that it might have a significant impact if Student were in his/her age-appropriate 6th grade classroom. All team members signed, as either agreeing or disagreeing with the decision, the eligibility form which clearly stated that it had been determined that Student did not exhibit any ADHD symptoms which resulted in limited alertness with respect to the educational environment. (Exhibit D81, P300.)

(128) Some time after the eligibility decision was made and PWN sent, Student's Oregon benchmark scores on the 4th grade math and reading assessment tests that had been taken in the Spring of 2007 were issued. Student did not meet either 4th grade benchmark, having scored 206 on each with a 211 required to meet the reading benchmark and a 212 required to meet the math benchmark. (Exhibits D7 and P-H.)

(129) On June 15, 2007 the District sent Parent a PWN advising that "The IEP team met and determined that [Student] is not eligible for special education services under the categories Specific Learning Disability, Communication Disorder and Other Health Impairment" because, "The IEP team reviewed the criteria for each disability area. [Student] does not meet eligibility criteria in these three areas." It noted under "any other factors considered by the team" that "[Student] is progressing in [his/her] current general education setting." (Exhibit D83.)

(130) On June 21, 2007 Parent wrote the District asking for clarification, including a PWN, of the team's decision about further auditory processing testing. (Exhibit D86.)

(131) On June 29, 2007, the District sent Parent a PWN denying an auditory processing disorder evaluation because "The team had sufficient information to determine eligibility. This was consensus of the IEP team with exception of the parent and parent's attorney." The notice cited the WISC IV, WJ III, Leiter, Observation, WIAT II, OWLS, File Review, Classroom performance, CELF, CASL, and work sample as the bases for the denial and further noted that, "An auditory processing disorder evaluation is not needed to determine eligibility." (Exhibit D89.)

(132) On July 2, 2007, the District re-mailed the PWNs of June 13 and 27, 2007 to Parent. (Exhibit D90.)

(133) In April 2008, Student was evaluated by Dr. Lucker. Dr. Lucker found that Student has an auditory processing disorder with deficits in auditory integration at the linguistic level and in the sequencing and processing of information, resulting in deficits in word finding and understanding higher semantic levels of word meaning and susceptibility to auditory distractions. He made several recommendation for specialized instruction and accommodations for Student. He disagreed with the conclusions of the co-author of one of his learned articles, Ms. Kossover-Wechter (See, FF #9, above) regarding the presence and impact of cognitive deficits in Student. (Testimony of Dr. Lucker T95-147; Exhibit P239.)

(134) In April 2008, Student was evaluated by Dr. Kay, a licensed psychologist. Among other testing, Dr. Kay administered the WISC-IV and the Test of Non-Verbal Intelligence-3rd Edition (TONI-3). Student's scores on the WISC-IV included FSIQ 83 and GAI 84 and were generally consistent with his/her scores on the WISC-IV in 2006. Student's TONI-3 scores indicated an average (48th percentile) intellectual ability. However, the Leiter-R is a more reliable test and Student's 2006 results on the Leiter-R were consistent with the 2006 and the 2008 WISC-IV results. (Testimony of Dr. Carey, T629-33, 661 and Dr. Kay, 1378-81; Exhibit D108.) Dr. Kay also administered the Wechsler Individual Achievement Test –Second Edition (WIAT-II) to Student. Dr. Kay used regression formulas to calculate difference between Student's predicted, using the WISC-IV results, and actual WIAT subtest and composite scores. She found what she believed to be cognizable discrepancies in Student's word reading and written expression subtest scores and no cognizable differences in any of the composite scores. (Testimony of Dr. Kay, T1400-1402; Exhibit D108.)

CONCLUSIONS OF LAW

(1) The remainder of Parent's complaints about alleged acts or omissions prior to April 9, 2006 are dismissed.

(2) The District did not retaliate against Parent for protected activities.

(3) During the 2006 IEP and eligibility determination process the District acted in a timely manner, had appropriate and qualified staff at the meetings, conducted and adequately considered required evaluations, allowed adequate participation by Parent and Parent's expert, adequately implemented the interim IEP, and correctly identified Student as not eligible for special education and related services.

(4) The District did not violate the stay-put provision during the *Student I* proceedings.

(5) The District adequately processed Parents August 2006 IEE request.

(6) Any failure by the District to implement the final order in *Student I* is outside of the ALJ's jurisdiction.

(7) The PWNs of May 26, 2006 and June 15, 2007 were not in compliance with the IDEA, but did not significantly impede Parent's participation in the process or deprive Student of a FAPE or educational benefit.

(8) During the 2007 eligibility determination process the District had appropriate and qualified participants at the meetings, conducted and adequately considered necessary and appropriate evaluations and other information, allowed Parent and Parent's attorney adequate participation in the meetings, and ultimately correctly identified Student as not eligible for special education and related services. Any errors the District made in applying the SLD eligibility template did not significantly impede Parent's participation in the process or deprive Student of a FAPE or educational benefit.

OPINION

34 CFR § 300.17 provides:

> Free appropriate public education or FAPE means special education and related services that--
> (a) Are provided at public expense, under public supervision and direction, and without charge;
> (b) Meet the standards of the SEA, including the requirements of this part;
> (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. Sec. 300.320 through 300.324.

34 CFR § 300.513 provides, in relevant part:

> (a) Decision of hearing officer on the provision of FAPE. (1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.
> (2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--
> (i) Impeded the child's right to a FAPE;
> (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the

parent's child; or
(iii) Caused a deprivation of educational benefit.
(3) Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under Sec. Sec. 300.500 through 300.536.

ORS 343.167 provides, in relevant part:

(1) If the finding at the hearing held under ORS 343.165 is that the identification, evaluation and educational placement by the district are appropriate and that the child is being provided a free appropriate public education, the hearing officer shall decide in support of the determination of the district.
(2) If the finding at the hearing is that the identification, evaluation or educational placement is not appropriate or that the child is not being provided a free appropriate public education, the hearing officer shall grant appropriate relief within the hearing officer's scope of authority.
(3) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies:
(a) Impeded the child's right to a free appropriate public education;
(b) Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the child; or
(c) Caused a deprivation of educational benefits.
(4) Nothing in subsection (3) of this section shall be construed to preclude a hearing officer from ordering a school district to comply with procedural requirements.

The burden of proof in an administrative hearing challenging an eligibility decision is properly placed upon the party seeking relief. *Schaffer v. Weast*, 126 S Ct 528, (2005). In this case Parent is seeking relief and, therefore, has the burden of persuasion.

I. Limitations Period.

34 CFR 300.511 provides, in relevant part:

(d) Subject matter of due process hearings. The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under Sec.300.508(b), unless the other party agrees otherwise.
(e) Timeline for requesting a hearing. A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that

State law.
(f) Exceptions to the timeline. The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to--
(1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or
(2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

Former OAR 581-015-0081(3) (2003) in effect through April 25, 2007 provided:

> Special education due process hearing shall be requested within two years after the date of the act or omission that gives rise to the right to request the hearing.

OAR 581-015-2345(3) (2007) provides:

> (3) Time limitation and exception:
>
> (a) A special education due process hearing must be requested within two years after the date of the act or omission that gives rise to the right to request the hearing.
>
> (b) This timeline does not apply to a parent if the parent was prevented from requesting the hearing due to specific misrepresentations by the school district that it had resolved the problem forming the basis of the complaint, or the school district's withholding of information from the parent that the district was required to provide under Chapter 343.

