

and R71 on the basis that, although these were identified as transcripts of various IEP meetings, they were inaccurate and incomplete. (Tr 1 at 17-19.) The School District responded that the transcripts were “a fairly accurate and faithful rendition of the tapes” which the District had made at the meetings. (Tr 1 at 21.) Exhibit R71, which the District offered at the hearing, was identified as “corrected” copies of the transcripts identified as Exhibits R34 and R35, with changes based upon the parents’ CD recordings. After comparing the transcripts to the parents’ recordings I find the parents’ criticisms of the transcripts to be correct. The parents’ objections to Exhibits R15a, R34 through R38, R54 and R71 go to the weight of the evidence. The objections are overruled, but the transcripts are admitted with the understanding that they are not exact transcripts of the meetings they purport to record, and that in any instance where there is a discrepancy between the transcripts and the parents’ recordings, the recordings are the reliable evidence.

In addition the parents objected to District Exhibit R61, a transcript of the November 27, 2007 IEP meeting which was not recorded by the parents (because they were not present). Given the quality of the other transcriptions and the absence of a contemporary recording of that meeting for comparison purposes, Exhibit R61 is admitted with the understanding that it is a “rough draft,” rather than an exact transcript of the meeting. At the hearing the District also offered another transcript, identified as Exhibit 15b. The parents’ objection to Exhibit 15b as untimely was sustained.

District Exhibits R1 through R15 (but not R15a or 15b), R33, R39 through R53, R55 through R60, R62 through R64 and R66 and R67 were admitted without objection. District Exhibits R68, R69 and R70 were admitted as rebuttal evidence after the objections of the parents were overruled. District Exhibit R65 was admitted after the objections of the parents were overruled, with the understanding that this was the District’s view of relevant events and chronology, which the parents disputed in some or many particulars.

The District objected to the parents’ Exhibit B27, stating that the Final Order issued on March 10, 2008 (2008 Complaint Final Order) by the Oregon Department of Education (ODE) in response to a complaint by the parents, had been withdrawn for reconsideration by the ODE after the School District requested judicial review and the parents requested this due process hearing.¹ OAR 581-015-2030(10) states:

If a written complaint is received that is also the subject of a due process hearing under OAR 581-015-2345, or contains multiple issues of which one or more are part of that hearing, the Superintendent will set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing. Any issue in the complaint that is not a part of the due process hearing will be resolved using the time limit and procedures in this rule.

¹ The District argued at hearing that this was “not just a matter of reconsideration,” that ODE “withdrew [the order] because [the District was] going to go into County Circuit Court to have it overruled,” and that “by withdrawing it, they stopped that process.” (Tr 7 at 975.)

The District states that after this hearing concluded the ODE reissued the 2008 Complaint Final Order, but eliminated all sections that relate to matters that are issues in this due process hearing. District's Post-hearing Brief at 2. For obvious reasons that order is not part of the record in this matter, and its specific terms, and whether or how they might affect the validity of the remainder of the 2008 Complaint Final Order, are unknown.

There is no claim or evidence, in this hearing, that the School District ever requested a stay of the 2008 Complaint Final Order, and its current legal status, with respect to the issues also raised in this due process proceeding, need not be decided here. *See* Oregon Revised Statute (ORS) 183.341(1), 183.484(4), Oregon Administrative Rule (OAR) 137-004-0080, 581-001-0005, 581-015-0054. It is, however, relevant that the complaint was filed and a decision was issued. Exhibit B27 is admitted. *See* OAR 581-015-0087. Parents' Exhibits A1 through A16, B1 through B26, B28 through B32, and C1 through C26 were admitted without objection.

ISSUES

The parents have requested a hearing based on the following issues, as stated in their hearing request and with some pre-hearing modifications in response to District motions:

STUDENT 1

1. [Withdrawn by parents during hearing. (Tr 1 at 43-45, 333.)]
2. In April 2007, did the School District fail to place Student 1 in the least restrictive environment in which the IEP could be implemented?
3. On or after May 16, 2006, *see* OAR 581-015-2395(3), 581-015-2345, did the School District retaliate against Student 1 for his/her parents' interactions with, and complaints about, the School District, in violation of Section 504 of the Rehabilitation Act of 1973?

STUDENT 2

4. Did the School District limit the parents' right to participate effectively in the development of an IEP for Student 2 at a meeting on August 29, 2007,² in violation of legal requirements?
5. Did the School District fail to inform the parents, in the meeting notice, of the names of three staff members who attended the August 29, 2007 IEP meeting, in violation of OAR 581-015-2190(2)(b)?
6. Did the School District develop an interim IEP for Student 2 on August 29, 2007 which did not meet legal requirements?
7. At the IEP meeting of August 29, 2007, did the School District decline to finalize, or specifically require implementation of, modifications identified in the IEP of August 29, 2007, in violation of legal requirements?
8. Did the School District fail to meet legal requirements to provide one or both parents with an opportunity to participate in the IEP meeting for Student 2 on November 27, 2007?
9. Did the School District require, at the IEP meeting on August 29, 2007, that Student 2 be re-evaluated for eligibility for special education, in violation of legal requirements?

² References to this meeting include the continuance of the meeting on September 4, 2007.

10. Did the School District fail to engage in “evaluation planning” for the evaluation of Student 2 required on August 29, 2007?
11. Was the IEP team instructed to make an eligibility determination on November 5, 2007 based on a draft evaluation which lacked a medical statement from Student 2’s doctor? Were assessments to determine the impact of autism on Student 2’s educational performance, and evaluations to identify Student 2’s educational needs, necessary, and if they were, were they omitted from that draft evaluation?
12. Was the draft evaluation prepared by the School District for Student 2 based in part on invalid information from a psychologist which was inconsistent with information known to IEP team members (parents and others)? (Did the School District fail to ensure that information obtained from the psychologist was documented and carefully considered?)
13. Did the (final) evaluation prepared by the School District for Student 2 fail to include information relating to enabling Student 2 to be involved in and progress in the general education curriculum?
14. Did the School District fail to provide its (final) evaluation of Student 2 to the parents upon completion (and before the November 27, 2007 IEP meeting)?
15. Did the School District improperly make an eligibility determination in November 2007 without a complete evaluation or a current medical statement?
16. Did the School District Director of Educational Support Services personally determine Student 2’s eligibility at the November 27, 2007 IEP meeting?
17. At the IEP meeting which began on August 29, 2007, did the School District fail to place Student 2 in the least restrictive environment in which his/her IEP could be implemented?
18. Did the School District fail to comply with legal requirements in responding to a request from the parents for Student 2’s education records?
19. On or after May 16, 2006, did the School District retaliate against Student 2 for his/her parents’ interactions with, and complaints about, the School District, in violation of Section 504 of the Rehabilitation Act of 1973?

STUDENT 3

20. After the parents requested an IEP meeting in July 2007, did the School District fail to have an IEP in effect for Student 3 at the beginning of the 2007-2008 school year, in violation of legal requirements?
21. [withdrawn by parents before hearing]
22. In evaluating Student 3 in or after July 2007, did the School District fail to comply with legal requirements?
23. Did the School District fail to engage in “evaluation planning” for the evaluation of Student 3 required in or after July 2007?
24. Has the School District failed to provide the parents with a copy of its evaluation of Student 3?
25. For the 2007-2008 school year, did the School District fail to place Student 3 in the least restrictive environment in which his/her IEP could be implemented?
26. On or after May 16, 2006, did the School District retaliate against Student 3 for his/her parents’ interactions with, and complaints about, the School District, in violation of Section 504 of the Rehabilitation Act of 1973?

Abbreviations Used in this Order

IA	Instructional Assistant
IEE	Independent Educational Evaluation
IEP	Individualized Education Program
LC	Learning Center
LRE	Least Restrictive Environment
ODE	Oregon Department of Education, or Superintendent of Public Instruction
PLAAFP	Present Level of Academic and Functional Performance
PLEP or PLP	Present Level of Performance
PN or PWN	Prior Notice, or Prior Written Notice
RLC	Regional Learning Center

FINDINGS OF FACT

(1) Student 1 was born in 1993. In January 2006 Student 1 was in grade 6 at Middle School A. Student 1's home school was Middle School B. (Ex. R1 at 1.) Student 1 is a child with autism. (Tr 5 at 686.) Student 1 had some instruction in a Regional Learning Center (RLC) early in his education, but the parents felt that the years he/she was included in the general education population were when he/she made the most academic gains. (Tr 5 at 687.) While aware that full inclusion was not the best strategy for every child, the parents believed it was very effective for their three children. (Tr 5 at 690.)

(2) An Individualized Education Program (IEP) meeting for Student 1 was held on January 20, 2006, and an IEP was completed. (Ex. R1.) The IEP offered Student 1 specially designed instruction at an RLC. (Ex. R1 at 2.) The placement selected was "Instruction in a special program for more than 60% of the day." That placement was rejected by the parents but accepted by the other members of the IEP team. The placement option "Instruction in regular class, with resource room support for 20-60% of the day" was rejected. (Ex. R1 at 17.)

(3) The School District provided a Prior Notice of Special Education Action to the parents, dated January 25, 2006, indicating that it was refusing to "initiate" or "change" (the District failed to check the box next to either of these options) Student 1's placement ("Placement for more than 60% of the day"). The reason for the action was that "[Student 1] needs modified and more concrete instruction accompanied by higher levels of support in order to access and participate in the curriculum. The amended IEP reflects these needs." (Ex. R2.)

(4) Larry Sullivan is the Director of Educational Support Services for the District. supervises all special education and related services for the District. He has held that position for four years. He has a Ph.D. in school psychology and has had a long career in education and school psychology, including working for 12 years as a school psychologist and teaching in a graduate program in school psychology. (Tr 3 at 509-510.) Mr. Sullivan believed that a placement was established for Student 1 in January 2006 that remained in effect at the time of this hearing. (Tr 4 at 599.)

(5) Student 1 has been home schooled since January 20, 2006. (Stipulation of parties.) The parents filed a request for a due process hearing concerning Student 1's education on August 31, 2006. (Ex. R3 at 1.) ALJ Darrell Walker issued a Final Order in Case No. DP 06-

119 on January 31, 2007, and a Corrected Final Order (to correct formatting errors) (Due Process Final Order) on February 14, 2007. (Ex. R3 at 1; stipulation of parties.) That order stated, in part:

The January 20, 2006 IEP/placement meeting and the resulting IEP and placement determinations were deeply flawed. They were not developed according to the procedures required by the IDEA and the Department's rules. * * * The placement was made utilizing the wrong methodology and the placement document states a placement far more restrictive than necessary.

(Ex. R3 at 23.) The Due Process Final Order also stated that whether Student 1 should be assigned to the neighborhood school and its learning center (LC), or another middle school and its RLC was a close question which could not be answered until:

Student has an IEP with PLPs [Present Levels of Performance] and goals adopted at an IEP meeting conducted to allow the parents' full participation, after * * * which, b) the IEP/placement team decides upon placement, c) beginning that determination with a determination of whether the IEP can be implemented at Student's neighborhood school * * * . And that cannot happen until * * * a current evaluation is completed.

(Ex. R3 at 24.)

(6) The Due Process Final Order required that the District offer Student 1 an Independent Educational Evaluation (IEE), offer the parents an IEP/placement meeting with a neutral facilitator provided by the ODE after completion of the IEE, and provide Student 1 with compensatory education services. (Ex. R3 at 26.)

(7) By letter dated February 12, 2007 the School District offered several services to the parents in accordance with the Due Process Final Order. The District offered an IEE for Student 1 at District expense, as long as the IEE met District guidelines and the parents consented to allow the District to obtain a copy of the IEE report upon completion. The District stated that it remained ready to convene an IEP meeting with a neutral facilitator, and suggested that if the parents wished to proceed with an IEE, the IEP meeting be held after the IEE was completed. (Ex. R4 at 1.) The parents did not accept the District's offer to convene an IEP meeting for Student 1 (Tr 4 at 516-17.)

(8) By letter dated March 31, 2007, the parents filed for another due process hearing (Case No. DP 07-108), alleging that the District "ha[d] denied Student 1 a Free Appropriate Public Education from September of 1999 to December of 2005 by placing him/her in a special class (Regional Learning Center) using an illegal system of delivery." (Ex. R5; stipulation of parties.) In the hearing request the parents requested that the ALJ "place [Student 1] in 'General education with resource room' (Learning Center), which is consistent with [Student 1's] removal from the general education classroom in the 20 - 60% range," and that the ALJ place Student 1 in [his/her] neighborhood school. (Ex. R5 at 2.) That hearing request was dismissed by an Order of Dismissal on May 16, 2007. (Ex. R7; stipulation of parties.)

(9) By letter dated April 13, 2007 Mr. Sullivan informed the parents that, after carefully reviewing their due process hearing request (DP 07-108), the District refused to amend the January 20, 2006 IEP for Student 1 regarding placement and location of services. The letter stated, “The IEP team will consider placement, LRE [least restrictive environment], additional evaluation or performance measures, and other issues, if you request an IEP for your [child] in accordance with the Oregon Department of Education Final Order issued on January 31, 2007.”³ (Ex. R6 at 1.) With the letter Mr. Sullivan enclosed a Prior Notice of Special Education Action (PWN) indicating that the District refused to change Student 1’s “identification” (removal “from the general education classroom for more than 60% of the day”).⁴ (Ex. R6 at 2.) The parents considered the PWN retaliatory because the District was continuing to say Student 1 would be removed for over 60% of the school day, despite what ALJ Walker and the ODE required. (Tr 6 at 872, 879-80.)

(10) On May 24, 2006 (and in April 2006), ODE staff met with Mr. Sullivan to review the corrective action submitted by the District in response to the ODE order in Case No. 05-054-032. On November 28, 2005 the ODE had issued a Final Order on the complaint filed by the parents in that matter (2005 Complaint Final Order), requiring that the District hold an IEP/placement meeting for Student 1 by January 31, 2006. (Ex. A1 at 14.) The ODE found that the District had held an IEP/placement meeting as required but did not complete the placement meeting and determination. The ODE therefore required the District to offer another IEP/placement meeting for Student 1, to be held before the start of the 2007-2008 school year. (Ex. A7 at 4.)

(11) The first day of the 2006-07 school year was September 6, 2006. (Tr 4 at 574.) The dates which Mr. Sullivan offered for the IEP/placement meeting required by the ODE were September 5, 6, 7 or 8, 2006. (Ex. A16.) The teachers had only been back for a couple of days, and Mr. Sullivan wanted to have general and special education teachers from two different middle schools (the school Student 1 had attended and the school where the parents wished to send Student 1) at the meeting. As a result, those were the dates that worked best. (Tr 7 at 1078.) In his letter of August 1, 2006 proposing the meeting dates, Mr. Sullivan wrote, “The District will comply with the ODE Corrective Action (Case No. 05-054-032) requiring the District to hold an IEP/Placement meeting for your [student] by September 8, 2006.” (Ex. A16.) The Corrective Action required that the District submit to the ODE a copy of the IEP meeting notice sent to the parent. The due date for the submission was September 8, 2006. (Ex. A7 at 4.) The parents thought the scheduling options – because only one was before the start of the school year – were “retaliation for all the trouble around that complaint.” (Tr 6 at 879.)

³ Under the IDEA as amended in 2004, as one parent noted, there is a process whereby parents and a school district can agree to amend an IEP without assembling an IEP team. (Tr 4 at 641-42.) See OAR 581-015-2225(2). But as a special education director, Mr. Sullivan felt uncomfortable amending an IEP without an IEP team. (Tr 4 at 642.)

⁴ The PWN issued by the District on April 13, 2007 indicated – because the wrong box was checked – that it concerned a refusal to change Student 1’s “identification,” rather than the placement. (Ex. R6 at 2.) The District acknowledged the error and issued a corrected notice in the course of the hearing, whereupon the parents withdrew their original Issue no. 1. The reason the District issued the PWN was, according to Mr. Sullivan, that “in conjunction with legal consultation we felt it necessary to outline in a prior notice of special education that the District was not going to unilaterally change the placement, and that we would in fact again offer an IEP [meeting] in order to look at placement.” (Tr 4 at 517.)

(12) During the past two years, Student 1 has never re-enrolled in the District and has never received special education services from the District. The parents never re-enrolled Student 1 in public school. (Stipulation of parties.)

(13) On June 26, 2007 the parents requested that the ODE provide mediation relating to educational services for Student 1 (Ex. R67 at 1.) The District agreed to mediation, but Mr. Sullivan imposed several conditions including limiting the subject matter of the mediation (he especially did not wish to discuss subjects that were addressed in the February 2007 Due Process Final Order) and requiring that the principals (who would oversee transition services for Student 1) and his supervisor, Ms. Linder, be present, as well as one of the District's attorneys. (Ex. R67 at 5; Tr 4 at 602-04.) Mr. Sullivan wanted to have the mediation in the second or third week of August, when Ms. Linder and the principals were available. (Ex. R67 at 2.) The parents objected to Mr. Sullivan's conditions because a complaint had been filed against Ms. Linder with the Teacher Standards and Practices Commission, the principals did not know Student 1, and the parents did not want the District's attorney at the mediation. (Ex. R67 at 6.) The parents wanted to mediate only with Mr. Sullivan. (Ex. R67 at 4.) Mr. Sullivan agreed that the attorney would not participate, but he considered the others necessary. (Ex. R67 at 5.)

(14) The parents obtained an IEE at the Child Development and Rehabilitation Center (CDRC) on October 1, 2006. (Stipulation of parties; Tr 4 at 513; Ex. A10.) The School District was billed for the evaluation but never received a copy of it. (Tr 4 at 515.) The CDRC evaluation indicated Student 1 had IQ scores within normal limits in areas requiring nonverbal reasoning. (Ex. A10 at 2.) The parents thought it was retaliation that Mr. Sullivan, despite his Ph.D. in school psychology, improperly combined Student 1's scores on various IQ subtests and testified in a due process hearing⁵ that Student 1 had "borderline intelligence across the board." (Tr 6 at 877.)

STUDENT 2

(15) Student 2 was born in 1996. (Ex. R40.) Student 2 is identified as eligible for special education services under the IDEA in the category of autism spectrum disorder. (Stipulation of parties.) From March 2006 through August 2007 Student 2 was home schooled and the District did not provide IEP services in conjunction with home schooling. As a home schooler, Student 2 had not been served by any special education staff since March 2006. (Stipulation of parties.) In July 2007, following failed efforts by the parties to initiate mediation, the parents contacted the District to request IEP meetings. The meetings were needed in order to have IEPs in effect for two of their children, Student 2 and Student 3, to be enrolled in school in September 2007. (See Stipulation of parties.) In response to the parents' request for an IEP meeting, the District convened the IEP team prior to the start of the school year, on August 29, 2007. (See Stipulation of parties.) On August 27, 2007, two days before the scheduled IEP meeting, the District sent a letter to the parents with copies of the IEP Team Meeting notices, dated August 24, 2007. (Stipulation of parties.) The District scheduled an IEP meeting for Student 2 from noon to 2 p.m. and for Student 3 from 2 to 4 p.m. on August 29, 2007, 2008. (Ex. B8.) The team was unable to complete its review and revision of Student 2's

⁵ This was apparently the due process hearing in December 2006. (See Ex. R3.)

IEP and placement, and the meeting was continued to September 4, 2007. (Stipulation of parties.)

(16) In his letter of August 27, 2007 to the parents Mr. Sullivan wrote,

Although the current eligibilities and IEPs have lapsed, the District would like to develop an interim IEP (4-6 weeks in duration) for each student. The interim period will allow us to gather the information to re-consider eligibility and write an IEP that will reflect their current level of performance.

(Ex. B7.) The District offered to provide “an independent IEP facilitator” for the meeting if the parents wished. Mr. Sullivan also informed the parents that the District’s attorney might attend the IEP meetings.⁶ (Ex. R13.) The parents responded that they disagreed with the idea of developing interim IEPs and found that approach “presumptuous and counterintuitive.” They objected to the District bringing an attorney to the meeting, concerned that attorneys created a hostile environment at IEP meetings. They declined the offer of a facilitator for the meeting. (Ex. B8.) The District staff whom Mr. Sullivan thought needed to participate on the IEP teams for Student 2 and Student 3 were unavailable before August 29, 2007, which was the first day of school (for the staff). (Tr 1 at 169.)

(17) The IEP meeting notice for the August 29, 2007 meeting had the following boxes checked:

- Review existing information
- Decide if your child should be evaluated for special education eligibility;
- Decide whether additional testing is needed;
- Develop or review an individual education program (IEP) and placement for your child. The development of the IEP will be based on information from a variety of sources including the most recent evaluation, progress report, test results and information from you.

(Stipulation of parties; Ex. R12.)

(18) The agenda for the August 29, 2007 IEP was:

- Introduction
- Review Agenda
- Interim: IEP/Placement
- Parent Concerns
- Student 2’s Strengths and Concerns
- Eligibility and Evaluation
- Present Levels of Academic Achievement and Functional Performance

⁶ It was incorrect that Student 2’s eligibility (determined previously on March 24, 2006) had “lapsed.” (See Ex. R27.)

- Related Services, Accommodations and Modifications
- Special Factors, Extended School Year, Non-Participation Justification
- State and School Assessments
- Placements
- Retention
- Home-School/Communication
- Next Steps

(Ex. R31.)

(19) The Notice of IEP Meeting for the August 29, 2007 meeting for Student 2 indicated that the following individuals were required to attend: Larry Williams, principal; Valda Fields, autism specialist; Mr. Sullivan; and Rich Cohn-Lee, attorney. In addition the District invited Katie Mason, speech and language specialist; Tina Leaton, regular education teacher; and Kathleen Gray, special education teacher.⁷ All were present when the meeting began. (Exs. B29, CD 1, R30; Tr 4 at 522-23.)

(20) Mr. Sullivan invited the District's legal counsel, Mr. Cohn-Lee, to participate in the IEP meeting for Student 2 on August 29, 2007 for several reasons. First, the District wanted legal advice available, in part because the children were making a transition from home schooling to public school. Second, staff members had requested that the District have counsel present at the meeting because of the contentiousness of previous meetings with the parents, and because the parents had made an allegation concerning one of the staff members present and had filed a complaint with the Teacher Standards and Practices Commission against a previous administrator. (Exs. B29, CD 1 at 2, B30, CD 1 at 1 *et seq.*; Tr 4 at 521.) Mr. Sullivan often brings a facilitator to IEP meetings, especially if there may be some difficulty with the IEP or the District cannot anticipate what will happen. In most cases the facilitator is a licensed attorney who does not work for the District. Another reason Mr. Sullivan brought the District's attorney to the IEP meeting on August 29, 2007 was that the parents did not accept his offer to provide a facilitator. (Tr 7 at 1039.)

(21) The parents objected to the participation of the attorney at the August 29, 2007 IEP meeting (Ex. B8) but the District declined to excuse him. The parents thought the presence of the attorney created a hostile environment. (Ex. B29, CD 1.) The mother thought that it was retaliation for the District to bring the attorney to the IEP meeting because there was no corrective action at issue. She considered the attorney "a very scary man" who is "not looking out for the child. He is looking out for the District. And he is there just to argue with you and break you down. * * * The District feels that it has to somehow protect themselves from the parents." (Tr 7 at 954.)

(22) At one point the following exchange took place between the attorney and the father:

⁷ In fact, the regular and special education teachers were required to be present. The attorney was not. See Oregon Administrative Rule (OAR) 581-015-2210(1).

Attorney: * * * because none of us are teachers –⁸
Father: I'm a teacher.
Attorney: Okay. None of us are accredited –
Father: I'm a regular education teacher.

(Ex. B29, CD 5 at 7.) The father, who was Student 2's home school teacher, thought the above comments by the attorney discredited him as a teacher, and that this resulted in making the information provided by the parents less valuable to the other members of the IEP team. (Tr 5 at 716, 736.) Among other criticisms the parents thought the attorney's comments that their proposed accommodations and modifications were not individualized indicated complete disregard for their information, and limited their participation in the IEP meeting. (Tr 5 at 725-26, 729.) In their view the attorney had no previous experience as a teacher and had never met Student 2, and had no idea whether the modifications and accommodations they proposed were appropriate for Student 2 (Tr 5 at 729.) The parents stated that they found the presence of an attorney was intimidating. (Tr 5 at 735-36.) The father also thought the attorney's comments about home schooling, which he viewed as denigrating, to be retaliation. (Tr 5 at 735.)

(23) The parents had at least one negative past experience involving Mr. Cohn-Lee. In Fall 2005 Mr. Cohn-Lee called the parents' attorney and left a message saying that he had heard that the father intended to attempt to enroll Student 1 at the neighborhood school. He stated in the message that he felt that would be inappropriate; he advised the parents' attorney to counsel the father against taking such action; and he stated that if the father attempted to enroll Student 1 in the school "a problem would be expected and that school authorities would call the police department to have [the father] arrested for the offense of Criminal Trespass." The parents' attorney conveyed this message to the parents, and reported that the mother was quite upset. (Ex. A2.)

(24) The parents were active participants throughout the IEP meeting on August 29, 2007. They contributed a great deal of information about Student 2, including his/her achievements in home school and his/her present levels of academic and functional performance (PLAAFPs), to which the other members of the IEP team listened with interest and respect. (Ex. B29, CDs 1-5.) The parents were correct in their assessment that Mr. Cohn-Lee's participation went beyond providing legal advice. (*See, e.g.*, Ex. B29, CD 2 at 16-22, CD 3 at 34-36, CD 4 at 9.) They found this upsetting. They did not hesitate to challenge the attorney or other team members. At times the parents were quite rude, making offensive remarks or interrupting other speakers, and at times they – especially the father -- raised their voices. (*See, e.g.*, Ex. B29, CD 2 at 18, CD 4 at 31, CD 5 at 9.) Although Mr. Sullivan and Mr. Cohn-Lee also raised their voices at times, it was in general in response to provocative comments by the parents. At one point the mother became quite upset at an altercation between the father and the attorney and urged them both to leave the room. (Ex. B29, CD 5 at 9.) If the parents were

⁸ Ms. Gray and Ms. Leaton, the special and regular education teachers at Elementary School C, were both present at the beginning of the meeting. Although Ms. Leaton may have departed by the time the attorney made this statement, *see* Ex. B29, CD 3 at 27, Ms. Gray was still at the meeting. A statement that "none of us are teachers" improperly excluded her as well as the father, although the father took it as a personal insult.

intimidated at the IEP meeting on August 29, 2007, it was not evident. Moreover, despite the occasional heated exchanges in the course of the meeting, for the most part all participants were polite to each other. (*See* Ex. B29, CDs 1-5.)

(25) Valda Fields has been an autism consultant for the Eugene School District for five years, and has worked as an autism consultant since 1994. She has a master's degree in special education with an emphasis on autism and is a certified special education teacher. She consults with regular and special education staff for students who are eligible for services based on autism spectrum disorder. (Tr 2 at 176-179.)

(26) For personal reasons Ms. Fields felt vulnerable at the IEP meeting on August 29, 2007 and said little or nothing. There was a lot of yelling and screaming at the meeting and she felt she could not have "taken it." The person she remembered to have been yelling and screaming was the father. She thought that was perhaps because he was the loudest. (Tr 2 at 232-233.) Although Mr. Sullivan and Mr. Cohn-Lee also raised their voices at the meeting, Ms. Fields thought she remembered the parent's comments "the most" because they were often "directed at people, and sometimes in a hurtful way." She described the District's staff as more defensive, responding to the parent. (Tr 2 at 235-236.) Tina Leaton, the regular education teacher, recalled that the contentious moments at the IEP meeting were initiated by the parent. She did not recall any behavior on the part of the District's attorney or its representatives that she would have considered intimidating to the parents. (Tr 2 at 291.)

(27) Kathleen Gray has been the special education teacher at Elementary School C for 12 years. She began her teaching career in 1973 and about three years later, after receiving her master's degree, began working as a special education teacher. (Tr 3 at 398.) Ms. Gray did not think the parents seemed intimidated in any way by Mr. Cohn-Lee at the August 29, 2007 IEP meeting. (Tr 3 at 422.) (However, at one point Ms. Gray asked the father to please not yell at her. (Ex. B29, CD 5 at 8.)) Any comment about the fact that the father was not a certified teacher did not have any impact on Ms. Gray's willingness to listen to the information he presented. The participants in the August 29, 2007 IEP meeting did not discount the father's abilities as a teacher but rather were pretty impressed with how much progress the children had made in home schooling. (Tr 7 at 994-95.)

(28) The father could not identify any information concerning Student 2 and Student 3 that he wished to present at the IEP meetings in August and 2007, that would contribute to the IEP team's decision-making, that he was prevented from giving to the IEP team. (Tr 6 at 828-32.)

(29) Four District employees attended the August 29, 2007 IEP meeting whose names were not included on the PWN. (Stipulation of District, Tr 1 at 46; *see* Ex. B29, CD 1.) One was Jeralynn Beghetto, the former principal of Elementary School C, who had been invited by Mr. Sullivan and Mr. Williams to participate because the parents had raised the issue of retention of the children.⁹ In the District the ultimate decision about retention is made by the school principal, and Mr. Williams was a new principal in the District and new to the school.

⁹ The parents proposed that Student 2 be retained in fifth grade for a second year. (*See* Tr 6 at 824.)

(Tr 4 at 524.) Ms. Beghetto had been the principal when the children attended Elementary School C in 2006. (Tr 6 at 839.) Once the retention issue was discussed she did not attend any further meetings. (Tr 4 at 525.) The second was Katie Allgood, an occupational therapist, who was invited for the meeting for Student 3 which was to take place on August 29, 2007 as well. Mainly she was sitting outside the meeting room, and when it became clear Student 3 would not be discussed on August 29, 2007 she left. (Tr 3 at 421, Tr 4 at 525.) The third person, Marilyn Nersesian, was the special education administrator in charge of elementary schools. In that role she often attended IEP meetings. (Tr 3 at 422.) She was actively involved in decisions about allocating resources such as Instructional Assistants (IAs), and consulted with IEP teams concerning placement and eligibility. In addition the meeting notice failed to mention that Nancy Reiter, school psychologist, would be present as a member of the IEP team. (Tr 4 at 525.) Ms. Reiter and Ms. Nersesian were present and were introduced at the beginning of the meeting. (Tr 4 at 526.)

(30) The parents asserted during this hearing that they found it intimidating to have a lot of people from the District in the room for the IEP meeting. (Tr 5 at 738, 740.) But at the meeting the parents did not object to the participation of the persons not listed on the meeting notice. (Tr 4 at 526.) The parents felt it would presumptuous to ask people whom, they were told, were present for a reason, to leave. (Tr 5 at 741.) Having objected unsuccessfully to the presence of the District's attorney, they also thought it would be futile to "pick a fight" about others in the room. (Tr 6 at 908.)

(31) Ms. Fields did not perceive that the presence at the IEP meeting of persons not listed on the notice interfered in any way with the participation of the parents, nor did Ms. Gray. (Tr 2 at 184-85, Tr 3 at 419, 422.)

(32) Ms. Leaton, the regular education teacher at the August 29, 2007 meeting, left after two hours, although the meeting continued for another hour. She was not present for at least some of the discussion of accommodations and modifications. (Exs. B29, CD 3 at 40; B30, CD 1 at 15.)

(33) In August and September 2007 there were three IEP meetings for Student 2 totaling approximately 10-11 hours. (Tr 1 at 57.) At those meetings the parents presented data from the home school setting concerning Student 2. The other members of the IEP team were enthusiastic about the amount of progress which the data seemed to indicate. (Tr 1 at 65.) The District members of the IEP team initially accepted the parents' information about the PLAAFPs for Student 2 because it portrayed his/her current abilities more accurately than information from his/her prior experience in public school. (Tr 3 at 412.) The team wanted to see how the parents' present levels for Student 2 "played out" when Student 2 was receiving instruction in the general education curriculum. (Tr 3 at 413.)

(34) The information from the parents was used "pretty much in its entirety" to create the interim IEP. (Tr 1 at 90.) There was little or no file review at the August 29, 2007 IEP

meeting for Student 2 The District was just trying to get information from the parents. (Tr 5 at 754.)¹⁰

(35) Mr. Sullivan proposed to develop “interim” (short term) IEPs for Student 2 and Student 3, partly because the children had not been in the public school system for some time, and partly because he thought that for interim IEPs (only) the District could accept the parents’ PLAAFPs. (Tr 4 at 538-39.) Mr. Sullivan considered the parents’ information insufficient to create annual IEPs because the District had no evaluation data, no standardized assessments, and only some understanding of the types of curriculum that the father used in home schooling. (Tr 4 at 627-28.) To create annual IEPs the District needed more data, but collecting additional information at the outset would have increased the amount of time needed to get the students back into school with updated IEPs. (See Tr 4 at 632-33.)

(36) Larry Williams has been the principal of Elementary School C since Fall 2007. He was previously employed as an assistant principal at several schools, and for six years as the multicultural affairs coordinator at a high school. (Tr 1 at 55-56.) He attended the IEP meetings for Student 2 in August and September 2007. (Tr 1 at 57.) Mr. Williams thought the parents’ PLAAFPs (for both children) were sufficient for developing interim IEPs but not annual IEPs. He thought it was necessary to see whether the students would produce the same results in public school as they did in the home school environment. Some, but not all, children have a period of adjustment when changing schools or environments. (Tr 1 at 141-142.)

(37) Nancy Reiter has been a school psychologist with the District for almost eleven years. She has a Ph.D. in psychology, has worked professionally with adults and children in various settings, and is licensed in school psychology by the Teacher Standards and Practices Commission. (Tr 3 at 335-36.) Ms. Reiter thought an interim IEP was necessary for Student 2 in August 2007 because District staff had not taught him/her for a year and one-half and lacked knowledge of his/her academic and functional levels in a school setting. (Tr 3 at 390.) Ms. Gray, the special education teacher, felt that the August 2007 IEP for Student 2 should be an interim IEP because Student 2 had not been in public school for one and one-half years and the District did not have updated information to determine his/her present levels. The interim IEP would allow District staff to get some baseline academic information from which they could formulate accurate present levels and an accurate IEP. (Tr 3 at 411.) Ms. Gray thought there was a need to reevaluate Student 2 (Tr 4 at 414-45.)