Parent filed this due process hearing request on April 9, 2008. As in the *Student I* hearing request, Parent missed the deadline for disputing all the alleged acts or omissions which caused him/her concern. Parent did not allege, and the evidence did not indicate, that either of the exceptions to the limitations period was applicable.

Any and all alleged acts or omissions occurring prior to April 9, 2006 are outside of the limitations period and outside of my jurisdiction. These include the District's alleged failure to timely begin the IEP/eligibility process once it learned of Student's enrollment in a charter school, the alleged acts and omissions of the District in the April 3, 2006 IEP/eligibility meeting, and any alleged deficiencies in the interim IEP of April 3, 2006. If Parent had wanted to dispute these things she could easily have included them in her May 1, 2006 due process hearing request or at some other time within the two year period. Parent was well aware after the *Student I* hearing of the two year limitations period, but failed to meet it.

In the Notice of Hearing, Issues 1(a)&(b); 3(a),(b),(c),(f), and (g), insofar as it refers to anything prior to April 9, 2006; Issue 4, insofar as it refers to anything prior to April 9, 2006; and Issue 5 were included because it was still unclear from Parent's hearing request and the parties'

averments in pre-hearing matters if the alleged acts and omissions complained of fell before or after April 9, 2006. Based upon the entire record, events referred to in those issued occurred prior to April I, 2006. Therefore, those allegations are beyond my jurisdiction because of the two year limitations period. They are dismissed.

II. DISTRICT'S ACTS and OMISSIONS

A. Retaliation and Animus

34 CFR 100.7(e) provides:

> Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

This provision is incorporated into Section 504 by 34 CFR 104.61. OAR 581-015-2395 provides for jurisdiction in this IDEA due process hearing for Section 504 claims "with respect to actions regarding the identification, evaluation, provision of a free appropriate education, or education placement of the student with a disability[.]" The due process procedures of the IDEA are the heart of a free appropriate education for students with disabilities.

To prove a retaliation claimant parents must demonstrate that:

> 1. They engaged in a protected activity, such as filing a special education complaint;
> 2. District personnel were aware of the complainants' protected activity;
> 3. Following the complainants' protected activity, the school district took adverse action against them, and the adverse action was significant or severe; and
> 4. There was a causal connection between the protected activity and the adverse action.
> 5. If the complainants prove all four elements of retaliation, the school district has the burden of presenting evidence that it had a legitimate, non-retaliatory purpose for its adverse action.

In the matter of the Oregon Department of Education Complaint Proceeding 07-054-033

Parent made two specific and one general allegation of retaliation against Parent by the District because of Parent's attempts to exercise his/her rights under the IDEA and § 504.

1. Parent's removal from the substitute teaching list.

The District was aware of Parent's May 1, 2006 due process request. The District's May 25, 2006 removal of Parent from the substitute teacher list would be a significant adverse action if it were not one done at Parent's own request. Since it was done at Parent's voluntary request, it was neither adverse nor connected with the protected activity. The District's failure to note why it had removed Parent and its subsequent attempts to ascertain why it had removed Parent and explain its reasons to Parent, who already knew or should have known the reason, had no causal connection to Parent's due process complaint.

2. Ms. Gelbrich's e-mail to Parent's witness during his testimony in *Student I.*

Ms. Gelbrich's action in sending one of Parent's expert witnesses, with a copy to his department head, an irate e-mail in the midst of his testimony during the *Student I* proceedings is troubling. The District presented no evidence[12] at all regarding Ms. Gelbrich's action. Her act was arguably an intimidatory act. But, it was directed against the witness, not Parent. The action caused no loss of a FAPE to Student; it was dealt with during the *Student I* hearing by the ALJ; and it is being dealt with now by the appropriate administrative agency. There is no remedy available in this hearing.

3. Unspecified actions and attitudes by District staff.

Parent conflates disagreement with animus and retaliation. The District's methodology in assigning one contact person in the District to receive, and coordinate responses to, Parent's queries, comments, and demands - which are unusual, if not unique, in number and complexity - is reasonable and not contrary to law. As explained to Parent by the Department in its letter of June 8, 2007 (Exhibit D77), Parent has significant rights under the IDEA but does not have a carte blanche to dictate the details of how the District will evaluate and educate Student. There was no evidence of any communication between District staff which was "derogatory, disrespectful, or humiliating toward [Parent]."

B. 2006 IEP and Eligibility Process

1. Timeliness

Former OAR 581-015-0072(13) and current OAR 581-015-2110(5) (2007) provide that an initial evaluation or a reevaluation must be completed "within a reasonable period of time" which it defined as "within 60 school days from written parent consent ***."[13] Then, an IEP must be developed within 30 calendar days of the eligibility determination and must be reviewed at least annually such that an IEP is always in effect for each child with a disability within the district. *Former* OARs 581-015-0064 and -0065 and current OAR 581-015-0220.

Former OAR 581-015-0065 required that an IEP meeting be held within a "reasonable time" after a parent's request for one. "Reasonable time" was not defined.

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[12] Speculation by District counsel during pre-hearing conferences and in closing argument that Ms. Gelbrich was unfamiliar with her e-mail program and that the e-mail may have been sent accidentally is not evidence.

[13] OAR 581-015-2110 adds, "to the date of the meeting to consider eligibility."

Parent requested an IEP on February 16, 2006. By April 9, 2006 there had been an initial IEP meeting and an interim IEP was in place. The interim IEP was being implemented. The process of conducting the evaluation/reevaluation (which Parent had consented to on April 3, 2006) and, if appropriate, developing a full IEP was under way. That process was completed on May 26, 2006 – within 60 days of the date of parental consent. The District acted in a timely manner.

2. Staffing.

Former OAR 581-015-0066 required a school district to ensure that each IEP team meeting include: Parent; one regular education teacher of the child; one special education teacher or provider of the child; a district representative with knowledge about the district's general curriculum and district resources and authorized to commit district resources; an individual knowledgeable about the child's disability who can interpret the instructional implications of the evaluation results; and other persons invited by the parent or the district determined to have knowledge or special expertise regarding the child. *Former* OAR 581-015-0072 required, among other things, that evaluations be conducted by trained and knowledgeable personnel in accordance with any instructions provide by the producer of the tests.

The District established that its participants in the 2006 IEP/eligibility meetings and its staff conducting the evaluations met and followed the requirements. Parent specifically questioned Mr. Zegar's qualifications to administer and interpret the Leiter-R in light of Exhibit P24, an excerpt from the Leiter-R's publisher's instructions for the evaluation. That document suggests that the test's results be interpreted by persons with graduate level courses in intellectual assessment. Mr. Zegar had such course work. In addition, Dr. Smith, who meets that qualification and is a psychologist, was a member of the IEP/eligibility team using the Leiter-R results to assist in determining Student's eligibility. Also, the 2006 Leiter-R results are consistent with the 2006 and 2008 WISC-IV results. A preponderance of the evidence shows that Mr. Zegar was qualified to, and did, adequately administer and score the Leiter-R and that he and Dr. Smith adequately interpreted those results.

3. Parental Participation.

The recording of the May 2006 IEP/eligibility meeting, Exhibit P300, shows that parent and Dr. Lucker had adequate and ample opportunity to, and did, provide input and that the District considered, although it often disagreed with, that input.

4. Test Results

Parent's claim that the District was required to have utilized the 2006 WISC-IV's GAI score rather than its FSIQ score in determining whether or not Student had any discrepancy between ability and achievement fails because the Wechsler technical report, Exhibit P297, upon which Parent bases his/her argument provides that use of the GAI is optional and that a difference of 6 or greater between the FSIQ and GAI scores is required to show cognizable statistical significance. The District has not opted to the use the GAI, and the difference was only 5 in 2006.

There is a mystery surrounding the 2003 WISC-III FSIQ score - why is it significantly higher than the 2006 and 2008 WISC-IV FSIQ and the 2006 Leiter-R scores? Parent insists that the decline

opined in emphasized type that, although Student had significant auditory processing problems, Student's primary areas of difficulty lay in higher level cognitive problems rather than in auditory processing problems. Also, as Dr. Carey explained in his testimony, if Student's decline in FSIQ results were due to a Matthew Effect, one would expect a significant decline between the 2006 and 2008 results. There was not such a decline. The results were consistent. In addition, the 2006 non-verbal Leiter-R evaluation, which more likely than not compensated for any language loading of the WISC-IV, came up with results consistent with the WISC-IV. Based upon the conflicting expert testimony, I find that more likely than not the 2003 WISC-III results were not as accurate as the 2006 Leiter-R and WISC-IV and the 2008 WISC-IV results and that any apparent decline in FSIQ was not due to any Mathew Effect.

The District's refusal to conduct a CTOPP test for eligibility purposes was reasonable. As District staff opined during the meetings, stated in the PWNs, and testified in the hearing, the three tests administered - the CELF, CASL, and TWF-2 - were sufficient to determine if Student's "language in the area of syntax, morphology, semantics, or pragmatics is significantly discrepant as measured by standardized tests." *Former* OAR 581-015-0051(2). Although the CTOPP test may have been useful for purposes of designing specialized instruction for Student, once Student was determined not eligible, there as no reason to conduct further testing.

5. Eligibility

a. Under the Communication Disorder Category.

Former OAR 581-015-0051(2)(b)(D)(i) required, as does current OAR 581-015-2135(2)(d)(A), "the child's language in the area of syntax, morphology, semantics or pragmatics [to be] significantly discrepancy as measured by standardized test(s)." As expert testimony established and as the Districts guidelines provided, it takes a difference greater than 15 points, one standard deviation, on standardized tests to be statistically significant, to be of import, or to constitute any cognizable discrepancy. Although Parent disputed the validity of the WISC-IV FSIQ scores, Parent did not dispute, and repeatedly acknowledged during the IEP/eligibility meetings, that if the WISC-IV FSIQ were valid, Student was not eligible. As discussed above, a preponderance of the evidence shows the score to have been valid. Student was not eligible under the communication disorder category.

b. Under the Specific Learning Disability (SLD) Category.

During the 2006 eligibility determination process, the District applied a severe discrepancy test for determining SLD eligibility. Basing eligibility upon a severe discrepancy was in accord with *former* OAR 581-015-0051(9)(b)(B) and *former* 34 CFR §300.541(a)(2) which required a severe discrepancy when determining initial eligibility. However, *former* OAR 581-015-0074(4) regarding the reevaluation of eligibility for children identified with a specific learning disability, provided:

> A child identified as having a specific learning disability need only have a "discrepancy" and not necessarily a "severe discrepancy" to continue eligibility.

The District's guidelines for reevaluation of a child previously found to be eligible as a child with a learning disability provided:

> Reevaluation of a student with specific learning disabilities should focus on improvement which has been made during the time special education and related services have been provided, instead of stressing the discrepancy between achievement and intellectual ability. The student's need for continued special education and related service should be evaluated.
>
> At the end of three years, the student no longer may meet the original requirements for eligibility; however, the student still may not be able to successfully manage placement in the regular school program without some special education support.
>
> *****

(Exhibit D2, p. 19.)

The District did not mention this guideline or *former* OAR 581-015-0074(4) during the 2006 eligibility determination process. Parent was unaware of the rule and the guideline. Ms. Felber testified that she decided that they were inapplicable because Student had not been provided with any special education and related services during the 2004-05 and 2005-06 school years. Although the District had offered an IEP for 2004-05, Parent had refused the special education services offered by the District in that IEP, had continued to home schooled Student during 2004-05, and had enrolled Student in a neighboring District for 2005-06. Parent had not yet challenged the 2004 IEP with a hearing request.

Although the law was unclear at the time, it has now been clarified that parents can refuse such services and that, if they do refuse those services and later request them again, the subsequent evaluation is an initial evaluation and not a reevaluation. 73 Fed. Reg. 73014-015, December 1, 2008. The District properly treated the 2006 process as an initial evaluation and applied the severe discrepancy standard. Student had no severe discrepancy between ability, measured either by FSIQ or GAI, and achievement.

Even if the correct standard were the "discrepancy" standard for a reevaluation in OAR 581-015-0074(4), Student did not meet that standard. Although enclosed in quotes in the rule, the term "discrepancy" was nowhere defined in OAR Chapter 581. The term means, as explained by the District's witnesses, a significant discrepancy, one that is statistically meaningful and cognizable, one that is greater than one standard deviation, 15 points. Student had no discrepancies greater than 15 points between ability and achievement, measured either by GAI or FSIQ. Student had no "discrepancy."

6. Implementation of the April 3, 2006 Interim IEP

The IEP of April 3, 2006 called for 100 minutes per month of specialized instruction in accord with the stated goals dealing with Student's verbal expression of various language constructs and concepts. On a pro-rata basis, Ms. Brundidge provided, and documented her provision of, slightly more minutes of services than called for by the IEP in each of the partial months of April and May 2006. During that brief period Ms. Brundidge reasonably emphasized services in those areas specified on the IEP in which Student demonstrated his/herself to be most deficient.

C. STAY-PUT DURING THE *STUDENT I* PROCEEDINGS

Parent and the District misunderstand the stay-put provision of 20 U.S.C. §1415(j).