(38) Ms. Fields, the autism consultant, attended the August 29, 2007 IEP meeting for Student 2 and one of the two September IEP meetings. (Tr 2 at 192.) She thought it was “very generous” of the IEP team to accept the parents’ PLEPS for Student 2 and Student 3 in August and September 2007 because they represented a significant change from the children’s performance when they were previously enrolled in public school (“it didn’t sound like the

¹⁰ In April 2006 the District sent a letter to the parents concerning home schooling for STUDENT 2 (Ex. R28.) The letter stated that Student 2 should be assessed by August 15, 2007. The parents did not have Student 2 assessed by that date because they were planning to return him/her to public school, intended to talk about testing him/her in school, and were thinking about retention. (Tr 6 at 824.) Consequently there were no August 2007 assessment results available when the IEP meeting began for Student 2

same children”). (Tr 2 at 185-186.) She considered it reasonable to begin with interim IEPs because the school staff “needed to become reacquainted with the children.” She pointed out that one major characteristic of autism is an inability to generalize information learned in one setting to another, so it was not certain that Student 2 and Student 3 would perform at the same level in public school as they did at home. (Tr 2 at 187.) Ms. Fields did not know, however, whether this difficulty with generalization had been documented for Student 2 or Student 3 (Tr 2 at 216.)

(39) At the August 29, 2007 meeting it was decided that the IEP team would develop an interim IEP for Student 2 to last for eight weeks,¹¹ after which the IEP team would reconvene and reassess the IEP. This was considered desirable by all of the IEP team members other than the parents because it had been so long since Student 2 was in a public school setting. (Tr 1 at 59, 188.) The IEP team used the Oregon Standard Individualized Education Program form to prepare the IEP, with services to start on September 5, 2007 and end on November 2, 2007. (Ex. R40.) The IEP had all of the components of an annual IEP; only the review period was different. (Tr 3 at 450; Ex. R40.) It was intended that the interim IEP be implemented as quickly as any other IEP. (Tr 1 at 62.)

(40) The father stated that the home school environment which he provided for his three children with autism spectrum disorder was different from the public school environment “only in numbers.” (Tr 5 at 713.) The parents were very offended that the District proposed an interim IEP for Student 2 when they had presented a great deal of information about Student 2’s PLAAFPs, which they considered sufficient for preparing a valid annual IEP. (Tr 5 at 742-43.)

(41) At the IEP meetings in August and September 2007 the parents submitted a list of accommodations and modifications which they proposed for Student 2¹² (Tr 1 at 66; *see* Exs. B10, R39.) They had received the list from the Oregon Parent Training Institute (OrPTI).¹³ (Tr 5 at 723-24.) Based on their experience seeking services for Student 1 they believed that unless accommodations and modifications were detailed very specifically in the IEPs for Student 2 and Student 3 they might not be provided. (Tr 6 at 910.) On August 29, 2007 the IEP team spent an hour or more discussing each of the proposed items in relation to Student 2 and making some changes. (Tr 1 at 73-75, Tr 3 at 409, Tr 4 at 543.) The regular education teachers would probably be using the modifications and accommodations the most on a daily basis. Before agreeing to modifications and accommodations Mr. Williams wanted input from one or more regular education teachers, to ensure there were no obstacles to implementation which the other IEP team members were not recognizing. (Tr 1 at 75-76; *see* Exs. B29, CD 5, B30 CD 1.) He was new to his position and did not know the teachers as professionals yet, and wanted to be sure those involved in implementing the IEP would be comfortable with what was being

¹¹ Traditionally schools assess all students formally and informally in the first eight weeks of the year. (Tr 1 at 60-61, *see* Tr 2 at 247-248.)

¹² The mother acknowledged that the accommodations and modifications were “just suggestions,” and stated that the parents were open to suggestions from the other members of the IEP team. The father disagreed, stating, “A lot of these are not just suggestions.” (Ex. B29, CD 3 at 24.)

¹³ OrPTI advised, “When reviewing these ideas, keep in mind that any accommodations or modifications an IEP team chooses must be based on the individual needs of students.” (Ex. B10.)

required. (Tr 2 at 287.) No regular education teacher was present for much or all of the discussion of accommodations and modifications on August 29, 2007, as Ms. Leaton had left the meeting early. (Tr 5 at 719-21.) Outside of the IEP meeting(s) Mr. Williams discussed the feasibility of implementing the modifications and accommodations with Ms. Leaton and possibly her co-teacher, Ms. Newberry. (Tr 1 at 78, 114-115, Tr 5 at 719, *see* Tr 2 at 321-23.)

(42) The list of requested accommodations provided by the parents (Ex. R39) was the longest Ms. Gray had ever seen. (Tr 3 at 405.) Ms. Gray took notes while the accommodations and modifications were discussed extensively at the August 29, 2007 IEP meeting. (*See* Ex. R39.) She grouped the accommodations into more educational terms (organization, curriculum, instruction, etc.). None of them were rejected outright by the IEP team, although some were reworded. For example, the statement “[Student 2’s] teachers will draw arrows on worksheets * * * to show how ideas are related, or use other graphic organizers,” was restated as “Teachers will use visual cues to increase [Student 2’s] understanding of content material.” This gave the teachers a little more leeway in how they would accomplish the goal. (Tr 3 at 407; *see* Ex. R39.) The parents’ proposed accommodation that Student 2 would be provided with audiotapes of textbooks was modified to state this would happen “when available and feasible,” because often audiotapes are not available. (Tr 3 at 449; *see* Ex. R39 at 4.) The proposed accommodation that Student 2 would repeat back the directions for a task was modified by the words “as appropriate,” because it would be distracting to Student 2 and his/her seatmates for Student 2 to repeat every direction that was given. (Tr 3 at 449; Ex. R39 at 3.) During the August 29, 2007 IEP meeting the parents agreed to these and similar changes. (Ex. B29, CD 3 at 21-26.) Student 2 had more accommodations than any other student on the autism spectrum taught by Ms. Leaton. (Tr 2 at 286.)

(43) Ms. Gray typed up the accommodations and modifications page of the IEP (Ex. R40 at 7) taking into account the discussion that was held at the IEP meeting, and told the father that if the parents had any questions or concerns he should contact her and she would put in anything that was missing. She did not hear from the parents.¹⁴ (Tr 3 at 410.)

(44) Although the parents agreed to the version of the modifications and accommodations ultimately adopted by the IEP team, they later complained that adding the words “as needed,” or with “teacher approval,” to their proposed language in some instances meant those changes were not required, and would not be implemented. (*See* Tr 5 at 727-28.)

(45) In August and September 2007, when the IEP team considered placement for Student 2, the main concern of the parents was that Student 2 be in general education classes with general education peers as much as possible. (Tr 3 at 452.) The parents felt Student 2

¹⁴ Among their proposed accommodations and modifications the parents requested that Student 2 not have to perform timed tests. (*See* Ex. R39.) The IEP team agreed that STUDENT 2 would be permitted as much time as needed to finish tests. (*See* Ex. R32 at 9.) Nevertheless, apparently by oversight, that provision was not included in the final statement of accommodations and modifications included in the IEP. (*See* Ex. R40 at 7.) Although the parents comment on this omission in their Closing Statement (page 9), they did not bring it to Ms. Gray’s attention earlier.

would not learn to communicate with a large group of people with a lot of noise going on if he/she had never been in that situation. (See Tr 5 at 770.) The parents returned Student 2 to public school exclusively so that he/she could be in general education for the social activity. (Tr 5 at 763.) When Student 2's social skills goals were discussed, the parents explained that they wanted Student 2 to have more interactions with normally functioning peers. (Tr 1 at 139.) As compared to the environment in the Learning Center (LC), the parents had objections to having Student 2 interact with other students in the Regional Learning Center (RLC). (Tr 1 at 138-139.) They told the other IEP team members, at the August 29, 2007 meeting, that they wanted Student 2 to be in a social environment and had concerns relating to his/her social behavior (conversing with others, working with others to complete tasks, etc.) (Tr 2 at 311.) They were not concerned with Student 2's academic improvement, and offered to provide Student 2 with basic academics in home school if the District considered that too much of a challenge for Student 2 in general education. According to the parents, Mr. Sullivan "wouldn't allow [them] to take [Student 2] home for even one subject," and had informed them that was not District policy but "best practices." (Tr 5 at 763-64.)

(46) The placement which the IEP team selected for Student 2 in September 2007 was "General Education class LC/RLC instruction for Written Expression, Math Problem Solving, Social Skills and Speech/Language services." This option was selected because it was found to meet the specific instructional needs of the child in both the general education classroom and the special education environment. It offered an opportunity for Student 2 to be in class with typically developing peers in some subjects, and also receive small group instruction with ongoing feedback, immediate error correction, and opportunities for multiple responses. It also provided for specially designed instruction in both educational environments. Possible harmful effects were removal from general education peers; some academic and speech/language instruction outside the general education setting, away from typically developing peers; and potential damage to self-esteem and stigmatization in small groups, resulting in decreased cooperation. (Ex. R40 at 8.) The specially designed instruction included 30 minutes per week for math and 150 minutes per week for written expression in the RLC or LC; 60 minutes per week for social skills in the RLC; 180 minutes per month for communication in the speech/language room; and 180 minutes per week for reading in the general education room. (Ex. R40 at 1.)

(47) The option of "General Education with supplemental aids and services and pull-out for Speech Language" was also considered, because it would allow Student 2 to spend more time in class with typically developing peers and provide maximum opportunity to follow the grade level general education curriculum, as well as enhanced self-esteem, happiness, and cooperative behavior. The possible harmful effects of this placement were that Student 2 would not receive small group instruction, ongoing feedback, immediate error correction, opportunities for multiple responses, or instruction that was slower paced, direct and explicit with simplified concepts; and it would create an opportunity for more distractibility. This option was ultimately rejected because it did not allow for specially designed instruction in Math, Written Expression and Social Skills. (Exs. R40 at 8; Ex. C25.)

(48) When the IEP team discussed placement for Student 2 the District team members did not believe the placement option "General Education class with supplemental aids and services and pull-out for Speech/Lang[uage]" (see Ex. R40 at 8) would provide Student 2 with

enough support and smaller group opportunities. Mr. Williams thought the placement ultimately accepted, “General Education class LC/RLC instruction for Wr[itten] Exp[ression], Math Prob[lem] Solv[ing], Soc[ial] Skills, Sp[eech]/Lang[uage] services,” provided the least restrictive environment based on the current IEP, because it allowed Student 2 to be in the general education classroom as much as possible but also offered some small group opportunities to reinforce the classroom instruction. (Tr 1 at 91-92.)

(49) Ms. Gray started the RLC at Elementary School C 12 years ago. An RLC provides more intensive services to children with disabilities and yet allows them to be mainstreamed as much as possible. Usually a teacher and a number of instructional assistants work in the RLC, so there is more support for students in the RLC classroom. Depending on a student’s needs, instruction may be one-on-one or in groups of two to five. (Tr 3 at 400.) The RLC services students with a little higher level of need than those in the LC, and includes students from outside the neighborhood. (Tr 2 at 324.)

(50) In an LC there are generally six to eight students, and sometimes 10 or 12, in a group with one teacher and one assistant. Most of the time the curriculum used in the LC is the same as is used in the general education classroom, although students may use the curriculum from earlier grades or go more slowly. (Tr 3 at 399-400.) In the RLC Ms. Gray might supplement the general education curriculum or use completely different materials, depending on a student’s IEP goals. (Tr 3 at 402-04.) Students in the LC and the RLC might receive instruction together, and might be in a general education classroom together for instruction in some subjects such as social studies and science. (Tr 3 at 440-42.)

(51) Ms. Gray thought the amount of prompting Student 2 needed from his/her IA to stay focused on the classroom teacher was detrimental to Student 2’s ability to learn in that setting. But Student 2 could develop general classroom skills – such as focusing – while working on subjects other than reading and math in the general education class. (Tr 3 at 468.) All of Student 2’s specially designed instruction was delivered in the RLC, not the LC. (Tr 3 at 473.) If there were less than five students in an instructional group in the RLC, Student 2 was sometimes able to focus without being redirected frequently. (Tr 3 at 472.)

(52) Ms. Fields noted that many students with autism spectrum disorder were in regular classrooms for different periods of time just for socialization, with no academic gains really expected. But in her opinion, if the goal was to make academic gains, the regular classroom might not be the place where a student who was highly distractible and needed lots of prompts would make such gains. (Tr 2 at 226-227.)

(53) Ms. Leaton thought the placement selected for Student 2 in September 2007, to have specially designed instruction in the LC or RLC rather than the general education classroom, was necessary for Student 2 in the core academic areas (reading, math, writing).so that he/she could reach grade level. To fully grasp the concepts being taught Student 2 needed to have more attention from the teacher than whole group instruction would offer. (Tr 2 at 308-310; *see* Tr 2 at 318.) But it would be very rewarding for Student 2 to be involved in a whole group situation (general education) in social studies, science, P.E. and music. (Tr 2 at 318.)

(54) Ms. Leaton felt staff were unable to give Student 2, in the general education setting, the level of instruction he/she needed to enable him/her to be as successful as he/she could be. She disputed the parents' contention that Student 2 could have been educated in the regular classroom with specially designed instruction provided by the IA. The role of the IA was to help, but not teach, Student 2. Specially designed instruction should come from the special education teacher or an IA supervised by that teacher. (Tr 2 at 309.)

(55) Ms. Reiter favored the placement selected for Student 2 because the RLC could provide much smaller group instruction which was modified more than might be the case in a regular LC, and very much based on a child's current levels. She thought the RLC environment would help Student 2 make progress toward his/her goals. She also considered it a benefit that Ms. Gray was somewhat familiar with Student 2 (Tr 3 at 358-359.) Ms. Reiter believed that smaller group instruction was better for Student 2 because the general education curriculum needed to be modified for Student 2 and "taken in smaller chunks or taught in smaller chunks," and possibly the curriculum content needed to be modified to some extent. (Tr 3 at 386.) She thought it would be very difficult to modify the curriculum to the degree proposed in a large classroom with many other students. (Tr 3 at 388.)

(56) In considering Student 2's placement, Mr. Sullivan believed that the PLAAFPs, Student 2's needs and the IEP goals required fairly intense targeted instruction in small groups in the RLC for math, written expression and social skills, but in reading the general education teacher could provide the specially designed instruction. (Tr 4 at 549; *see* Exs. R40 at 8, R63 at 12.)

(57) Student 2 began school at the start of the 2007-08 school year, on September 5, 2007. (Stipulation of parties.) Student 2 had 27-29 students in her general education class. In the RLC classroom, when a group had five students, the group would have a teacher and an IA. Student 2 also had a one-on-one IA. (TR 3 at 425-26.) At that time Student 2 was receiving most of his/her academic instruction in the general education classroom, based on the PLAAFPs provided by the parents. After teaching Student 2 for two months, Ms. Gray's opinion was that Student 2's academic instruction goals would have been better met in the RLC. (Tr 3 at 435.)

(58) Based on information Ms. Gray received from the general education teachers and the IA, and data that was collected, Ms. Gray concluded that, despite a lot of changes based on the accommodations in Student 2's IEP, the general education curriculum was very difficult for Student 2. It was very hard for Student 2 to focus on the teacher in the large group and absorb and learn the information that was being taught. (Tr 3 at 427-28.) Even in a small group setting in the RLC Student 2 was not learning quickly, but he/she made meaningful progress. (Tr 3 at 428.) To deliver Student 2's specialized instruction in the regular education classroom, it would have been necessary for Student 2 to be isolated from the rest of the students, receiving instruction from his/her IA. But the parents wanted Student 2 to participate in whole group instruction. (Tr 3 at 429.) Ms. Gray agreed that the placement selected was the least restrictive environment in which Student 2's IEP goals and objectives could be implemented. (Tr 3 at 433.)

(59) Student 2's math and reading teacher in September 2007 was Debi Newberry. (Tr 2 at 243.) Student 2 was in Ms. Newberry's classroom for about one hour for reading, and two

hours for math, each day. (Tr 2 at 243.) There were 30 students in 5th grade reading and 25 in 5th grade math. Although Student 2 had a one-on-one IA, even when Student 2 was working in a smaller group of eight to nine it was difficult for him/her to pay attention. The aide attempted to break the information down for Student 2 and repeat it while Ms. Newberry was teaching, but that was really difficult. (Tr 2 at 254-55.) Ms. Newberry did not see the growth, success and interaction with Student 2 that she hoped to see. (Tr 2 at 255.)

(60) Ms. Leaton teaches a 4th and 5th grade blend, and Student 2 was in her class for whole group instruction in science, social studies, and other daily activities. (Tr 2 at 281-82.) Ms. Leaton never saw the same level of output from Student 2 as the worksheets provided by the parents demonstrated. (Tr 2 at 292.) Student 2 was more able to be fully involved where there was a literal context for the school work – for example, in math. But anything that was inferential was very difficult for Student 2. Student 2 was not working at the same level as even the fourth graders. His/her IA helped as much as possible to guide Student 2 to do what he/she could, and they eliminated work that was too hard or took too long. The assignments were modified to be much shorter, especially when writing was required. (Tr 2 at 292-94.) In 4th or 5th grade students need to use reading that is part of the curriculum to infer different emotions, concepts or facts. (Tr 2 at 294.) The written work which Student 2 produced in the classroom, even with some prompting from the IA, was not at the level the parents reported to the IEP team in August 2007. (Tr 2 at 313-15.)

(61) In Ms. Leaton's class it appeared that Student 2 would go to the rest room to escape when there was a difficult task to be performed, and there was a problem with lengthy stays in the rest room. Also, Student 2 believed the doors had to be closed, and if the door was open he/she would close it. (Tr 2 at 299.) If Student 2 was called on in class he/she would not give a verbal response beyond a simple one- or two-word answer. (Tr 2 at 300.) Sometimes the students worked in groups of five or six, and the other students engaged Student 2 and kept him/her involved in what was going on. Although Student 2 would not initiate a discussion, he/she might ask a question if he/she felt comfortable. (Tr 2 at 301.) Student 2 would have outbursts of giggles in class, sometimes in reaction to something in the environment, and sometimes seemingly for no reason. (Tr 2 at 301-302; *see* Ex. R50 at 3.) These outbursts happened two or three times daily in Ms. Leaton's room, more frequently at the beginning of the school year than later on. (Tr 2 at 302.)

(62) When Student 2 was in a large group it was difficult for him/her to attend to and understand a whole group question, direction or provision of information. Student 2 required additional prompts, visuals and restatements to understand the concept being discussed or attend to the verbal discussion as a whole. In the school setting he/she did not independently utilize a large amount of verbal language daily without prompts to use his/her words. When observed in the classroom he/she did not use verbal language to interact with the teacher or his/her peers. (Ex. R49 at 2-3.)

(63) Student 2 had music and P.E. class twice a week, for 25 minute blocks, and spent some time in the social skills group and with the speech and language teacher. (Tr 2 at 303-04.)

(64) In the 2007-2008 school year Ms. Leaton had eight students eligible for special education in her class of 27. Because there is an RLC at Elementary School C there is a larger

population of students with higher level needs at the school. Over the years Ms. Leaton has had a number of students with autism, as well as students with other disabling conditions. (Tr 2 at 285-86.) Ms. Leaton thought the students in her class with Student 2, who also spent time in the RLC, were among the hardest working, focused and driven students in her class, and were good role models for Student 2 within the classroom. (Tr 2 at 306-07.)

(65) The parents accepted the placement selected by the other IEP team members in September 2007, although they considered it inappropriate, because they wanted Student 2 to start school the next day (the first day of school). They only compromised on the placement – instead of complaining about it – because Student 2 would still remain in general education for the majority of the day. Ultimately they did not sign the IEP for Student 2 because they did not agree with the placement. (Ex. B23 at 2-3.) The IEP was completed on or around September 5, 2007. (See Ex. R40.)

(66) The District believed it was necessary to reevaluate Student 2 when he/she returned to public school in August 2007 because Student 2 had not been in public school for one and one-half years, and although the IEP team received examples of “classroom work-type assessments” from the parents, the team had not received any standardized test results. The District members of the IEP team felt a reevaluation was necessary in order to have a “complete look” at Student 2 (Tr 1 at 80, see Tr 2 at 193-94.) At one of the IEP meetings for Student 2 the team members, including the parents, discussed what assessments would be needed for Student 2 (Tr 1 at 80-81.)

(67) Ms. Fields had contact with Student 2 and Student 3 when they were enrolled, about three years earlier, at Elementary School A. (Tr 2 at 179, 215.) She thought it was necessary to reevaluate Student 2 and Student 3 in Fall 2007 so the District could get more current information about their performance. New evaluations would also be helpful in identifying necessary accommodations. (Tr 2 at 193-194.) Ms. Leaton agreed that reevaluation was necessary to identify Student 2’s present levels, so District staff could really help Student 2 to make as much academic progress as he/she could throughout the year. (Tr 2 at 295.) At the August 29, 2007 IEP meeting Ms. Reiter concurred with other members of the IEP team, including Ms. Gray, that it was necessary to reevaluate Student 2 to get a better picture of his/her current academic and functional levels. (Tr 3 at 339; see Tr 4 at 415.)

(68) Children on the autism spectrum do change; there is a variability in their functioning. The IEP team needs to know how a child is functioning in order to develop appropriate goals and accommodations. (Tr 3 at 339-40.)

(69) In the course of the IEP meetings for Student 2 in August and September 2007 District members of the IEP team planned his/her evaluation. They thought a measure of educational performance and an updated autism spectrum disorder evaluation would be helpful in determining Student 2’s current functional level, and providing some additional information about his/her academic skills. (Tr 3 at 340.) The parents denied permission for standardized academic achievement and intellectual ability tests. They believed an IQ test would not be a reasonable or correct representation of Student 2’s abilities, although the District offered nonverbal tests as one option. (Tr 3 at 340-341.) Consequently the team, including the parents, planned for an evaluation that would address or identify Student 2’s level of academic

achievement with all of the measures that could be obtained within a school setting (in-class performance) as well as an autism behavior rating scale, interview, observations, a medical statement, and a functional communication statement. (Tr 3 at 341-42, 416-17.)

(70) On September 6, 2007 the parent signed a Prior Notice About Evaluation/Consent for Evaluation for Student 2 identifying the evaluation procedures and assessments which the District planned to use in the reevaluation process. These were “Behavior Rating Scale, observations/interactions, Statement of Functional Communication, Medical Statement, Review of Characteristics of ASD, district 4j measures of academic achievement & classroom assessments to assess learning strengths and weaknesses.” (Ex. R41.) The notice states that the proposed evaluation was “based on the following evaluation procedures, test, records or reports: File review, including records and reports, parent reports.” (Ex. R41.) The file review was a review of the extensive information provided by the parents, as that was the only current information available.

(71) Ms. Reiter looked over Student 2’s file before the August 29, 2007 IEP meeting but did not review it until after the District received a consent to evaluate Student 2 (Tr 3 at 365.) She had noted that Student 2’s eligibility for special education services was last determined on March 24, 2006. (Tr 3 at 365; Ex. R27.) Although the parents had removed Student 2 from school several days before that date, at the time District staff did not know whether Student 2 would be returning to school, and if he/she returned they wanted to have his/her eligibility documented so there would be no disruption or interruption in the special education services the District was providing. (Tr 1 at 370.) Student 2’s parents did not participate in the March 2006 eligibility determination for Student 2 and in February 2006 had refused consent for a reevaluation of Student 2 (Tr 4 at 414-15; Exs. B3, B4.) The last Statement of Eligibility for Special Education services for Student 2 prepared before March 2006 was dated March 10, 2003 and appeared to be a three-year redetermination of eligibility. (See Ex. R24.) In March 2006 the parents believed, and informed Ms. Reiter, that no additional evaluation data was needed to determine that Student 2 continued to be eligible for special education services. (Ex. R25 at 3.) At the IEP meeting on November 5, 2007 the parents received a draft assessment summary (Ex. R46) which informed them, for the first time, that there had been an eligibility determination on March 24, 2006. (Tr 5 at 753.)

(72) Ms. Reiter referred to a “lapse in eligibility” when more than three years had passed since a previous eligibility determination – the situation the District was trying to avoid with Student 2 in March 2006. (Tr 3 at 371.) Although Student 2’s eligibility had not reached the three-year deadline when he/she returned to school in August 2007, the team thought it was necessary to get an updated evaluation and eligibility for him/her based on current information. The evaluation is one part of the process of determining eligibility. (Tr 3 at 373-74.) Ms. Reiter would not have expected, in November 2007, that Student 2 would no longer have autism spectrum disorder. But in the eligibility determination process, which includes an evaluation, the IEP team gets more information about the child’s current abilities. (Tr 3 at 375.) A child with a diagnosis of autism spectrum disorder will not, based on the diagnosis alone, be eligible for special education services. For eligibility the child must meet the criteria in Oregon Administrative Rule (OAR) 581-015-2130.

(73) Once Student 2 returned to public school in September 2007 his/her teachers and aides observed him/her on a daily basis and his/her aide was taking detailed data, logging his/her educational milestones and behaviors. (Tr 1 at 165.) When Student 2 came jointed to Ms. Gray's class in September 2007, his/her actual performance was not consistent with the parents' PLAAFPs in some areas. (Tr 3 at 413-14, 452.)

(74) On October 3, 2007 the District sent the parents a Prior Notice of Special Education Action which was intended to inform them that "The District's IEP team developed and implemented an interim IEP [for Student 2] to be reviewed by 11/2/2007." The notice described this as a "refusal" to "initiate" the following aspect of Student 2's special education: "Provision of a free, appropriate public education (includes IEP)." The notice stated that implementation of an annual IEP was another option considered. The notice, prepared by Ms. Gray, indicated that Student 2's eligibility and his/her current IEP "had lapsed." (Ex. R42.)

(75) The District sent the parents a Prior Notice of IEP Team Meeting on October 24, 2007, informing them that a meeting had been scheduled for November 5, 2007. (Stipulation of parties.) The agenda for the November 5, 2007 IEP meeting was:

- Introduction
- Review agenda/timelines
- Parent concerns
- Student 2 strengths
- Eligibility
- Present levels of academic achievement and functional performance
- Goals: reading, math, written language, communication, social skills
- Related services, accommodations and modifications
- Service summary
- Special factors, ESY, non-participation justification
- State assessments. District/school assessments
- Placement
- Conclusion, next steps

(Ex. R44.)

(76) Debi Newberry has been an elementary school teacher at Elementary School C for 21 years. She was Student 2's reading and math teacher. (Tr 2 at 241-43.) Before the November 5, 2007 meeting Ms. Newberry provided PLAAFP information for Student 2 for reading and math to Ms. Gray. (Tr 2 at 259.) Ms. Gray and other staff presented the PLAAFPs for Student 2 at the November 5, 2007 meeting. (Ex. R45; Tr 4 at 528.)

(77) Ms. Reiter, the school psychologist, conducted an autism spectrum disorder (ASD) assessment of Student 2 with the assistance of other members of the IEP team. The purpose of the assessment was not to identify Student 2's strengths and weaknesses but to determine whether he/she met the eligibility criteria to continue receiving special education services. (See Ex. R46 at 1.)

(78) One of Ms. Fields' responsibilities is doing assessments for special education services as part of the Student Support Team. (Tr 3 at 337.) At the request of Ms. Reiter, Ms. Fields observed Student 2 on September 27, 2007 in a regular education reading class. (Ex. R52 at 3-6). Ms. Fields observed that when the teacher turned on the overhead Student 2 "immediately began to disconnect," and the instructional assistant (IA) had to work really hard to keep Student 2 engaged. Ms. Fields noted that Student 2 had to be involved in the instruction pretty frequently or he/she would go "off task." (Tr 2 at 203.) She wondered what benefit Student 2 was getting from the instruction in the regular classroom, because Student 2 "just seemed checked out for a lot of the time." (Tr 2 at 205-206, 22-226.) Ms. Fields thought Student 2 did not seem as "checked out" in the RLC because he/she was directly engaged more often. (Tr 2 at 226.) Ms. Fields noted that Student 2's answers seemed more reliable when Student 2 read the questions. (Tr 2 at 224-225.) Ms. Fields did not record information about Student 2's social interactions because she did not see such interactions. She observed that while the teacher was talking to the whole class Student 2 seemed lost in his/her own world and was giggling. (Tr 2 at 207, 223.) Student 2 also seemed to feel a need to close the door if he/she noticed that it was open. (Tr 2 at 205, 207, 224.) Ms. Fields provided information about her observations to Ms. Reiter. (Tr 2 at 208.)

(79) Katie Mason is a speech-language pathologist with the District. She has a master's degree in communication disorders and is licensed by the Teacher Standards and Practices Commission and the American Speech and Language Association. She has held her position with the District for three years. (Tr 3 at 482-83.)

(80) Tina Leaton was Student 2's homeroom teacher at Elementary School C. She has a master's degree and has taught for 10 years, including eight years at Elementary School C. Ms. Mason asked Ms. Leaton to prepare a functional communication evaluation of Student 2 (Ex. R50 at 1-3). (Tr 2 at 295) The evaluation, which Ms. Leaton prepared around October 2007, indicates that Student 2 rarely understood non-verbal cues such as pointing and rarely responded to gestures appropriately, followed an eye gaze or looked to people for cues. Ms. Leaton expected most of the students in her class to have these skills, and they are among the behaviors which showed Ms. Leaton the students were paying attention to, and understanding, what was happening. (Ex. R50 at 1, Tr 2 at 296-97.) When Ms. Leaton was interacting with another student, Student 2 could only maintain focus and connection if Ms. Leaton purposely engaged him/her and made efforts to keep him/her engaged. (Tr 2 at 297.) Student 2 rarely followed directions appropriately unless someone specifically spoke to him/her, or he/she saw a cue for a routine behavior. When Ms. Leaton gave a list of three or four things for the students to do, Student 2 would need the assistance of his/her IA to follow the instructions. (Tr 2 at 298.) Ms. Leaton did not recall Student 2 ever asking a question for clarification, although mostly he/she would take direction and try to do what was required. (Tr 2 at 296-97.)

(81) Based on checklists completed by Ms. Leaton and others Ms. Mason prepared a Functional Communication Evaluation Report for Student 2 on October 29, 2007. (Ex. R50.) She was concerned that Student 2 did not have a lot of language output unless strongly encouraged or in a really comfortable environment. She was also concerned that in a regular education environment Student 2 would not reach his/her potential because he/she would not have the opportunity and encouragement to "get [his/her] language out." Also, it would be difficult for Student 2 to understand what he/she should focus on, and get all of the information

he/she required, in a fifth grade classroom with a high amount of very difficult vocabulary and very complex directions. (Tr 3 at 491.)

(82) To complete her part of the assessment Ms. Reiter met for about one and one-half hours with the mother, who spoke with Ms. Reiter about H.B's strengths and weaknesses in various areas (communication, repetitive behaviors; etc.). Ms. Reiter documented the information she received in the course of the interview in a Parent Interview form. She also had the parent complete a Gilliam Autism Rating Scale, which includes the categories of Communication and Social Interaction. (Tr 3 at 344, 353-54; *see* Exs. R51, R53.)¹⁵ In addition, on September 17, 2007 Ms. Reiter observed Student 2 in a math classroom for an hour. (*See* Ex. R52.) Student 2 consistently needed individual instruction from an aide to do the (geometry) task. Student 2 did not really work on the problem. He/she stared a lot. (Tr 3 at 348.)

(83) Ms. Reiter prepared and brought a draft Autism Spectrum Disorder Assessment Summary for Student 2 to the November 5, 2007 IEP team meeting for Student 2 (See Ex. R46; Tr 3 at 352.) She submitted a draft of the assessment, rather than the final version, of the assessment summary because a student's behavior might change from one observation to the next, depending upon the time, environment and many other factors. (Tr 1 at 81.) Mr. Sullivan encouraged school psychologists and speech therapists to present draft reports. (Tr 4 at 530.) This process was used in preparing other IEPs as well, especially with autism assessments, because of the variability of students on the autism spectrum. (Tr 7 at 1061.) The assessment included observations by various IEP team members, a parent interview, and information from the Gilliam Autism Rating Scale completed by the mother. (The other part of the evaluation was the Functional Communication Evaluation Report prepared by Ms. Mason.) The assessment provided comprehensive information about Student 2's impairments in communication and social action; patterns of behavior, interest and other activities that were restricted, repetitive or stereotypic; and unusual responses to sensory information, all of which were helpful in determining the impact of autism on Student 2's educational performance. (*See* Ex. R46.)

(84) At the November 5, 2007 IEP meeting Ms. Reiter reviewed the draft assessment summary which she had prepared. (Stipulation of parties.) Ms. Reiter repeatedly invited the other IEP team members to comment and make suggestions for changes or additions to the report. There was a lengthy and congenial discussion of the draft, with comments by many of the IEP team members, including the parents, about their own observations of Student 2. The draft was revised repeatedly in response to the comments, with general agreement. (Ex. R31, CD 1 at 9 *et seq.*) Ms. Reiter incorporated the suggestions about the draft assessment when she prepared a second draft. (Tr 3 at 356; *see* Ex. R47.) The final version of the assessment did not include several terms the parents found offensive, including the words "obsessively" and "compulsive."¹⁶ (*See* Ex. R48.) Also, at the November 5, 2007 meeting, Ms. Mason, the

¹⁵ Ms. Reiter informed the parent that she, and not the parent, had to fill out the form. The parent thought some of the information Ms. Reiter recorded was inaccurate. (Tr 6 at 927.)

¹⁶ Ms. Reiter wrote in the draft assessment that Student 2 "obsessively makes lists." (Ex. R46 at 3.) Ms. Reiter based this comment on information she had received from the parents. When Ms. Reiter discussed this comment at

Speech and Language Specialist, reviewed the Functional Communication Evaluation Report. (Stipulation of parties.)

(85) The parents believed that the District's assessment did not include information that would enable Student 2 to be involved and progress in general education, and that the educational recommendations at the end were those the District received from the parents. (Tr 5 at 759.) Ms. Fields agreed with the educational recommendations based on the information presented in the assessment and her experience as an autism consultant. (Tr 2 at 233.)