That provision provides:

> Maintenance of current educational placement
> Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

That provision is well explained in *M.K. v. Roselle Park Board Of Education*, 46 IDELR 253, (U.S. Dist. New Jersey 2006):

> The stay-put provision of the IDEA provides that "during the pendency of any proceedings conducted pursuant to [20 U.S.C. § 1415], unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." 20 U.S.C. §1415(j). "Stay-put orders are designed to maintain the status quo during the course of proceedings." *J.O. ex rel. C.O. v. Orange Tp. Bd. of Educ.*, 287 F.3d 267, 272 (3d Cir. 2002); see also *Schaffer ex rel. Schaffer v. Weast*, 126 S.Ct. 528, 539 n.1 (2005). They "function[ ], in essence as an automatic preliminary injunction." *J.O.*, 287 F.3d at 272 (quoting *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996) (describing the stay-put provision as "an absolute rule" to maintain the current educational placement "regardless" of the merits of the case)).
>
> ***
>
> A parent can invoke the IDEA's stay-put provision when the school system proposes "a fundamental change in, or elimination of, a basic element of the [then-current education placement]." *Lunceford v. Dist. of Columbia Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C. Cir. 1984). A parent moving for a stay-put injunction "must identify, at a

> minimum, a fundamental change in, or elimination of a basic element of the education program in order for the change to qualify as a change in educational placement." *Id.*
>
> "[T]he plain meaning of 'current educational placement' refers to the 'operative placement actually functioning at the time the dispute first arises.'" *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181, 192 (3d Cir. 2005) (quoting *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625-626 (6th Cir. 1990)). Although the IDEA does not define the term "then-current educational placement," the meaning of the term "falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *Bd. of Educ. of Cmty High Sch. Dist.* No. 218, 103 F.3d at 548; see also *Tilton v. Jefferson County Bd. of Educ.*, 705 F.2d 800, 804 (6th Cir. 1983), cert. denied, 465 U.S. 1006 (1984) (transfer from one school to another school with comparable program is not a change in educational placement); *Spilsbury v. Dist. of Columbia*, 307 F. Supp. 2d 22, 26-27 (D.D.C. 2004) (explaining that "the IDEA clearly intends 'current educational placement' to encompass the whole range of services that a child needs" and that the term "cannot be read to only indicate which physical school building a child attends").

The District argued that a termination of ongoing eligibility, services, and IEP did not constitute a change in educational placement for stay-put purposes. The District pointed out that there has been no authority which identifies, in relation to the stay-put provision, a change in educational placement occurring upon a determination of a child being no longer eligible for services and a termination of services currently provided under a current IEP, as happened to Student on May 26, 2006. The District's argument is not persuasive.

To support its proposition the District cited *L.M. v. Capistrano School Dist.*, 556 F.3d 900 (9th Cir. 2009), a case dealing with a child who was making his initial application for public school and who had never had an agreed upon placement or an implemented IEP and whose parents enrolled him in a private placement after refusing the district's placement offer. The circuit court found, as had the district court, that the private placement was not the stay-put placement. In *Joshua A. v. Rocklin Unified School District*, 109 LRP 15440, (9th Cir. 2009) the court, citing *L.M.*, noted, "The phrase current educational placement includes the placement described in the child's most recently implemented IEP [internal quotations omitted.] For Joshua, the most recently implemented IEP required the District to co-fund forty hours a week of in-home educational services administered by [a private agency]." And, the District was required to continue co-funding those 40 hours a week as the stay-out placement. In general, a student's educational placement is changed, for stay-put purposes, "if there has been a fundamental change in, or elimination of, a basic element of the student's educational program." *Stancourt v. Worthington city School Dist. Bd. of Edn.*, 51 IDELR 19, (Ohio Court of Appeals, 2008).

In this case, after Parent's May 1, 2006 due process hearing request, the District proposed the total elimination of Student's eligibility and all special education and related services s/he had been receiving under the existing, implemented IEP. In accord with case law, the result was a

fundamental change in Student's educational program and, therefore, a change of educational placement for stay-put purposes.

Student clearly would have qualified for a stay-put order requiring a continuation of the services provided under the April 3, 2006 IEP *if* Parent had contested the May 2006 termination of eligibility and services by requesting a due process hearing about those actions. Perhaps Student would also have been eligible for a similar order if parent had invoked stay-put sometime during the *Student I* proceedings, even though those proceedings dealt only with the April 2004 IEP which had expired in April 2005. However, Parent failed to timely invoke a right to stay-put in relation to the District's actions taken after May 1, 2006.

Parent testified that s/he recalls believing in 2006 that the stay-put provision involved only the physical school building and, therefore, did not invoke the Act's stay-put provisions during the *Student I* proceedings. As noted in *Joshua*, "A motion for stay-put functions as an automatic preliminary injunction, meaning that the moving party need not show the traditionally required factors (e.g. irreparable harm) in order to obtain preliminary relief." However, for whatever reason(s), Parent did not invoke stay-put at anytime between the *Student I* hearing request and the final order. And, s/he did not appeal that final order. Parent made no claim, and there was no evidence, that the District misled him/her into not invoking stay-put. That failure was his/her own act or omission.

Parent argued that because the District did not maintain the April 3, 2006 IEP and services throughout the *Student I* proceedings, the May 26, 2006 eligibility decision is somehow voided and that void somehow negates the District's ability to have made its 2007 eligibility decision – thus having left Student continuously eligible under both communication disorder and specific learning disability categories.

The record does not support Parent's argument and Parent provided no supporting authority to support his/her proposition. The IEP of April 2004, the only IEP in dispute in *Student* I, had expired in April 2005. The IEP of April 2006 was not disputed by Parent in the May 1, 2006 due process hearing request. Parent did not request a due process hearing regarding the April 2006 IEP or the May 2006 eligibility decision until April 2008. In the meantime, there had been the subsequent June 2007 eligibility decision. By April 2008 there was no current educational placement to maintain. Parent never invoked stay-put during the *Student I* proceedings. Perhaps, if Parent had invoked stay-put in *Student I*, the District could have been required to maintain the essence of the April 3, 2006 IEP, but the District could also have countered with its own request for a hearing under 34 CFR §300.507(a), putting at issue its May 26, 2006 eligibility decision. None of these things happened because Parent waited two years to raise any of these stay-put issues. There was no stay-put violation during the *Student I* proceedings.

D. INDEPENDENT EDUCATIONAL EVALUATION (IEE)

Former OAR 581-015-094 (2004), *renumbered as* OAR 581-015-2305 (2007), provides:

> (1) A parent of a child with a disability or suspected disability has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district.

(a) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the school district responsible for the education of the child.
(b) "Public expense" means that the school district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.
(2) If a parent requests an independent educational evaluation at public expense, the school district must provide information to parents about where an independent educational evaluation may be obtained, and the school district criteria applicable for independent educational evaluations.
(3) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation, the qualifications of the examiner, and cost, must be the same as the criteria the school district uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.
(a) Except for the criteria in subsection (3), a school district may not impose conditions, or timelines related to obtaining an independent education evaluation at public expense.
(b) The school district must provide parents an opportunity to demonstrate that unique circumstances justify an independent education evaluation that does not meet the district's criteria.
(4) If a parent requests an independent education evaluation at public expense, the school district must, without unnecessary delay, either:
(a) Ensure that an independent educational evaluation is provided at public expense unless the school district demonstrates in a hearing under OAR 581-015-2345 that the evaluation obtained by the parent did not meet school district criteria in accordance with (3); or
(b) Initiate a due process hearing under OAR 581-015-2345 to show that its evaluation is appropriate.
(5) If the school district initiates a hearing and the final decision is that the school district's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
(6) If the parent requests an independent educational evaluation, the school district may ask why the parent disagrees with the public evaluation. The parent may, but is not required, to provide an explanation. The school district may not unreasonably delay either providing the independent education evaluation at public expense or initiating a due process hearing to defend the public evaluation.
(7) If the parent obtains an independent educational evaluation at public expense or shares with the district an evaluation obtained at private expense, the results of the evaluation:
(a) Must be considered by the school district, if it meets the district's criteria, in any decision made with respect to the provision of a free appropriate public education to the child; and

(b) May be presented by any party as evidence at a due process hearing.
(8) If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.
(9) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