(86) The parents submitted medical information about Student 2 to the District when Student 2 was three years old. (See Stipulation of parties.) This was the last medical statement on file for Student 2 (Tr 3 at 342.) Dr. Kordesch completed the Medical Statement or Health Assessment for Student 2 on November 5, 2007. On the form the doctor checked the statement, "There are physical or sensory factors that may affect the child's educational performance, If yes, please describe" and wrote in "Autism." Dr. Kordesch provided no other information on the medical statement. (Ex. B16.) The mother had indicated before the November 5, 2007 IEP meeting that there were no changes in Student 2's health. (Tr 3 at 357-58.) Ms. Reiter wrote on the draft assessment summary that a medical statement had not been received, but crossed out that comment. (Ex. R46 at 2) because (as she recalled) at the November 5, 2007 meeting the parents said they had a current statement and agreed to provide it the next day.¹⁷ The team took it on good faith that the parents would bring it in the next day. But they did not. (Tr 3 at 343, 354; see Tr 1 at 124, Tr 3 at 417-18.) Until they submitted the medical statement as evidence in this hearing the parents had provided no current medical statement for Student 2 to the District. (See Stipulation of parties; Ex. B16.)

(87) At the August 29, 2007 IEP meeting Mr. Sullivan acknowledged, with regard to Student 2, that "we have an eligibility." (Ex. B29, CD 2 at 25.) Although the District did not have a medical statement for Student 2 in hand on November 5, 2007, Mr. Williams believed that with information about Student 2's performance in class for the past two months, and the data from Ms. Reiter and Ms. Mason, they had adequate information to make an eligibility determination and write an IEP. (Tr 1 at 82, 85.) Ms. Newberry and Ms. Fields also believed that at the end of the November 5, 2007 IEP meeting the IEP team had enough information to make a determination that Student 2 remained eligible for special education services as a student with autism. (Tr 2 at 212, 259.)

(88) Ms. Reiter also agreed that on November 5, 2007 the IEP team had enough information to make an eligibility decision as a result of the evaluation (including the

the November 5, 2007 meeting the School District staff responded that they had never seen that behavior, but the parents confirmed that it occurred at home and the father offered an illustration. (Ex. B31, CD 1 at 31 *et seq.*) Ms. Reiter wrote in the draft assessment that Student 2 "Appeared to have a compulsive need to have the classroom door shut," but at the November 5, 2007 meeting Ms. Reiter voluntarily removed the word "compulsive." (See Ex. 46 at 3.) When this observation was discussed at the meeting the parents did not object or become upset, but rather explained that this behavior resulted from them trying to teach Student 2 to keep the outside door closed at home, and volunteered that they would teach him/her to differentiate between outside and inside doors. (Ex. B31, CD 1 at 34 *et seq.*)

¹⁷ In fact, the father said the doctor did not have the statements for Student 2 and Student 3 ready on November 5, 2007 but he could bring them the next day. (Ex. B31, CD 1.)

assessment and functional communication reports) and the information contributed by the IEP team members. (Tr 3 at 357, 358.) She believed the team had sufficient information to plan a program for Student 2, with an IEP including goals, objectives, levels of service and accommodations. (Tr 3 at 357.) It was agreed that Student 2 remained eligible for special education services under the category of autism spectrum disorder. (Tr 1 at 85, 210, Tr 3 at 357, Tr 4 at 531.) The parents and the other IEP team members signed the eligibility determination on November 5, 2007 (which indicated the medical statement had not yet been submitted), and the parents received a copy of the evaluation report and the eligibility statement. (Ex. R55.)

(89) Although Mr. Sullivan believed the IEP team would have benefits from receiving data from standardized assessments (rejected by the parents) he concluded that the information the District had collected – including classroom performance data, District assessments, communication and autism summaries, and input from the parents – was sufficient for an evaluation of Student 2 (Tr 4 at 544-45.) Ms. Gray also believed the assessment provided enough information to determine eligibility, and combined with other information was sufficient to write IEP goals and determine accommodations, modifications and placement. (Tr 3 at 437.)

(90) At the November 5, 2007 IEP meeting the IEP team, including the parents, agreed that Student 2 was eligible for special education services under the category “autism spectrum disorder.” (Tr 4 at 531.) The parents had not received the draft assessment summary report (Ex. R46) before that meeting and it was difficult and confusing for them to have to review it in the course of the meeting. They felt it put them at a great disadvantage. (Tr 5 at 758.) The parents did not recall whether they had asked to receive documents relating to the evaluation of Student 2 before the November, 2007 meeting. (Tr 6 at 922.)

(91) On November 6, 2007, the day after the IEP meeting, the parents sent Mr. Sullivan an e-mail message rescinding their agreement to the eligibility determination because they disagreed with the draft autism assessment prepared by Ms. Reiter, commenting that “Several members of the team including the parents disagreed with several statements and observations, saying they were wrong, unobserved by them, or over identified.”¹⁸ (Ex. R56 at 1.) The parents particularly objected to the use of the terms “obsessively,” “perseverates” and “compulsively” in the draft report. (Tr 6 at 844, 920.)

(92) After the parents rescinded their agreement to the eligibility determination for Student 2, Mr. Sullivan decided that as there was no longer a consensus on eligibility, it would be reconsidered at the next IEP meeting. He thought it was the District’s obligation to complete the eligibility process. (Tr 4 at 532.) Another IEP meeting was scheduled for Student 2 on November 7, 2007. But that day one of the teachers expected to attend was sick, so Mr. Sullivan informed the parents the meeting would be cancelled and rescheduled for November 13, 2007, and invited them to meet with him before then if they wished. (Ex. R56 at 2-3.)

¹⁸ Some of the observations reported in the draft assessment were inconsistent with what the father observed in Student 2’s classroom at Elementary School C on November 6, 2007. (See Ex. B17.)

(93) On November 8, 2007 the parents sent Mr. Sullivan an e-mail stating, “You can’t base eligibility on a faulty evaluation and no medical information.” They also revoked their consent for the District to do any further evaluation of Student 2 and Student 3 (Ex. R56 at 5.) Later that day Mr. Sullivan met with the parents and discussed the draft assessment summary presented at the November 5, 2007 meeting. The parents objected to the fact that the summary was a draft and objected to some language in the draft (the words “obsessive” and “compulsive” were specifically mentioned). Despite their agreement with Ms. Reiter’s comment about Student 2 making lists (at the November 5, 2007 meeting), and the fact that the information came from the mother and was identified as coming from the home, the father now asserted that use of the word “obsessive” was “malicious.” The parents extended that judgment to the use of the words “compulsive” and “perseverative” in the draft as well. They had investigated what those words meant as terms of art to psychologists, and that was one basis of their objection to the terms.¹⁹ The parents believed the draft autism summary misrepresented Student 2, which is something they had feared would be the result of an evaluation. (Ex. B32, CD at 3 *et seq.*) They viewed the assessment as “an attack” on their child. (Ex. B32, CD at 23.) The parents claimed that the information they had received from Student 2’s teachers was inconsistent with what the teachers said in the November 5, 2007 meeting, and they wanted to have the draft evaluation destroyed (“burned”). (Ex. B32, CD at 17 *et seq.*) They asserted they were going to send “their psychologists” into Student 2’s classroom to provide their own observations. (Ex. B32, CD at 54.)

(94) Mr. Sullivan indicated the parents could revisit the assessment with the IEP team at the next meeting and request further amendments. He offered to remove language that was offensive to the parents if the IEP team considered it inaccurate. (Ex. B32, CD at 33 *et seq.*, 46 *et seq.*) He identified the District’s procedure for amending or purging a student’s records at parents’ request; he gave them a copy of that procedure. (Tr 4 at 556, Tr 6 at 840; *see* Stipulation of parties.)²⁰ After the meeting with the parents Mr. Sullivan met with Ms. Reiter and made a few more changes to the draft report. (Tr 7 at 1063; *see* Ex. R47) Mr. Sullivan assumed the final version of the assessment summary report was sent to the parents with PWNs on November 28, 2007, in accordance with his instructions to his staff. (Tr 7 at 1064.) Only the final version of the report went into Student 2’s official file. Ms. Reiter had saved the two earlier drafts in her assessment file. (Tr 7 at 1097-98.) The parents acknowledged receiving the final version of the assessment summary on November 29, 2007. (Ex. B23 at 3.)

(95) At the November 8, 2007 meeting Mr. Sullivan told the parents the District could extend the interim IEP so that they could arrange for an IEE for Student 2, and could reconsider eligibility. (Tr 7 at 1045.) The parents requested “every scrap” of information Ms. Reiter relied upon in preparing the draft assessment. (Ex. B32, CD at 1:00.) On November 9, 2007 the parents wrote Mr. Sullivan reiterating that they expected to receive copies of all of the materials

¹⁹ Mr. Sullivan, who has a Ph.D. in school psychology and had worked for years as a school psychologist, acknowledged at this hearing that the words were inaccurate, an overstatement. He thought a reason the parents had “real difficulty” with these terms was that they were viewing them in relation to the psychological diagnosis of obsessive-compulsive disorder, “seeing it as a diagnosis rather than a descriptor.” (Tr 7 at 1061-62.)

²⁰ The parents did not follow that procedure because they did not understand why it was necessary to do so for a draft document. (Tr 6 at 926.)

Ms. Reiter used to develop the draft autism assessment, and that he could mail the information to them or they would pick it up. Mr. Sullivan responded the same day that he would ask Ms. Reiter and the team to provide any information (including copies of the protocols) used to develop the evaluation in a timely manner, and as soon as possible. (Ex. R56 at 6.)

(96) In his response on November 9, 2007 Mr. Sullivan also asked the parents what they had decided concerning their next steps in relation to eligibility and the IEP meeting for Student 2 (Ex. R56 at 6.) The parents replied that they needed at least ten business days to think about their next steps and needed to cancel the IEP meetings scheduled for the following week; and they asked Mr. Sullivan not to attempt, as he had “threatened” at the November 8 meeting, to have any IEP meetings without them. (Ex. R56 at 6.) Acceding to the parents’ wishes, Mr. Sullivan cancelled the meeting scheduled on November 13, 2007. He was concerned about the postponement, however, because the interim IEPs expired on November 2, 2007. (Tr 7 at 1050.)

(97) In a November 14, 2007 letter to the parents, Mr. Sullivan informed them that the District had rescheduled the IEP meetings for Student 2 and Student 3 for Tuesday, November 27 and Wednesday, November 28, 2007.²¹ (Stipulation of parties.) The letter stated, “The current eligibilities and interim IEPs have lapsed,” “[t]he District needs to extend the timeline to complete the IEP activities for both children,” and the District “has initiated a request for mediation from the Oregon Department of Education.” (Ex. R57 at 2.) The parents responded on the same date that they needed more time to contemplate their options; they did not receive a copy of the draft autism assessment summary until after the November 5, 2007 meeting; and they still had not received the documents that backed up the draft assessment summary. They noted that this information should have been provided on November 5, 2007 and reminded Mr. Sullivan that they had requested it again on November 8, 2007. They asserted they would give Mr. Sullivan their decision “by November 26, 2007 * * * providing the district sends or allows us to review the ‘DRAFT’ Evaluation documentation immediately.” They wrote Mr. Sullivan that he “should not” schedule any IEP meetings until they decided how to proceed. (Ex. R56 at 1.)

(98) Mr. Sullivan did not provide the parents with copies of the materials used to create the Autism Spectrum Disorder Assessment Summary and the Functional Communication Evaluation Reports for Student 2 until March 20, 2008, when he was required to do so in a Corrective Action from the ODE. (Ex. B28.)

(99) On November 14, 2007 Mr. Sullivan requested mediation from the ODE to assist in resolving issues relating to Student 2 and Student 3’s special education program. He stated that “The current eligibilities and interim IEPS [had] lapsed for both children” and the parents were disputing the eligibility assessment and the District’s PLEPS. The parent signed the request on November 21, 2007. (Ex. B21.) The parents wanted only Mr. Sullivan to be in the mediation with them. Mr. Sullivan told his supervisor, the deputy superintendent, that he felt uncomfortable about that and wanted someone else from the District to participate as well. Mr. Sullivan had been aware for some time that there was a flyer in circulation referring to a website

²¹ He had honored the parents’ request for 10 business days to consider their options.

that described at length Student 1's relationship with the District, including links where Mr. Sullivan's recorded voice and voices of other District staff were heard, sometimes out of context. Some of the recorded snippets were from conversations where only the parents and School District staff members were present. Mr. Sullivan felt that the parents misunderstood or misconstrued his statements, and that whenever he disagreed with the parents they framed it as retaliation or some other "untoward act." He wanted someone else from the District to hear the conversations. (Tr 7 at 1068-1074.)

(100) The parents cancelled the mediation because the mediator informed them Mr. Sullivan had been talking to the deputy superintendent and his attorney about the mediation. The parents were concerned because the deputy superintendent and the attorney had not signed the confidentiality provision of the mediation agreement (which had been signed by Mr. Sullivan, Mr. Williams and Ms. Gray), and they did not know whether Mr. Sullivan would be providing his attorney with information about the mediation. According to the parent, the mediator denied such contact would be a violation of the confidentiality agreement, but the ODE said it would be. (Tr 6 at 934-37.)

(101) In a November 21, 2007 letter to the parents, Mr. Sullivan wrote (in part):

In my letter responding to your request for an Independent Educational Evaluation (IEE), I stated that District must have completed our educational evaluation of your [student] prior to your request to pursue an IEE. You have not allowed the District to complete a comprehensive (strengths-based) evaluation, only agreeing to an autism evaluation. Since you disagree with the autism evaluation results, the District would support an IEE for that component of an evaluation. The District will accept the revised autism evaluation for [Student 2] based on information provided at the eligibility meeting. *A copy will be provided to you prior to the scheduled IEP meeting.*

As we discussed, the current eligibilities and IEPs for your children have lapsed. The District has the responsibility to complete a student's eligibility and IEPs within procedural guidelines. Although you requested addition[al] time, the District has scheduled IEP meetings for both children within a reasonable time period. We must complete the eligibilities for your children and, at that time, the IEP Team will review or revise the interim IEPs. As I mentioned in our informal meeting, an option for you and the IEP team would be to extend the interim IEP to consider additional information before completing the annual IEP, including classroom performance or other assessment data.

From the District's perspective, we have sufficient information to consider eligibility for [Student 2]. Although you disagree with some of the information used to consider eligibility and failed to provide updated medical information, *as the District representative I am required, if there is not a consensus, to determine [Student 2's] eligibility at the November 27th IEP meeting.*

(Ex. R59; *see* Stipulation of parties.) (Emphasis added.) The mother considered Mr. Sullivan’s statement that as District representative he was required, if there was no consensus, to determine Student 2’s eligibility at the November 27, 2007 meeting to be “very retaliatory, that he feels so free with his ultimate power over my children.” (Tr 6 at 934.)

(102) On November 15, 2007 the District issued a Notice of IEP Team Meeting to the parents, informing them that an IEP meeting for Student 2 was scheduled on November 27, 2007 at 3 p.m. The notice stated that if the parents could not attend the meeting or wished to discuss a different location or time, or wished to participate by alternate means, they should contact Ms. Gray by “11/02/2007.” (Ex. R58.) The mother was “really, really offended” by this notice. She claimed it did not occur to her that the November 2 date could have been a mistake.²² She thought Mr. Sullivan was advising the parents that they should notify the District before the notice date if they wanted to change the proposed meeting because he intended, as he had proposed in their November 8, 2007 meeting, to hold an IEP meeting without them. (Tr 6 at 931-33.) Ms. Gray, who prepared the notice, had intended that the date be November 20, and was very upset about her mistake. Mr. Sullivan did not instruct Ms. Gray to put the November 2 date on the notice. (Tr 7 at 1047.)

(103) On November 21, 2007 Mr. Sullivan wrote to the Department of Education that the District would hold IEP meetings for Student 2 and Student 3 on November 27 and 28, 2007, respectively; that “as the District representative” he was “required – if there is not a consensus – to determine Student 2’s eligibility”; and that he would be willing to extend interim IEPs for Student 2 and Student 3 if the parents agreed to mediation, and complete their annual IEPs after mediation occurred. He asserted that the District would not cancel the IEP meetings scheduled the following week, as the District had the responsibility to complete the eligibilities for both students and revise or extend the interim IEPs. (Ex. R60 at 1.)

(104) On November 26, 2007 the mother gave Mr. Williams a letter stating that as of that date the parents officially withdrew Student 2 from Elementary School C. (Ex. C20; Tr 7 at 970-71.)

(105) On November 27, 2007 at 11:14 a.m. the father sent an e-mail to Mr. Williams stating, “I am begging you to base eligibility on past information and not [accept] Nancy [Reiter’s] illegal evaluations. Mr. Sullivan has agreed to ODE’s proposal that the district will only hold an eligibility meeting for our children, not an IEP meeting. We will not be there * * * . And if Mr. Sullivan [tries] to start an IEP, STOP HIM because it’s the right thing to do. GOD WILL BE ON YOUR SIDE. * * * . And if you are at that meeting to side with the devil may GOD have mercy on your SOUL.” (Ex. R60 at 2.) The mother was aware that the e-mail had been sent. (Tr 7 at 968.) Thereafter the mother spoke with Mary Anne Linden, the legal specialist at the ODE, who assured her, based on conversations with Mr. Sullivan, that the November 27, 2007 meeting would only be about eligibility, and urged the mother to attend the

²² The November 15, 2007 notice appears to be a duplicate of the notice which the District (through Ms. Gray) sent on October 24, 2007 for the meeting on November 5, 2007, with a few changes. The earlier notice invited the parents to notify the District by November 2 if they could not attend or wished to change the meeting location or time. (*See* Ex. R43.)

meeting. On November 27, 2007 the mother was tried to leave work to attend. But the father was unavailable, and an older child, who was going to come home to babysit, had a bicycle accident and could not get home in time. (Tr 7 at 968-69.) At 2:58 p.m. on November 27 one or both parents sent an e-mail to Mr. Sullivan stating that they wanted to attend the IEP meeting but had a family emergency and could not; and they requested that he contact them to reschedule the meeting. (Ex. R60 at 3.) The parents did not attend the meeting. (Ex. R60 at 4.) The parents did not receive a copy of the final version of the assessment summary report (Ex. R48) before the November 27, 2007 IEP meeting. (Tr 5 at 759.)

(106) Mr. Sullivan was aware at the beginning of the November 27, 2007 IEP meeting that the parents had withdrawn Student 2 from Elementary School C. He also knew about the e-mail the had father sent to Mr. Williams that morning, stating the parents would not be at the meeting. But Mr. Sullivan had been talking to Ms.Linden about encouraging the parents to come to the meeting, and he thought they would attend. (Tr 7 at 1050-1052.) He and the other participants delayed the start of the meeting and waited to see whether the parents would come. (Tr 4 at 532.) Mr. Sullivan did not know about the e-mail message which the parents sent at 2:58 p.m. on November 27, 2007 (Ex. R60 at 3) until about an hour after the IEP meeting began, when his secretary called and told him about it. (Tr 7 at 1052-53.) Mr. Sullivan wanted to complete the eligibility process on November 27, 2007 because, although the District knew Student 2 had been withdrawn from Elementary School C, the District was unaware on that day of where the parents were going to continue Student 2's education. The next day the parents informed the District they would be home schooling Student 2 (Tr 4 at 534-45, Tr 7 at 1054; Ex. R60 at 5.)

(107) At the IEP meeting on November 27 the participants discussed the fact that Student 2 and Student 3 had been removed from school the day before. (Tr 1 at 147.) The information presented at the November 5, 2007 IEP meeting was considered again. Mr. Sullivan, Mr. Williams, Ms. Reiter, Ms. Fields, Ms. Leaton, Ms. Newberry, Ms. Mason and Ms. Gray were present, in addition to Ms. Armbrust, a facilitator. The District members of the team unanimously agreed that Student 2 remained eligible for special education under the category of autism spectrum disorder.²³ (Tr 1 at 85, 88, Tr 2 at 260.) After all of the other IEP team members had expressed agreement, Mr. Sullivan stated that it was the District's decision that Student 2 remained eligible under the autism spectrum disorder category. The IEP team members then agreed to extend Student 2's interim IEP until February 26, 2008 in the hope that progress could be made through mediation, and added the District PLAAFPs (discussed at the November 5, 2007 IEP meeting) to the information previously provided by the parents. The team members did not change the other aspects of the IEP (goals, accommodations and modifications, etc.) (*See generally* Ex. R61.) The IEP team members present at the November 27, 2007 IEP meeting recognized that "it would be very tough to move forward without the parents there," and "stayed away from the hard core areas." (Tr 1 at 102-103.)

²³ At the August 29, 2007 IEP meeting Ms. Reiter stated she could not sign an eligibility determination for Student 2 without a medical statement, but the IEP team made the eligibility determination on November 27, 2007 despite the fact that the parents never provided the medical statement. (*See* Tr 5 at 761.)

(108) The parents wrote to Mr. Sullivan on November 28, 2007, “You did not have legal rights to hold IEP meetings while our children are in home school without us accepting your offer first. We never accepted your offer.” (Ex. R60 at 5.) Mr. Sullivan responded on November 28, 2007 with a letter, stating that the parents’ e-mail of November 28, 2007 was the first information he had received that they had begun to home school Student 2 and Student 3, and noting that the children were not yet registered with the Lane ESD as home school students. He asked the parents to notify him by December 5, 2007 of whether they intended to seek special education services from the District in conjunction with home schooling. If the parents wished to consider such services, Mr. Sullivan stated that the District would be required to convene an IEP meeting to determine whether it could provide a FAPE in conjunction with home schooling. (Ex. R62 at 1.)

(109) On November 29, 2007 Mr. Sullivan sent three PWNs to the parents. The first informed them that the District revised the IEP meeting participants and service summary sections of the current interim IEP and extended the interim IEP to February 26, 2008. The notice stated that the District had requested ODE mediation to assist in completing the IEP. (Ex. R64 at 1.) The second stated that the District determined at the eligibility/IEP meeting on November 27, 2007 that Student 2 qualified for special education with the eligibility of Autism Disorder. The notice stated, “The District representative, with consensus from the IEP team (parents did not attend) determined [Student 2’s] eligibility at the November 27, 2007 meeting.” (Ex. R64 at 2.) The third indicated that the District representative, with consensus from the IEP team, added information based on classroom performance to Student 2’s PLAAFPs, and that the information had been presented at the November 5, 2007 IEP meeting. (Ex. R64 at 3.)

(110) The parents thought it was retaliation for the District to take many hours to develop Student 2’s IEP, when (the parents believe) the IEP team could have prepared an IEP much more quickly had they relied more on the parents’ data. The parents felt there was enough time to develop two IEPs and have both children start school on time, instead of having “these extensive meetings of constant arguing,” so that Student 3 did not start school at the beginning of the year. (Tr 6 at 905.)

(111) The mother believes research has shown that children with special needs who are in the general education population do better in life, and that when Student 2 and Student 3 are in general education classes they are learning, even if they do not do as well as other students in the class. She felt that removing the children to special education classes would not help them to function in the real world. (Tr 7 at 958-960, 1002.) It was Ms. Gray’s opinion, based on 31 years of experience as a special education teacher, that if Student 2 and Student 3 are only or mostly in regular education classes it is not likely that they will achieve commensurate with their ability. (Tr 7 at 1003.) The mother believes the School District will not allow the parents to receive the services they want for Student 2 without accepting specialized instruction in reading, math and writing for him/her. (Tr 7 at 955-56.)

STUDENT 3

(112) Student 3 was born in 1998. (Ex. R8 at 1.) On May 17, 2004 an IEP team found Student 3 eligible for special education services as a student with autism spectrum disorder. (Ex. R9.) Student 3 initially attended Elementary School A. Student 3's parents withdrew Student 3 from that school on January 18, 2006 and enrolled him/her in Elementary School B on February 8, 2006. The parents withdrew Student 3 from that school on March 8, 2006 (when Student 3 was in second grade) to home school him/her. (Ex. R8; *see* Stipulation of parties.) The parent's home schooled Student 3 through the end of the 2006-2007 school year. (Stipulation of parties.)

(113) By letter dated August 16, 2006 Mr. Sullivan informed the parents that although Student 2 and Student 3 were registered with the Lane ESD as home schooled students, they continued to be eligible for special education services and the District was ready to implement such services if the parents decided to re-enroll them in a public school in the District. Mr. Sullivan wrote that the District was also willing to schedule an IEP meeting to consider special education services in conjunction with home schooling, and to request facilitation from the Oregon Department of Education (ODE) to address the parents' concerns and assist in IEP meetings for Student 2 and Student 3. Mr. Sullivan invited the parents to contact him if they decided to schedule an IEP meeting. (Ex. R10.) On August 20, 2007 the parents enrolled Student 3 in Elementary School C. (Ex. R11.)

(114) In response to the parents' request for an IEP meeting, the District scheduled an IEP meeting on August 29, 2007. (Stipulation of parties.) The District scheduled the meeting for Student 2 to take place from noon to 2 p.m. and the meeting for Student 3 to take place from 2 p.m. to 4 p.m. that day. (Exs. R12, R13.) This was the first day the teachers were back in school, and it was to have been a planning day. (Tr 4 at 552.) The IEP meeting did not happen sooner in part because the District had been engaged in discussions about mediation with the parents and the ODE. (Tr 4 at 552.) Mr. Sullivan believed that an IEP meeting on August 29, 2007, and an interim IEP, would enable the District to have an IEP for Student 3 in place before school started. (Tr 4 at 552.)

(115) Student 2's IEP was not completed on August 29, 2007 and the parents agreed to postpone the IEP meeting for Student 3 so that the IEP team could first finish an IEP for Student 2 (Tr 6 at 856.) Student 3's IEP meetings took place on September 6, 10 and 13, 2007. (Tr 7 at 943; *see* Ex. C13.) Student 3 started school at Elementary School C on September 17, 2007. Student 3 missed eight school days from the start of the school year until the date he/she began school. (Stipulation of parties.) At the IEP meeting on September 6, 2007 there was a discussion about the fact that Student 3's IEP would not be completed, and he/she would not start school at the beginning of the year. The father believed that the sooner Student 3 returned to school the better, although it would be desirable to "ease [him/her] into it" because he/she was anxious.

(116) The District sent the parents a Notice of IEP Team Meeting on September 6, 2007 for Student 3. The meeting notice for September 6, 2007 indicated that the IEP team would:

- review existing information;
- decide if your child should be evaluated for special education eligibility;

- decide whether additional testing is needed;
- Develop or review an individual education program (IEP) and placement for your child. The development of the IEP will be based on information from a variety of sources including the most recent evaluation, progress report, test results and information from you.

(Stipulation of parties.)²⁴

(117) The District brought to Student 3's first IEP meeting a draft IEP, prepared by Ms. Gray on or before August 29, 2007, based on Student 3's performance at the time he/she left public school in March 2006, when all of his/her instruction was in the RLC. It did not include current information from the parents. (Ex. C10; Tr 7 at 979.) Student 3 had been in Ms. Gray's reading group for a few weeks in 2006 before he/she was withdrawn from public school. (Tr 7 at 993-94, 1005.) The District did not really use their old information about Student 3, but sought information from the parents. (Tr 6 at 794, 885.) The parents also provided a draft IEP with detailed PLAAFPs in reading and math. (Ex. C11.)

(118) After reviewing the parents' information the IEP team developed new PLAAFPs, determined what sort of specially-designed instruction Student 3 might need, and developed goals for him/her. (Tr 7 at 981-82; *see* Ex. R18.) The parents wished to have Student 3 retained in third grade. (Ex. R15 at 2.)

(119) The parents provided a list of requested accommodations and modifications for Student 3. These included how staff should deal with consequences for negative behaviors and development of a behavior intervention plan. (Ex. C12.) There were changes discussed at one or more of the IEP meetings for Student 3 and Ms. Gray produced a final version of the accommodations and modifications which appeared in the interim IEP. (Exs. C14, R18 at 12; Tr 7 at 983.)

(120) On their draft IEP the parents reported, as a parental concern, that Student 3 did not have behavior problems at home and in the community, and was a fun-loving, happy, energetic child. Student 3 having negative behaviors had only been reported to the parents by School District staff. (Ex. C11 at 13; *see, e.g.* Exs. C6 at 3, C7, C10.) Ms. Gray recalled that Student 3 was removed to the RLC for behavior problems perhaps once each day. (Tr 7 at 985.) Student 3's behavior in the regular classroom would escalate from not wanting to do schoolwork to throwing himself/herself on the floor, yelling, and perhaps trying to pinch the IA. Often Student 3 and the IA would take a break, go for a walk, and come into the RLC to finish Student 3's work. (Tr 7 at 987-88.)

(121) Ms. Fields observed Student 3 in a regular education classroom during a science lesson, as the teacher was describing and demonstrating an activity. Student 3 "ended up on the floor," and bit and pinched the educational assistant who tried to get him/her back to hi/her seat. The assistant then took Student 3 and the class materials to the RLC. There, although Student 3

²⁴ The notice of the IEP team meeting for Student 3 scheduled on August 29, 2007 gave the same information. (*See* Ex. R12.)

resisted at first, Ms. Fields assisted in breaking the task down into smaller parts, so it was more easily understandable, and Student 3 eventually finished it and was rewarded with computer time. (Tr 2 at 196-197.)

(122) The IEP meeting for Student 3 continued on September 10, 2007. (Exs. R15, R16.) The agenda for the meeting included the following items:

- Review Agenda
- Goals
- Related Services, Accommodations and Modifications
- Service Summary
- Special Factors, Extended School Year, Non-Participation Justification
- State and School Assessments
- Placements
- Home-School/Communication
- Next Steps

(Ex. R16.) The IEP was completed after September 10, 2007 and indicated that services would be provided for Student 3 beginning on September 17, 2007. (Tr 1 at 36-39; Ex. R18 at 1.) In describing Student 3's PLAAFPs the IEP gave information which the parents reported about Student 3's performance in the home school environment. (Tr 1 at 97-98; *see* Ex. R18 at 3-4.)

(123) The District IEP team members felt that an interim IEP was appropriate for Student 3 so they could do some additional assessments and ensure that a change in environment (from home school to public school) would not change the outcomes. (Tr 1 at 95, 188, Tr 7 at 1001.) The rationale for the interim IEP was discussed at the IEP meetings. (Tr 1 at 95-96.) The fact that the IEP was an interim IEP did not affect when it was implemented or the quality of the implementation. (Tr 1 at 96.) Ms. Gray noted that an interim IEP was appropriate because Student 3 had not been in public school for one and one-half years, and considering the progress h/she had made, she thought the team required some additional information to ensure his/her IEP was targeting what he/she needed. In Ms. Gray's professional experience the academic setting (for example, home school with three children, or public school with 25 students in a class) has an impact on how children perform. (Tr 7 at 998.) Although the parents brought many work samples to show the IEP team, these did not necessarily demonstrate whether the Student 2 and Student 3 could do grade level work. For example, the children had made excellent progress in their basic math skills, but the team could not tell whether they could use the knowledge to do graphing, geometry and complex story problems. (Tr 7 at 1007-08.)

(124) Apparently in response to the parents' objection to the concept of an interim IEP, on October 3, 2007 the District sent the parents another PWN. According to that notice, the IEP team developed and implemented an interim IEP for Student 3 to be reviewed by November 2, 2007, which was described on the notice – by a series of checks in boxes – as a "refusal" to "initiate" "provision of a free, appropriate public education" to Student 3. The notice stated that the action was proposed because "The District needed an interim time period to: 1. Gather information to determine eligibility; 2. Gather academic performance data; 3. Implement

instructional strategies including modifications and accommodations.” The notice also stated that the IEP team rejected implementation of an annual IEP because “There was not sufficient information to determine eligibility, current levels of academic performance outside of the Home-school environment and develop appropriate instructional strategies including modifications and accommodations.” (Ex. R19.) The District intended, with the PWN, to inform the parents that the District was refusing their request to develop an annual (rather than an interim) IEP. According to Mr. Sullivan, the District was attempting “to really document and follow procedures” with their PWNs. (Tr 7 at 1075-76.) Mr. Sullivan worked with Ms. Gray to develop the language for the notice. (Tr 7 at 1092.)

(125) When Student 3’s IEP was completed the IEP team discussed placement. The parents’ goal was that when Student 3 was in the general education classroom the instruction would come from the teacher, with the IA present to help keep Student 3 focused on that instruction. When the students worked individually, the IA would assist Student 3 in completing his/her work. (Tr 7 at 989-90.)

(126) There were two placement options indicated on the September 17, 2007 IEP prepared for Student 3. The placement selected by the IEP team members for Student 3 was “General Education class with pull-out for RLC/LC instruction for Read, Math & Wr Exp. Pull-out for Sp/Lang & OT services and access to Assistive Technology to aid with written language assignments.” (Ex. R18 at 11.) The specially designed instruction included 150 minutes per week for reading, 60 minutes per week for math, and 100 minutes per week for written expression, all in the RLC, as well as communication for 180 minutes per month in the speech/language room. It also provided 45 minutes per month of occupational therapy in the OT room. (Ex. R18 at 1.) It was noted on the IEP that the placement option selected meets “the specific instructional needs of the child in both the general education classroom and the special education environment. It also provides for specially designed instruction in both educational environments.” The IEP team rejected the placement “General Education class with supplemental aids and services and pull-out for OT and Speech/Lang services.” The team concluded that placement “Does not allow for specially designed instruction in Read, Math and Wr Exp.” (Ex. R18 at 11.) The IEP team, with the exception of the parents, did not believe that the rejected placement option provided adequate support for Student 3, and that the IEP could not be implemented in that placement. (Tr 1 at 94-95.)

(127) Ms. Gray advocated for the placement selected. The general education teacher was teaching to 20 to 26 children, not specifically to Student 3’s IEP goals. In the RLC there were five students in Student 3’s reading group, taught by an IA, and Student 3 was also assisted by hi/her own IA. In addition, Ms. Gray was in the room at all times. Student 3 needed a lot of prompting to stay focused. Student 3’s written work was significantly reduced. (Tr 3 at 425-26, Tr 7 at 990-991.)