Following Parent's August 7, 2006 request for an IEE, the District was required, "without unnecessary delay," to decide if it was going to request a due process hearing to show that its spring 2006 evaluations were adequate or if it was going to authorized payment for an independent educational evaluation. The District responded on August 24, 2006 to Parent's August 7, 2006 request, stating that it was willing to authorize an evaluation in the areas of specific learning disability and communication disorder and that it would be notifying Parent of possible evaluators. On September 13, 2006 the District sent Parent the names of two evaluators who had indicted they could do the evaluations and asked Parent to contact them and choose one. The District also advised Parent that it was authorizing an assessment of intellectual ability and academic achievement as necessary for determining eligibility under a specific learning disability and an assessment of language processing by a speech pathologist as necessary to determine eligibility under a communication disorder. The District further stated that it did not believe a neuropsychological evaluation was necessary. I find that a response on the 14th business day during summer break is a timely response. The District stated that it was willing to authorize an evaluation in the areas of specific learning disability and communication disorder. There then ensued the eight months of mutual miscommunication detailed in Findings 75 through 85, above. However, once Parent, after repeated requests from the District, submitted a copy of the IEE and the billing for it, the District paid for it. The District complied with the rule.

E. PRIOR WRITTEN NOTICE (PWN)

Former OAR 581-015-0075 (2004), *renumbered as* OAR 581-015-2310 (2007), provides in relevant part:

(1) Prior written notice must be given to the parent of a child, and to the adult student after rights have transferred, within a reasonable period of time before a school district proposes to initiate or change, refuses 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.
(2) Prior written notice must be given after a decision is made and a reasonable time before that decision is implemented.
(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 any other options that the IEP team considered

and reasons why those options were rejected;
(d) A description of each evaluation procedure, assessment, test, record, or report the school district used as a basis for the proposed or refused action;
(e) A description of any other factors that are relevant to the school district's proposal or refusal; and
(f) A statement that the parents of a child with a disability have procedural safeguards, and if it is not an initial referral for evaluation, the means by which a copy of the Notice of Procedural Safeguards may be obtained;
(g) Sources for parents to contact to obtain assistance in understanding their procedural safeguards.
(4) The prior notice must be:
(a) Written in language understandable to the general public; and

***

The District's PWNs were also at issue in *Student I* regarding the 2004 IEP process and in the Oregon Depart of Education complaint proceedings regarding the 2003 IEP process. (Exhibits ALJ1, D77).

The May 1, 2006 PWN (sent after the decision was made and before it was implemented) regarding the District's refusal to conduct a CTOPP test for eligibility purposes explained, as had been explained to Parent in the April 3, 2006 meeting, the reason for the refusal. The three tests to be administered – the CELF, CASL, and TWF-2 - were sufficient to determine if Student's "language in the area of syntax, morphology, semantics, or pragmatics is significantly discrepant as measured by standardized tests." *Former* OAR 581-015-0051(2). Parent presented no evidence to the contrary.[14] Presumably, as Ms. Felber had indicated to Parent at the April 3, 2006 meeting, the possibility of a CTOPP could be revisited at Parent's request if an IEP were developed and Parent believed a CTOPP might provide some information necessary for an IEP which the other tests did not provide. However, the PWN was adequate and timely.

The May 26, 2006 PWN regarding the District's determination that Student was not eligible for special education was timely. The decision had been made the same day. On its face it was not adequate in its explanation of the reasons for the decision. Brevity is not always a virtue. Merely stating, "[Student] does not meet District criteria for either category[.]" is the equivalent of, "Student is not eligible because Student is not eligible." The rule requires that a parent be given more of an explanation for the decision than a mere restatement of the decision.

However, based upon the record in this matter, Parent understood at the time of the decision precisely why the District had found Student not eligible. Parent had explained in the May 26 meeting how Student's IQ score and achievement test scores aligned to make Student ineligible. Likewise, Dr. Smith and Mr. Hanks had explained to Parent, and the rest of the team, in the meeting how those scores aligned. After Parent complained on June 28, 2006 about the inadequate explanation on the PWN, Ms. Felber sent Parent on July 26, 2006 a detailed explanation of the reasons for the decision. Although the PWN of May 26, 2006 was not compliant, Parent's

[14] Parent is correct that, as parent specified in correspondence to the District on May 10, 2006 (Exhibit P38), that the District could have re-arranged its responses on the form in more precise manner. However, taken as a whole, the explanations on the one page form are adequate to apprise any reasonable person of the reasons for the refusal.

opportunity to participate in the process was not significantly impeded and Student was not deprived of a FAPE or educational benefit by that procedural violation. *E.g., W.G. v. BD. of Trustees of Target Range Sch.,* 960 F.2d 1479 (9th Cir. 1992); 34 CFR § 300.513.

Parent cited the PWNs of April 30, May 3, and May 24, 2007 in the complaint of April 9, 2008. The April 30, 2007 PWN appears to be adequate and timely. Parent did not mention it in this hearing, other than to confuse it, Exhibit D52, with Exhibit P22, notes of the April 3, 2006 meeting. (T1302-03.) It is unclear for what purposes the May 3 and May 30, 2007 PWNs, Exhibits D54 and D68, were cited by Parent. Parent made no mention of either PWN after filing her complaint. Parent failed to meet her burden of coming forward on each of those PWNs.

The June 13, 2007 PWN was timely. Parent had requested at the June 8 IEP/eligibility team meeting that Student be administered a DIBELS exam to evaluate Student's reading fluency in relation to the 4th grade benchmark. The reasons given for that refusal are procedurally adequate – that reading fluency had already been adequately assessed through the "WJ III testing as well as classroom curriculum based measures." The PWN contained all the elements required by OAR 581-015-2310(3), above. It was equally adequate on June 29, 2007 when resent to Parent after Parent's letter of June 22, 2007 stating, without further explanation, that the June 13, 2007 PWN "did not comply with federal regulations." (Exhibit D79, D88, and D90.)

The June 15, 2007 PWN regarding eligibility suffers the same defect as that of the May 26, 2006 PWN regarding eligibility, it is terminally circular – "Student is not eligible because s/he does not meet the eligibility criteria." However, as in 2006, Parent was well aware of the reasoning of the other members of the team and had signed the eligibility forms for each disability category which clearly stated the eligibility criteria Student had not met. (Exhibit D90.) Although, as discussed below, the decision that Student was not eligible because s/he failed to meet criterion #1 of the SLD category may have been an erroneous decision, neither Parent nor Student suffered remediable harm by any deficiency in the PWN of June 15, 2007. *E.g., W.G. v. BD. of Trustees of Target Range Sch.,* 960 F.2d 1479 (9th Cir. 1992); 34 CFR § 300.513.

The PWN of June 29, 2007 regarding the District's refusal to conduct an auditory processing disorder evaluation has all the required elements. It states that the team, other than Parent and Parent's attorney, believed they had sufficient information to evaluate Student's eligibility without further audiological testing. It then lists the eleven evaluations, tests, records, and reports upon which the District relied to make the eligibility determination. The PWN was procedurally adequate. (Exhibit D89).