(128) The parents expected Student 3’s placement would, like Student 2’s, be LC/RLC. When they saw that the anticipated location on the cover page of the September 2007 was only RLC, they did not protest but they did not sign the IEP. They trusted that the District would try to put Student 3 into the LC because that was also an option on the placement page. (See Tr 6 at 918-19, see Ex. R18 at 1, 11.) Student 3’s father, his home school teacher, thought the RLC was not the least restrictive environment for Student 3 because his communication functioning

level was much higher than Student 2's. According to the father, "his only issue in school is focus" and staying in his/her seat. (Tr 5 at 797.)

(129) Mr. Williams believed that Student 2 and Student 3 required placement in the RLC because they were not at grade level for their ages; they were to be retained; and they needed extra support in the best environment the District could provide. He thought the RLC offered the best instruction coupled with general education, and allowed for the smallest group settings so staff could really work with the students. (Tr 1 at 159.) In the RLC the students would be taught by a special education teacher and other individuals. (Tr 1 at 159-160.) The District members of the IEP team in September 2007 selected the more restrictive placement because they believed Student 3 would be able to receive the level of service he/she needed there in order to make progress towards his/her educational goals. (Tr 3 at 360.)

(130) Ms. Fields observed that especially with children on the autism spectrum, the fewer distractions and the more focused instruction could be, the more they would get out of it. Consequently the level of performance might be quite different in a home school situation than in a regular public school setting. (Tr 2 at 189-190.)

(131) Before 2007, the last eligibility determination for Student 3 was on May 17, 2004. (Ex. R9.) The District wanted to reevaluate Student 3 to help develop a new IEP. At the September 6, 2007 IEP meeting for B.B the IEP team discussed what assessments would be needed. The parents were present and participated in the plans for reevaluation. (Tr 1 at 93, Tr 6 at 886.) The District staff told the parents what tests they would be doing and what materials they would be using to evaluate Student 3. There was no file review. The parents asserted that they did not want any intelligence testing or other standardized tests. (Tr 3 at 360, Tr 6 at 886-87.)

(132) On September 6, 2007 the mother signed a Consent for Evaluation for Student 3, agreeing to a reevaluation that would be used to decide Student 3's continued eligibility and/or education needs. The form indicated that the Team decided against not evaluating Student 3 because "A current assessment of [Student 3's] strengths and weaknesses is needed to develop an appropriate academic plan. An Autism Spectrum Disorder (ASD) reevaluation is needed to determine eligibility for [special education] services." Another reason for the reevaluation was that Student 3 was returning to public school after being home schooled since March 2006. The consent form indicated that the evaluation procedures and assessments the district intended to use included "Behavior Rating Scale, observations/interaction, Statement of Functional Communication, medical statement, characteristics of ASD review, classroom measures of academic strengths and weaknesses, [and a] Sensory Profile." (Ex. R20 at 2.)

(133) The District issued a notice on October 24, 2007 indicating that there would be an IEP meeting for Student 3 on November 7, 2007 at which the child's eligibility for special education would be decided. (Ex. C16) Before the scheduled meeting Ms. Reiter had done a file review, completed a behavior rating scale and interviewed one of the parents. She had not done an observation of Student 3 (Tr 3 at 360-61.) She could not remember the reason. (Tr 3 at 395-96.) At the end of the IEP meeting for Student 2 on November 5, 2007 the team decided to continue the meeting for Student 2 on November 7, 2007 instead of beginning an IEP meeting for Student 3 as originally intended. (Tr 4 at 554, Tr 7 at 1057; *see* Tr 3 at 477, 480.)

The November 7, 2007 meeting was postponed by the District on November 7, 2007 because the general education teacher was ill. (Tr 3 at 477, Tr 7 at 1057.) The evaluation was not completed because Ms. Reiter received notice from Mr. Sullivan, on or around November 8, 2007, that the parents did not want any more observations of either of their children. (Tr 3 at 361.) The parents withdrew Student 3 from school before the evaluation was completed. (Tr 3 at 437.)

(134) Ms. Mason, the speech-language pathologist, prepared a functional communication evaluation report for Student 3 on November 1, 2007, based on checklists submitted by others who worked with Student 3 and her own observations and interactions with him. (Tr 3 at 484-86; Ex. C26.) Based on Student 3's language skills and ability to focus Ms. Mason thought the placement selected for Student 3, where he/she was in the regular education classroom for part of the time and in the RLC for the core academic subjects, was preferable. She thought he/she would do better in a small group with more intense instruction, where there was less distraction. Classroom teachers typically give many multiple step directions and speak relatively quickly, with few visual or verbal aids, which would impact how Student 3 could access language if Student 3 was not at that level. (Tr 3 at 487-88.)

(135) After two months' experience teaching Student 3 in Fall 2007, it was Ms. Gray's opinion that Student 3's academic instruction goals would have been better met in the RLC. She thought Student 3's performance in public school was not consistent with the PLAAFPs presented by the parents. (Tr 3 at 435-36.)

(136) On November 15, 2007 the District issued a Notice of IEP Team Meeting inviting the parents to an IEP meeting on November 28, 2007 to review existing information about Student 3 and decide whether he/she continued to be eligible for special education services. The notice, prepared by Ms. Gray, stated that if the parents could not participate in the meeting, wished to discuss a different location or time, or would like to participate through alternate means, they should contact Ms. Gray by "11/05/07."²⁵ (Ex. C19.)

(137) On November 26, 2007 the mother gave Mr. Williams a letter stating that as of that date the parents officially withdrew Student 3 from Elementary School C. (Ex. C20; Tr 7 at 970-71.) The parents intended to home school Student 3 (Ex. R8 at 1.) To date, Student 3 remains a home schooler. (Stipulation of parties.) When Mr. Sullivan learned on November 28, 2007 that Student 3 would be home schooled, he cancelled the IEP meeting scheduled for Student 3 that day. (Exs. C21, C22; Tr 7 at 1053.)

Retaliation

(138) Mr. Williams believed that, in developing IEPs for Student 2 and Student 3 in August and September 2007, the District staff worked hard to produce programs which were consistent with the students' abilities. He acknowledged that it was the District's obligation to provide a FAPE for students, and that at times the District, in meeting that obligation, caused parents to be unhappy. But he thought the IEPs which were developed for Student 2 and

²⁵ It appears this notice was a copy of the notice issued on October 24, 2007, with minor changes. (See Ex. C16.)

Student 3 were “very close” to what the parents wanted. (Tr 1 at 101.) He denied that the District, its staff and its counsel had ever taken any adverse action to retaliate against the parents or the students. (Tr 1 at 96-97.)

(139) During the hearing the father was asked for details about the parents’ repeated allegations that the School District retaliated against the parents and their children because of the complaints the parents filed. The father described several incidents which occurred before the statute of limitations period²⁶ began, on May 16, 2006. (Tr 5 at 771-785.) When the parents decided to return the children to the public school system they tried to initiate mediation with the School District, but in their opinion it seemed like the District did not ever want to cooperate with them. (Tr 5 at 786.) The father thought the District retaliated against Student 2 by requiring an interim IEP, making the eligibility determination, not providing all requested records before the hearing, and inviting the participation of the attorney in the August 29, 2007 IEP meeting. (Tr 5 at 792-93.)

(140) Mr. Williams told one or both parents that if they wanted to request that the teachers of Student 2 and Student 3 make changes in their classrooms, they let him know and he would speak with the teachers, instead of the parents approaching the teachers directly. (Tr 1 at 117.) He has done this with some other families as well. (Tr 1 at 116.)

(141) Mr. Sullivan felt that every time District staff disagreed with the parents, the parents framed it as retaliation. On November 27 the IEPs had lapsed, and Mr. Sullivan wanted to be sure the eligibility determinations were completed and there were IEPs they could work from. (Tr 4 at 558.)

(142) In May or June 2006 Mary Anne Linden, then employed as an independent contractor, investigated a complaint filed by the parents with the ODE. Ms. Linden’s impression was that there were no ill feeling between the parents and District staff until a dispute arose over where Student 1 would be attending school the following year. Several people she spoke with reported they were a little intimidated by the father, although most were not. Some were irritated because he was present a lot, and two stated he had behaved belligerently at a school office in the past. (Tr 5 at 658-59, 663, 665.) The mother thought the District was retaliating against the parents for complaining by characterizing the father as aggressive or abusive. (Tr 7 at 953-54.)

CONCLUSIONS OF LAW²⁷

2. In April 2007 the School District did not make a new placement decision about Student 1
3. The School District did not retaliate against Student 1 or his/her parents for the parents’ interactions with, and complaints about, the School District, in violation of Section 504 of the Rehabilitation Act of 1973.

²⁶ 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. OAR 581-015-2345(3)(a).

²⁷ The conclusions of law are numbered to correspond to the issues.

STUDENT 2

4. The School District did not limit the parents' right to participate effectively in the development of an IEP for Student 2 at a meeting on August 29, 2007.
5. The School District failed to inform the parents, in the meeting notice, of the names of four staff members who attended the August 29, 2007 IEP meeting, in violation of OAR 581-015-2190(2)(b).
6. The School District did not develop an interim IEP for Student 2 on August 29, 2007 (and in subsequent meetings) which failed to meet legal requirements.
7. The School District did not decline to finalize, or specifically require implementation of, modifications identified in Student 2's IEP of September 2007.
8. The School District did not fail to meet legal requirements to provide one or both parents with an opportunity to participate in the IEP meeting for Student 2 on November 27, 2007.
9. The School District did not violate legal requirements by requiring, at the IEP meetings in August and September 2007, that Student 2 be re-evaluated for eligibility for special education.
10. The School District did not fail to engage in "evaluation planning" for the evaluation of Student 2 required on August 29, 2007?
11. The IEP team made an eligibility determination on November 5, 2007 based on a draft evaluation which lacked a medical statement from Student 2's doctor. Assessments to determine the impact of autism on Student 2's educational performance, and evaluations to identify Student 2's educational needs were included in the draft evaluation.
12. The draft assessment prepared by the School District for Student 2 was based in part on information from a psychologist which was appropriately revised at the request of the parents and other IEP team members before the draft was finalized. The information obtained from the psychologist was documented and carefully considered.
13. The (final) evaluation prepared by the School District for Student 2 included information relating to enabling Student 2 to be involved in and progress in the general education curriculum.
14. The School District did not provide its (final) evaluation of Student 2 to the parents upon completion (and before the November 27, 2007 IEP meeting), but the parents did not attend that meeting.
15. The School District made an eligibility determination in November 2007 without a current medical statement for Student 2 but the medical statement was unnecessary. Otherwise, the school District had a complete evaluation.
16. The School District Director of Educational Support Services improperly stated that he would personally determine Student 2's eligibility at the November 27, 2007 IEP meeting, but in fact Student 2's eligibility was established by consensus of the IEP team members present at that meeting.
17. At the IEP meeting which began on August 29, 2007, the School District placed Student 2 in the least restrictive environment in which his/her IEP could be implemented.
18. The School District failed to comply with legal requirements in responding to a request from the parents for Student 2's education records.
19. The School District did not retaliate against Student 2 or his/her parents on or after May 16, 2006, for the parents' interactions with, and complaints about, the School District, in violation of Section 504 of the Rehabilitation Act of 1973.

STUDENT 3

20. After the parents requested an IEP meeting in July 2007, the School District failed to have an IEP in effect for Student 3 at the beginning of the 2007-2008 school year.
21. [withdrawn by parents before the hearing]
22. In evaluating Student 3 in or after July 2007, the School District did not fail to comply with legal requirements.
23. The School District did not fail to engage in “evaluation planning” for the evaluation of Student 3 required in or after July 2007.
24. The School District did not complete an evaluation of Student 3, and therefore could not provide a copy to the parents.
25. For the 2007-2008 school year, the School District did not fail to place Student 3 in the least restrictive environment in which his IEP could be implemented.
26. On or after May 16, 2006, the School District did not retaliate against Student 3 or his/her parents for the parents’ interactions with, and complaints about, the School District, in violation of Section 504 of the Rehabilitation Act of 1973.

OPINION

Background

The Individuals with Disabilities Education Act (IDEA, or Act), as amended effective June 4, 1997 and July 1, 2005 (by the Individuals with Disabilities Education Improvement Act of 2004), was a response to a finding by the Congress that “[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” 20 United States Code (USC) §1400(c)(1). One purpose of the Act is “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 USC § 1400(d)(1)(A).

To receive financial assistance from the federal government under the Act a State must ensure, among other requirements, that a FAPE is available to all children with disabilities between the ages of three and 21 residing in the State (with certain exceptions irrelevant here). 20 USC § 1412. Federal regulations implementing the IDEA are found at 34 *Code of Federal Regulations* (CFR) part 300 (revised effective August 3, 2006), and apply to each state that receives payments under Part B of the IDEA. 34 CFR §§ 300.2, 300.4. The federal regulations are for the most part mirrored in Oregon Administrative Rule (OAR) OAR 581-015-2000 *et seq.*²⁸

Burden of Proof

The burden of proof in an IDEA case is on the party challenging the administrative ruling. The burden of proof in an administrative hearing challenging an IEP is properly placed

²⁸ Most of these rules are effective April 25, 2007.

upon the party seeking relief. *Schaffer v. Weast*, 126 S Ct 528 (2005). In this case the parents have the burden of proof.

Free, Appropriate Public Education (FAPE)

In *Hendrick Hudson Cent. Sch. Dist. Bd. Of Ed. v. Rowley*, 458 US 176 (1982) the U.S. Supreme Court held that the requirement in the IDEA of a "free appropriate public education" is satisfied when a State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction, and it contains no express substantive standard prescribing the level of education to be accorded handicapped children. The IDEA does not require a State to maximize the potential of each handicapped child. In suits brought under the IDEA, a court must first determine whether the State has complied with the statutory procedures, and must then determine whether the individualized program developed through such procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. *See also Park, ex rel. Park v. Anaheim Union High Sch.*, 464 F.3d 1025, 1031 (9th Cir. 2006). The educational benefit must, however, be more than a minimal, trivial benefit. *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 890 (9th Cir. 2001).

“Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents’ opportunity to participate in the IEP formulation process, clearly result in a denial of a FAPE.” *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F2d 1479, 1484 (9th Cir. 1992). *See also M.L. v. Federal Way*, 394 F3d 634 (9th Cir 2004, amended January 14, 2005); *see also L.M. v. Capistrano SD*, 07-55469 (9th Cir 8-19-08).

Retaliation

The parents assert that the District retaliated against them and their children in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504). They allege that the District retaliated against Student 1 in various specific ways and that, with regard to Student 2 and Student 3, “every issue in this complaint is retaliation by the District. Every issue in this complaint could have been avoided if the district had not chosen to treat the parents and the child differently, because of previous complaints. Finally on the subject of retaliation do not believe for one second that this was anything other than retaliation.” Parents’ Closing Statement at 26-27, 31.

The parents’ claims of retaliation relating to each child are discussed below. Any claims relating to events which took place before the statute of limitations period began, on May 16, 2006, are beyond my jurisdiction.

OAR 581-015-2395, entitled Procedures for a Hearing under Section 504 of the Rehabilitation Act of 1973, states in relevant part:

- (1) The parent or guardian of a qualified student with a disability under section 504 may file a written request for a hearing with the State

Superintendent of Public Instruction with respect to actions regarding the identification, evaluation, provision of a free appropriate education, or education placement of the student with the disability under Section 504, which the parent or guardian alleges to be in violation of Section 504 of the Rehabilitation Act of 1973, Public Law 93-112, or any amendment thereof. In such event, the Superintendent will conduct a hearing.

Student 1, Student 2 and Student 3 are all qualified students with a disability under Section 504. See OAR 581-015-2390.

In their initial complaint in this matter the parents asserted that the District retaliated against them and their children in violation of OAR 581-015-0045. There was, and is, no such rule. The parents may have intended to refer to OAR 581-015-0054(16), which has now been renumbered OAR 581-015-2395(19) and provides:

No person may be subject to retaliation or discrimination for having filed or participated in this complaint procedure. Any person who believes that she or he has been subject to retaliation or discrimination may file a complaint under this rule with the Superintendent.

On April 14, 2006 the parents filed a complaint with the ODE alleging, among other claims, that the District violated the IDEA by retaliating against them and their three children for filing earlier complaints with the Department. (Ex. R66.) In its Final Order issued on June 19, 2006 the ODE articulated the following standard for evaluating retaliation complaints:

Complainants alleging retaliation must demonstrate that:

- a. They engaged in a protected activity (here, filing an IDEA complaint).
- b. District personnel were aware of the complainants' protected activity.
- c. Following the complainants' protected activity, the District took adverse action against them, and the adverse action was significant or severe.
- d. There was a causal connection between the protected activity and the adverse action.

(Ex. R66 at 17.)

The parents have submitted a recent US District Court ruling on summary judgment and other motions in two consolidated actions brought pursuant to the IDEA. The cases are *Pat Oman vs. Portland Public Schools, Multnomah School district No. 1, et al.* (DC Or 2007, case no. 3:05-cv-558-HU) and *Pat Oman vs. Portland Public Schools, et al.* (DC Or 2007, case no. 3:05-cv-1715-HU) (*Oman*). In *Oman* a parent alleged that the school district retaliated against her in violation of the IDEA. In its ruling the court adopted the standard articulated in *Bachelder v. America West Airlines, Inc.*, 259 F3d 1112, 1125 (9th Cir 2001), indicating that a prima facie case when discrimination in violation of the IDEA is alleged involves engaging in a protected activity; an adverse action; and a causal relationship between the adverse action and

the exercise of a protected right. *Oman* at 7. That standard is similar to the standard adopted by the ODE for retaliation complaints to be filed with the Superintendent of Public Instruction.