F. IMPLEMENTATION OF *STUDENT I* ORDER

As discussed in detail in the August 19, 2008 Order on District's Motion for Summary Determination, jurisdiction to enforce the provisions of a due process order does not lie with a due process hearing office but with the Superintendent of Public Instruction through the state educational agency complaint process and/or through the regular courts. OAR 581-015-2030(11) provides jurisdiction with the Department for Order enforcement. Although the Department does not conduct due process hearings, it has jurisdiction to resolve complaints alleging a school district's failure to implement a due process decision. Note 22, *DOE Case No. 07-054-033.* The District's alleged failures to offer Student the compensatory education ordered in *Student I* and the District's apparent

failure to develop, as ordered in *Student I*, an IEP under which to provide that compensatory education are both issues over which I have no jurisdiction.

F. 2007 EVALUATION and ELIGIBILITY DETERMINATION

Parent argues that no eligibility determination was necessary in 2007 because the *Student I* Final Order established Student's continued eligibility. However, that Final Order said nothing about Student's current eligibility. It determined only that Student was entitled to a specified amount of compensatory education to remedy the District's failure to provide FAPE during 2004. However, given that the spring 2006 evaluation of Student had resulted in a determination that Student was not eligible for special education, the February 2007 Final Order in *Student I* - finding, based upon testimony in the summer and fall of 2006, that the District had failed to provide Student with a FAPE during 2004 and ordering the District to develop an IEP for Student and provide Student with compensatory education to remedy the District's failings in 2004 – did constitute "a reason to suspect that [Student currently] has a disability that has an adverse impact on [Student's] educational performance and [Student] may need special education." Therefore an eligibility evaluation and determination was required independently of any evaluation that might have been ordered in *Student I*. OAR 581-015-2105.

1. Staffing

As in 2006, the District had all the participants at the 2007 meetings who were required to be there by the IDEA and they were all qualified to be there under the IDEA. Parent's specific allegations concern whether or not the participants had the qualifications required by the order in *Student I*. As discussed above, any alleged failure of a participant to have the qualifications specified in the *Student I* order to develop the IEP under which to provide the remedial services ordered in *Student I* is not within my jurisdiction.

2. Evaluations

The team utilized the information it had used in 2006 as well as Dr. Bryant's subsequent report, Ms. Hale's information about how Student had progressed during the 2006-07 school year, current classroom observations, and the ADHD questionnaires. As is 2006, discussed above, the decision to rely upon the 2006 intellectual assessments, rather than the 2003 assessment as advocated by Dr. Bryant, was reasonable, fully debated, and carefully considered.

OAR 581-015-2170(1)(f), set out below, requires an assessment of the student's strengths and weaknesses in classroom performance and academic achievement, relative to age, Oregon grade-level performance, or intellectual development. OAR 581-015-2170(3)(a)(B) specifies that Oregon's grade-level standard in reading fluency skills is one of eight skill sets which must be assessed and compared to Oregon grade-level standards. As specified in Exhibit D74, that standard is the ability to read aloud unpracticed grade-level text at a rate of at least 115 words correct per minute. Although the team had several assessments showing Student's general weakness in reading fluency, the team had no reliable evidence as to whether Student met the specific Oregon reading fluency grade-level standard. The Parent had scores of pages of data showing Student far from meeting the standard. But that data was, as explained in the meeting by District staff and subsequently confirmed in the hearing by various experts, suspect because it was obtain by a parent conducting the testing.

Ms. Hale had a similar amount of data showing that Student was generally meeting the standard. But that data was, as pointed out by Parent and obvious from Ms. Hale's explanation of how her data was collected and from the wording of the benchmark, severely flawed because Student was given the opportunity to read the text over the day prior to the timed reading. Thus, the team did not the have the required reading fluency assessment.

The team had assessments showing student's strengths and weaknesses in classroom performance and academic achievement relative to all of the Oregon 4th grade-level standards set out in Exhibit D74 and relative to Student's intellectual ability – with the exception of Student's reading fluency in terms of words correct per minute.

The District had received Ms. Kossover-Wechter's February 2004 auditory processing evaluation in which she strongly opined that, although Student had significant auditory processing problems, Student's primary areas of difficulty lay in higher level cognitive problems rather than in auditory processing problems. With that evaluation together with the subsequent assessments of classroom performance and academic achievement relative to grade-level standards and intellectual ability, the team did not require an auditory processing disability evaluation to determine Student's SLD eligibility. The District's 2007 evaluation of Student complied with the IDEA's requirements.

3. Parental Participation.

The 2007 meetings went on for four days both because the controlling state rules were amended in the midst of the process and because the facilitator gave Parent full, reasonable opportunity to participate in the process. Parent's attorney was present throughout and, although she had several objections to and questions about the process, she made none regarding her client's ability to participate fully.

4. Eligibility

a. Under the Communication Disorder Category

As discussed above, the criteria for eligibility under the communication disorder category were the same in 2007 as in 2006. Student did not have the required discrepancy as measured by standardized testing.

b. Other Health Impaired – Attention Deficit Hyperactivity Disorder (ADHD)

Some of Student's evaluators over the years, most recently Dr. Kay in 2008, have diagnosed Student with ADHD. ADHD is a condition specifically included in the Other Health Impairment category of 34 CFR § 300.9(c)(9). As provided in paragraph (ii) of that regulation, to be eligible under that category Student's ADHD must adversely affect Student's educational performance. Other than Parent's speculation that Student's educational performance might be affected if Student were placed in a 6th grade class rather than a 4th grade class, the team agreed, and all the evidence showed, that Student's educational performance was not affected by ADHD.

c. Eligibility Under the Specific Learning Disability Category

Congress amended the IDEA in 2004, including §614(b)(6)(A) of the Act which no longer requires, and does not allow state educational agencies (SEAs) to require, local education agencies (LEAs) to use a criterion of a severe discrepancy between intellectual ability and academic achievement to determine eligibility under the specific learning disability category. Implementing federal regulations were promulgated August 14, 2006 with an effective date of October 13, 2006. Those regulations made major changes in how a SEA could require, or allow, LEAs to determine eligibility under the specific learning disability category. Oregon's Department of Education did not adopt implementing rules until April 25, 2007.

34 CFR 300.309 provides, in relevant part:

> 300.309 Determining the existence of a specific learning disability.
>
> (a) The group described in Sec. 300.306 may determine that a child has a specific learning disability, as defined in Sec. 300.8(c)(10), if--
> (1) The child does not achieve adequately for the child's age <u>or</u> to meet State-approved grade-level standards in one or more of the following areas, <u>when provided with learning experiences and instruction appropriate for the child's</u> age or <u>State-approved grade-level standards</u>:
> (i) Oral expression.
> (ii) Listening comprehension.
> (iii) Written expression.
> (iv) Basic reading skill.
> (v) Reading fluency skills.
> (vi) Reading comprehension.
> (vii) Mathematics calculation.
> (viii) Mathematics problem solving.
> (2)(i) The child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph (a)(1) of this section when using a process based on the child's response to scientific, research-based intervention; <u>or</u>
> (ii) The child exhibits a pattern of strengths and weaknesses in <u>performance, achievement, or both, relative to</u> age, State-approved grade-level standards, <u>or intellectual development</u>, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with Sec. 300.304 and 300.305; <u>and</u>
> (3) The group determines that its findings under paragraphs (a)(1) and (2) of this section are not primarily the result of--
> (i) A visual, hearing, or motor disability;
> (ii) Mental retardation;
> (iii) Emotional disturbance;
> (iv) Cultural factors;
> (v) Environmental or economic disadvantage; or

> (vi) Limited English proficiency.
> (b) To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation described in Sec. Sec. 300.304 through 300.306--
> (1) Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and
> (2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.
> (c) The public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services, and must adhere to the timeframes described in Sec. Sec. 300.301 and 300.303, unless extended by mutual written agreement of the child's parents and a group of qualified professionals, as described in Sec. 300.306(a)(1)--
> (1) If, prior to a referral, a child has not made adequate progress after an appropriate period of time when provided instruction, as described in paragraphs (b)(1) and (b)(2) of this section; and
> (2) Whenever a child is referred for an evaluation.

(Emphasis added.)

Commentary in the Federal Register makes clear that the amended statute and the new regulations gave discretion to a state to allow the continued use by LEAs of ability-achievement discrepancy models, including a severe discrepancy model.

> The reference to "intellectual development" in [300.309(a)(2)(ii)] means that the child exhibits a pattern [of] strengths and weaknesses in performance relative to a standard of intellectual development such as commonly measured by IQ tests. Use of the term is consistent with the discretion provided in the Act in allowing the continued use of discrepancy models.

(71 Fed. Reg. 46651, August 14, 2006.)

That commentary also defines "patterns of strengths and weakness."

> Patterns of strengths and weaknesses commonly refer to the examination of profiles across different tests used historically in the identification of children with SLD.

(71 Fed. Reg. 46654, August 14, 2006.)

OAR 581-015-2170 provides in relevant part:

(1) If a child is suspected of having a specific learning disability, the following evaluation must be conducted:
(a) Academic assessment. An assessment of the child's academic achievement toward Oregon grade-level standards;
(b) Review. A review of cumulative records, previous IEPs or IFSPs and teacher collected work samples;
(c) Observation. An observation of the child in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty, which must consist of:

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(B) An observation conducted by a qualified professional (who is a member of the evaluation team) of the child's academic performance in a regular classroom after the child has been referred for an evaluation and parent consent obtained; or

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(d) Progress monitoring data, including:
(A) Data that demonstrate that before, or as part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and
(B) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress that is directly linked to instruction.
(e) For a student evaluated using a response to intervention model as part of a comprehensive evaluation process to determine if the child has a specific learning disability, the evaluation must include documentation of:

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(f) For a student evaluated using a model that is based on the student's strengths and weaknesses, the evaluation must include an assessment of the student's strengths and weaknesses in classroom performance and academic achievement, relative to age, Oregon grade-level standards, or intellectual development.
(g) Other:
(A) If needed, a developmental history;
(B) If needed, an assessment of cognition, fine motor, perceptual motor, communication, social or emotional, and perception or memory if the child exhibits impairment in one or more these areas;
(C) If needed, a medical statement or health assessment indicating whether there are any physical factors that may be affecting the child's educational performance; and
(D) Any other assessments required to determine the impact of the suspected disability:
(i) On the child's educational performance for a school-age child; or

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(2) For consideration of eligibility in the area of specific learning disabilities, the eligibility team must include:

(a) A group of qualified professionals and the parent;
(b) The child's regular classroom teacher or, if the child does not have a regular classroom teacher, a regular classroom teacher qualified to teach a child of his or her age, or, for a child of less than school age, a preschool teacher; and
(c) A person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or other qualified professional.
(3) To be eligible as a child with a specific learning disability, the child must meet the following minimum criteria:
(a) The child does not achieve adequately for the child's age or to meet Oregon grade-level standards in one or more of the following areas when provided with learning experiences and instruction appropriate for the child's age or Oregon grade-level standards:
(A) Basic reading skills:
(B) Reading fluency skills;
(C) Reading comprehension;
(D) Mathematics calculation;
(E) Mathematics problem-solving;
(F) Written Expression;
(G) Oral expression; or
(H) Listening comprehension.
(b) For a student evaluated using a response to intervention model, in relation to one or more of the areas in subsection (3)(a), the student does not make sufficient progress to meet age or Oregon grade-level standards based on the student's response to scientific, research-based intervention.
(c) For a student evaluated using a model that is based on the student's strengths and weaknesses, in relation to one or more of the areas in subsection (3)(a), the student exhibits a pattern of strengths and weaknesses in classroom performance, academic achievement, or both, relative to age, Oregon grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability.
(d) The child's rate of progress in subsection (3)(b) or pattern of strengths and weaknesses in subsection (3)(c) is not primarily the result of:
(A) A visual, hearing, or motor impairment; mental retardation or emotional disturbance;
(B) Cultural factors;
(C) Environmental or economic disadvantage; or
(D) Limited English proficiency.
(4) For a child to be eligible for special education services as a child with a specific learning disability, 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.
(5) The eligibility team must prepare an evaluation report and written statement of eligibility documenting its findings, including:
(a) The evaluation data considered in determining the child's eligibility;
(b) A determination of whether the child meets the minimum criteria for a specific learning disability;
(c) The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning;
(d) The educationally relevant medical findings, if any;
(e) If the child participated in a response to intervention process, documentation that the parents were notified in a timely manner about: the state's policies regarding the amount and nature of student performance data that would be collected, and the general education services that would be provided, as part of the response to intervention process; strategies for increasing the child's rate of learning; and the parent's right to request an evaluation.
(f) The determination of the team concerning the effects of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level; and
(g) A determination of whether the primary basis for the suspected disability is:
(A) A lack of appropriate instruction in reading or math; or
(B) Limited English proficiency;
(h) A determination of whether the child's disability has an adverse impact on the child's educational performance;
(i) A determination of whether, as a result of the disability, the child needs special education services; and
(j) The signature of each member of the team indicating agreement or disagreement with the eligibility determination.

(Emphasis added.)

To find a child eligible under SLD, the team must determine that the child must be found eligible under all four tests of §300.309(a)&(b): 1) The child's achievement does not meet age or, at the LEA's option in Oregon, grade-level standards; 2) a) The child fails to progress after intervention (the response to intervention (RTI) model) or, b) at the LEA's option in Oregon, the child exhibits a pattern of strengths and weaknesses relative to, at the LEA's option in Oregon, age, grade-level standards, or intellectual development; 3) if the child is determined to be eligible under the first two tests, those determinations must have been primarily due to some reason(s) other than those enumerated in § 300.309(3) including environmental disadvantage; and 4). If the child passes all of the first three hurdles, the team must then determine that a lack of appropriate instruction was not the reason s/he passed them.

If the child is not found to eligible under any one of the four tests, the child is not eligible under the SLD category. Therefore, it could seem be most efficient if, as District's eligibility template instructed the team in 2007, a team stopped the process after finding that the child did not pass the first hurdle. However, that methodology is problematic if, as in this case, the team errs in its determination that the child failed to qualify under the first test.

Parent argues that the team should have compared Student's achievement with Student's age peers rather than with Student's grade-level peers. Student would have easily qualified under the first test using age appropriate achievement as the standard. Student was then the age of most 6th graders and achieving at a 4th grade level or below in critical areas. However, as the team, other than Parent, repeatedly explained in the 2007 meetings, Student had had an unusual educational history and had not been instructed with age-appropriate materials. Using 4th grade-level rather than age-level standards was a reasonable decision and within the District's discretion under the regulation and rule.[15]

Nevertheless, the criterion of the federal regulation and the state rule at step one is, "does not achieve adequately *** to meet State-approved grade-level standards in one or more of the following areas ***" The criterion is not the, "progressing one year in achievement for each year in regular education" as the team, other than Parent, applied. As Parent repeatedly pointed out, Student, who had just begun the 4th grade reader at the end of 4th grade, was more-likely-than-not reading below State grade-level standards for 4th grade. This was convincingly confirmed a few days after the decision when Student's State benchmark testing results were issued showing that Student failed to meet State 4th grade-level standards in reading as well as in math.

There were even more serious problems with the team's handling of the issue of whether or not Student was achieving adequately to meet the State's benchmark in reading fluency. First, the team had no reliable evidence as to whether Student met the reading fluency grade-level standard, not even any reliable evidence that Student had been making a year's worth of achievement progress each year. Both the Parent's data, as explained in the meeting by District staff, and Ms. Hale's data, as pointed out by Parent and obvious from Ms. Hale's explanation of how her data was collected and from the wording of the benchmark, were severely flawed. Thus, it was unreasonable for the District to refuse Parent's repeated requests for additional testing of Student's reading fluency. In addition, due to the facilitator's oversight, the team made no decision as to whether Student passed that criterion or not. When asked by the facilitator if Student achieved adequately for his/her age, several participants, more than just Parent and her attorney, responded, "No." During discussions, prior to that vote, participants other than Parent and her attorney expressed reservations about whether Student's reading fluency was adequate to meet State grade-level standards. After getting distracted, the facilitator never asked the correct question of the team.

Thus, there was not a valid determination that Student did not qualify under the first test. There was no team determination about any of the other three tests.

District staff did imply throughout the 2007 meetings and throughout this hearing that Student would not get past the fourth test - that, if Student met the first three tests, it was primarily because s/he had been pulled out of regular school after the first year of kindergarten and received

[15] As Parent noted, the federal agency provided contradictory comments at 71 FR 46652 on the question of whether grade-level or age-level standards should be used with a child who has been retained.

home-school instruction by Parent for four years.

Student was an immature kindergartner during 2000-01, his/her first year of kindergarten. Several professionals have noted a relationship between Student and Parent which would not be conducive to a successful teacher-student relationship. After Student's first year of kindergarten, Student was then home schooled by Parent for four school years, 2001-02, 2002-03, 2003-04, and 2004-05. During 2003-04 Student received special education services scheduled for 4-5 hours per week but from which s/he was frequently absent. Those services were provided based upon an FSIQ of 104 from one IQ test, results which are significantly anomalous with three subsequent IQ tests showing a FSIQ between 81 and 86. For the 2005-06 school year, after four years of home schooling, Student was placed in a public school in a 2nd–3rd grade combined class and was instructed in some core areas at the beginning 2nd grade level at which s/he was then performing. In April 2007, at the end of two school years in that public, regular education placement, Student was performing at the 4th grade level, early 4th grade in some areas to late 4th grade in others. Student has a low average intellect and processing difficulties, but arguably seems to make adequate yearly educational progress when instructed in a regular educational environment.[16] However, the District never formally made that argument.

The District did argue in its closing briefs that Student did not meet the second SLD eligibility criterion used by the District, that of § 300.309(a)(2)(ii):

> The child exhibits a pattern of strengths and weaknesses in performance, <u>achievement</u>, or both, <u>relative to</u> age, State-approved grade-level standards, or <u>intellectual development</u>, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with Sec. Sec. 300.304 and 300.305;

(Emphasis added.)

The District continues to use a discrepancy model, comparing achievement to intellectual development to determine if a child has any significant strengths and weaknesses. This is permissible under the federal regulations[17], if allowed by the SEA, and is allowed by OAR 581-015-2170 which replicates the federal regulation, passing on to the LEAs the discretion given the SEAs by the regulation. Oregon's Department of Education confirmed that under OAR 581-015-2170 an LEA could set a 23 point discrepancy as the eligibility criterion at step two of the SLD determination process.[18] That interpretation is consistent with the language of both the regulation and the rule.

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[16] *See, Hood v. Ecinitas School District,* 482 F.2d 1175 (9th Cir, 2007) in which the child with a specific learning disability resulting from an auditory processing disorder had, although arguably with a severe discrepancy between average achievement scores and gifted ability scores, progressed adequately in regular education and was thus not eligible under the IDEA.

[17] It is clear in the commentary to those regulations that the policy analysts in the federal agency do not believe the discrepancy model is as scientifically sound as other models, but the policy decision as to whether or not to use that model remains, under the regulations and the state rule, within the District's discretion.

[18] Parent questioned whether a SEA can interpret federal regulations for an ALJ. It can not. What a state agency can do, pursuant to OAR 137-003-0635, is give the ALJ its interpretation of its own rules and any applicable statutes as guidance.

On May 21, 2007, after extensive discussion, the team, other than Parent, agreed that Student had no severe discrepancy between achievement and ability. As discussed above regarding the 2006 determination, that agreement was consistent with all the evidence and was clearly correct. When the team met again on June 8, 2007 the District's representative suggested formalizing that determination. However, the rest of the team convinced her to begin anew with the new eligibility forms and the four step process, in which the severe discrepancy model is applied at step two. The team continued on through the June 8 meeting discussing step one. Eventually at the June 15, 2007 meeting, as discussed above, the team, other than Parent and Ms. Broadhurst, erred at step one and did not then continue on to formalize the general consensus it had reached in the May 21, 2007 meeting that Student did not meet the criterion of step two. Nevertheless, the evidence convincingly shows that Student had neither a severe discrepancy nor even a cognizable discrepancy between achievement and ability. Student clearly did not meet criterion two and, thus, although Student likely met criterion one, Student was clearly not eligible under the SLD category using the discrepancy model eligibility criteria of the District which is allowed by the federal regulations and the state rule.

Because Student was not eligible for special education and related services, the District's failure to obtain valid reading fluency data and the District's erroneous determination that Student met the state's grade-level standards in all the specified areas did not deprive Student of any education benefit to which s/he was otherwise due. Because Parent participated in the lengthy team discussions over several days regarding Student's achievement and ability and whether or not there was any severe discrepancy between the two, Parent's opportunity to participate in the decision-making process was not significantly impeded. *E.g., W.G. v. BD. of Trustees of Target Range Sch.*, 960 F.2d 1479 (9th Cir. 1992); 34 CFR § 300.513.

ORDER

1. The District shall provide training to all staff who might be required to provide a Prior Written Notice to Parent about the requirements for issuing such notice and the proper completion of the notice forms including training on articulating meaningful explanations of the District's reason(s) for its actions. This training shall be completed no later than December 15, 2009.

2. The District shall provide training to all staff who might be required to participate in an eligibility meeting regarding Student about the eligibility requirements and determination process for Specific Learning Disability under current federal regulations, state rules, and District policies and guidelines. This training shall be completed no later than December 15, 2009.

Darrell D. Walker, 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 29th day of July, 2009 with copies mailed to:

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