Neither the complaint order described above nor *Oman* concerned a discrimination complaint under Section 504, and neither is binding in this matter. But both the District and the parents assume or urge, in their closing arguments, that the above-described standard be applied. District's Post-Hearing Brief at 41; Parents' Closing Statement at 31 *et seq.* A similar standard was cited in court cases (in other jurisdictions) addressing complaints of retaliation under Section 504. *See, e.g., Weixel v. Board of Education of the City of New York*, 287 F3d 138 ((2nd Cir 2002), *Draper v. Atlanta Public School District*, civil action no. 1:07-CV-0224-MHS (DC ND Ga March 31, 2008). Applying that standard I find that the District did not retaliate against the students or their parents.

Even if some or many of the legal and procedural errors which the District made in dealing with the parents and their children, or the consequences of those errors, could be considered "adverse action," especially to the extent that they delayed the preparation and implementation of IEPs for Student 2 and Student 3, the evidence does not prove, or even suggest, any causal connection between the parents' activity of filing complaints and subsequent District actions. The evidence indicates that the District acted carelessly, and possibly incompetently, in some situations, but does not show that this was due to the parents' filing complaints against the District.

STUDENT 1

2. *In April 2007, did the School District fail to place Student 1 in the least restrictive environment in which his IEP could be implemented?*

The parents believed that the District's January 20, 2006 placement determination for Student 1 required that he spend too much time – over 60% -- outside the general education setting. In May 2006 the Department reviewed whether the District had implemented the corrective actions in its 2005 Complaint Final Order, discussed the District's placement decision of January 20, 2006, and required the District to hold a new IEP/placement meet for Student 1. In a Corrected Final Order issued on February 14, 2007 after a due process hearing (Due Process Final Order) the ALJ ruled that the last placement decision for Student 1, made at the IEP/placement meeting on January 20, 2006, was deeply flawed. The ALJ concluded that to make a valid placement decision it was necessary to a) complete a current evaluation of Student 1; b) develop an IEP with PLPs and goals adopted at an IEP meeting conducted to allow the parents' full participation; after which c) the IEP/placement team would decide upon placement; beginning with d) a determination of whether the IEP could be implemented at Student 1's neighborhood school.

On March 31, 2007 the parents requested another due process hearing, asking that the ALJ change Student 1's placement. (The parents' hearing request was dismissed in May 2007.)

The School District responded to that hearing request by issuing, on April 13, 2007, a PWN indicating (as corrected at the hearing) that the School District refused to change Student 1's placement. Despite a) the determination of the ODE in May 2006 that the January 20, 2006 placement meeting did not meet its corrective action requirements; and b) the ODE's instruction that the School District hold another IEP/placement meeting for Student 1 before the start of the next school year; and c) the requirements in the Due Process Final Order relating to a new placement determination, the PWN issued on April 13, 2007 apparently reiterates the elements of the January 20, 2006 placement decision which had been found to be "deeply flawed."²⁹ The PWN was enclosed with a letter from Mr. Sullivan stating that the IEP team would consider placement and other issues if the parents requested an IEP for Student 1, "as indicated in the Final Order issued on January 31, 2007."

The parents note in their closing argument that in their March 2007 hearing request they asked the ALJ, and not the District, for a placement decision. The reason the District issued the PWN on April 13, 2007 is unknown. It was perhaps a misguided attempt to indicate that the District would not change Student 1's placement and the location of his/her schooling unilaterally, without an IEP/placement meeting. If it was issued for that purpose, it was confusing, superfluous and perhaps offensive in its implication that despite the ODE's condemnation of the placement decision the District did not intend to change it. The District's willingness to review the placement was, however, clear from Mr. Sullivan's letter accompanying the PWN, as the letter stated that the District stood ready to comply with the requirements of the Due Process Final Order.

3. On or after May 16, 2006, see OAR 581-015-2395(3), 581-015-2345, did the School District retaliate against Student 1 for his/her parents' interactions with, and complaints about, the School District, in violation of Section 504 of the Rehabilitation Act of 1973?

The ODE required, as a corrective action, that the School District offer the parents an IEP/placement meeting for Student 1 to be held before the start of the 2007-2908 school year. The School District offered the parents several dates for the meeting, ranging from the September 5, 2007 the day before school started, to September 8, 2007. School staff were returning at the beginning of the new school year, and these were the first dates on which those staff members Mr. Sullivan wished to invite – from Student 1's former and his potential future middle school – were available. Although the meeting could have been held with fewer participants, *see* OAR 461-015-2210, there was no evidence that even those required to be on the IEP team were available before September 5, 2007. The parents considered the late scheduling of the IEP meeting "more retaliation." (Parents' Closing Statement at 4.) The evidence does not support that contention. In fact, the selection of meeting dates may have resulted from Mr. Sullivan's misreading of the corrective action deadline.

The parents allege it was retaliation that Mr. Sullivan, despite his Ph.D. in school psychology, improperly combined Student 1's scores on various IQ subtests administered by the

²⁹ That PWN is signed by the person who conducted the January 20, 2006 IEP meeting for Student 1, and who is described in Due Process Final Order as "functioning more as a ramrod than as a facilitator." (Ex. R3 at 21.)

CDRC and testified in another due process hearing that Student 1 had “borderline intelligence across the board.” (Tr 6 at 877.) Assuming Mr. Sullivan was in error as the parents charge, there is no evidence to support attributing this mistake to retaliation rather than error or ignorance.

The parents allege it was “absolutely retaliation” that the School District sent a letter in April 2006 “saying they will not amend the January 20, 2006 IEP in regard to placement and location.” (Parents’ Closing Statement at 4.) It appears the parents’ were referring to Mr. Sullivan’s letter of April 2007, in which the District declined to make the requested amendments (without further action), but offered to address the parents’ concerns if the parents requested an IEP meeting, in accordance with the Due Process Final Order. The District, in expressing its willingness to meet the parents’ concerns by taking action in accordance with the Due Process Final Order, was not retaliating against the parents or Student 1

The parents assert that when they requested mediation in November 2007 the District, by imposing certain conditions (including requesting additional participants at the meeting), was not exercising good faith. They initially state that “this cannot be categorized as retaliatory,” but then refer to the District’s “retaliatory actions.” (Parents’ Closing Statement at 5.) The parents seem to be confusing the District’s request that additional participants attend the mediation on this occasion with Mr. Sullivan’s reasons for requesting that at least one other District staff person be present when he requested mediation in November 2007. (*See* Parents Closing Statement at 5.) There is no evidence that Mr. Sullivan’s wish, in June 2007, to bring two school principals and an administrator to a mediation session with the parents was retaliation.

The School District requested mediation again in August 2007. The parents were willing to participate, but wished to mediate with Mr. Sullivan alone. Mr. Sullivan did not want to be the only District participant. He felt the parents had misconstrued his statements in the past, and he was disturbed because statements made by him and other District staff in conversation with the parents had been recorded and were accessible through an internet website, in some cases taken out of context. The parents’ claim, relating to the material on the website, that “[i]t is not appropriate to retaliate against a family for exercising their rights under the 1st amendment” (Parents’ Closing Statement 5) suggests they consider Mr. Sullivan’s request to bring at least one other District participant to mediation in August 2007 was also some form of retaliation. I disagree. Although the matters discussed during mediation are confidential, Mr. Sullivan’s concerns were reasonable under the circumstances. Furthermore, as the District requested the mediation, it makes no sense that imposing a condition to which the parents would not agree – thereby making mediation impossible -- was in some way retaliating against the parents.

Although the School District made many careless errors in interpreting and stating the law, and attempting to comply with it, in its dealings with the parents, the evidence does not indicate that the School District or retaliated against Student 1 or his parents for the parents’ interactions with, and complaints about, the School District.

STUDENT 2

4. *Did the School District limit the parents' right to participate effectively in the development of an IEP for Student 2 at a meeting on August 29, 2007,³⁰ in violation of legal requirements?*

School districts must provide one or both parents with an opportunity to participate in meetings with respect to the identification, evaluation, IEP and educational placement of the child, and the provision of a free appropriate public education to the child. OAR 581-015-2190. The parents' main argument in relation to this issue is that the District limited their participation in the August 29, 2007 IEP meeting for Student 2 by inviting the School District's attorney to attend. *See Parents' Closing Statement at 5-9.*

The notice which the District issued for the IEP meeting incorrectly listed the attorney as a person who was required to attend. OAR 581-015-2210 states:

- (1) School districts must ensure that the IEP Team for each child with a disability includes the following participants:
 - (a) One or both of the child's parents, except as provided in OAR 581-015-2195;
 - (b) The child where appropriate;
 - (c) At least one regular education teacher of the child, if the child is or may be participating in the regular education environment, consistent with section (4) of this rule;
 - (d) At least one special education teacher of the child or, if appropriate, at least one special education provider of the child;
 - (e) A representative of the school district, who may also be another member of the team, who is:
 - (A) Qualified to provide, or supervise the provision of, specially designed instruction;
 - (B) Knowledgeable about the general education curriculum;
 - (C) Knowledgeable about district resources; and
 - (D) Authorized to commit district resources and ensure that services set out in the IEP will be provided.
 - (f) An individual who can interpret the instructional implications of the evaluation results (who may also be another member of the team);
 - (g) Other individuals, including related services personnel as appropriate, invited by:
 - (A) The parent, whom the parent determines to have knowledge or special expertise regarding the child; or
 - (B) The school district, whom the school district determines to have knowledge or special expertise regarding the child; and
 - (h) Transition services participants, as described in section (2) of this rule.

³⁰ In the initial issue statement it was noted that references to this meeting include the continuance of the meeting on September 4, 2007.

The School District was entitled to have its attorney present to provide legal advice. But the attorney does not fall within any of the categories described in OAR 581-015-2210. The rule indicates which participants a school district “must ensure” are included in the IEP team but it does not explicitly prohibit the participation of others. The parents are correct, however, that at times the attorney did not limit his function to providing legal advice, but inappropriately acted as a member of the IEP team.

The parents argue that the attorney failed to give IEP team members specific legal advice about eligibility, interim IEPs and other subjects. *See Parents’ Closing Statement at 6-8.* The attorney was not required to give his client, the District, legal advice on any particular subject unless that was arranged between the attorney and the District.

OAR 581-021-0029(5)(b) states that when a child’s IEP team is convened the child’s parent shall be treated as both parent and regular education teacher of the child unless the parent designates another individual as the regular education teacher. The parents assert that the attorney told the IEP team that the parent was not a teacher, and then “revised his statement to[,] the parent is not a certified teacher. He did this to undermine the parent’s participation as the regular education teacher * * * . His actions created the idea that the parents’ information was inaccurate, or should not have as much weight as District information.” Perhaps this is a reference to an interchange between the attorney and the father in the August 29, 2007 meeting, in a discussion of how Student 2 would be tested:

Attorney: * * * because none of us are teachers –
Father: I’m a teacher.
Attorney: Okay. None of us are accredited –
Father: I’m a regular education teacher.

Ex. B29, CD 5 at 7.

In that interchange the attorney made a mistake which he immediately corrected. The parents’ contention that the attorney caused the IEP team members to devalue the parents’ information by denigrating the father’s status as a teacher is not supported by the record. The IEP team listened carefully, and asked appropriate questions, as the parents presented Student 2’s PLAAFP’s and described his/her progress in home schooling. They reviewed work samples provided by the parents. They praised Student 2’s accomplishments under the tutelage of the father and accepted the PLAAFP’s offered by the parents. The father’s ability and achievement as Student 2’s teacher was in no way devalued by the attorney or the IEP team members.

After the dialogue quoted above, and at a few other times during the meeting, the parents became very upset and rude. There were a number of instances when the father started yelling, and at one point Ms. Gray asked him to please not yell at her. Distressed by another altercation the mother suggested that the father and the attorney, whom she characterized as “an evil man,” both leave the room. On a few occasions there were heated exchanges between the attorney and the parents, usually provoked by the parents. For the most part, however, the attorney and the IEP team members, including the parents, were polite and respectful toward each other.

The parents testified that they were intimidated by the attorney at the IEP meeting. But they did not appear to be intimidated, as they confronted the attorney quickly and forcefully when they disagreed with him, and did not hesitate on occasion to make provocative remarks about him.

The parents obviously prepared extensively for the IEP meeting for Student 2 and provided the other members of the IEP team with a great deal of information. The parents acknowledge that they “were given a chance to speak at the meeting, and their information was used to devise the IEP.” Parents’ Closing Statement at 9. But, they claim, “[n]ever was the parents’ information considered reliable or accurate.” Parents’ Closing Statement at 9. The parents were deeply offended by the District’s decision to develop an interim IEP (*see* discussion below). The parents thought their PLAAFPs should be used to formulate an annual IEP for Student 2. They seemed to find it unreasonable that the District staff believed the home schooling setting for Student 2 (with two other students – Student 2’s siblings – and their father as the teacher was different from public school, and therefore it would be advisable to revisit Student 2’s IEP after Student 2 had been in public school for a short time, to see whether any adjustments were needed.

The District staff’s position was not unreasonable. The District staff did not consider the parent’s data unreliable or inaccurate, but wanted new information about a different subject – how Student 2 fared in public school.

Although there were some unpleasant and contentious moments during the IEP meeting on August 29, 2007, 2008, the parents had a meaningful opportunity to present their information about Student 2 and provide input for the IEP. The District staff considered their suggestions thoughtfully and adopted them whenever they found it possible. When the other IEP team members found that impossible they carefully tried to explain their reasoning to the parents.

The District did not adopt all of the parents’ proposals or accede to all of their wishes, but the District did not limit their right to participate effectively in the development of an IEP for HB. While the parents were acting to further what they considered to be the best interests of their children, the School District had a legal responsibility to offer the children a Free Appropriate Public Education, and a concomitant responsibility to make the ultimate determination as to what services and placement were required to meet that obligation.

5. Did the School District fail to inform the parents, in the meeting notice, of the names of three staff members who attended the August 29, 2007 IEP meeting, in violation of OAR 581-015-2190(2)(b)?

A school district must provide parents with a written notice of an IEP meeting which states the purpose, time and place of the meeting and who will attend. OAR 581-015-2190(2)(b). Jeralynn Beghetto, Katie Allgood, Marilyn Nersesian and Nancy Reiter all attended the meeting on August 29, 2007, although their names were not listed on the meeting notice.

Ms. Beghetto was the former principal at Elementary School C. She was invited to the meeting to discuss the parents’ retention requests, because retention is decided by the school

principal and Mr. Williams was new to that job and the District. Ms. Allgood was invited because it was believed Student 3's IEP meeting would also take place on August 29, 2007, and she was to address occupational therapy for him/her. She left when it became clear the IEP team would not get to Student 3's IEP that day. Ms. Nersesian often attends IEP meetings and is actively involved in decisions relating to allocating resources. Also, she consults with IEP teams concerning placement and eligibility. Ms. Reiter is the school psychologist.

The unlisted participants were introduced at the beginning of the meeting. The parents did not object to their presence. They had objected to the presence of the attorney at the meeting and he was allowed to remain. Thus, they state, "It would have been illogical for the parents to believe that if they voiced their objection to other less offensive staff any action would have been taken." Parents' Closing Statement at 10.

Ms. Allgood only appeared on August 29, 2007 to attend Student 3's IEP meeting. Ms. Beghetto, Ms. Nersesian and Ms. Reiter were all appropriate members of the IEP team for Student 2 as described by OAR 581-015-2210, quoted above. But the parents felt they were "ambushed," and that the number of District staff at the meeting was "intimidating." Parents' Closing Statement at 10.

The parents are correct that the District violated the meeting notice requirement. There is, however, no prohibition on allowing persons not listed on the notice to attend.³¹ The parents did not object to the presence of the additional participants. And as discussed above, the parents did not appear to be intimidated in any way in the course of the meeting. This procedural violation did not interfere with the provision of FAPE to Student 2

6. Did the School District develop an interim IEP for Student 2 on August 29, 2007 which did not meet legal requirements?

The parents object to the District's development of what Mr. Sullivan called an interim IEP, rather than an annual IEP, for Student 2 in August and September 2007.³² OAR 581-015-2225 provides:

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

³¹ Had the parents objected to the presence of Ms. Nersesian, Ms. Beghetto and Ms. Reiter, if the School District considered their participation necessary one remedy would have been to terminate the IEP meeting so the District could issue a corrected notice. That would, however, have had the undesirable result of postponing the completion of the IEPs for Student 2 and Student 3. In a Final Order issued on November 28, 2005, after the parents filed a complaint concerning Student 1, the ODE found that the District had failed to list all IEP meeting participants on the meeting notice. The ODE observed in that matter that the error was not material because the District had all necessary participants at the meeting. The ODE advised that the appropriate action was to request a correction to the notice form, citing OAR 581-021-0300. (Ex. A1 at 9.)

³² The District used the Oregon Standard IEP form to draft the IEP. See OAR 581-015-2215(1). The parents do not assert the interim IEP violated legal requirements in any way other than with regard to its duration. See Parents' Closing Statement at 10-14.

- (a) Determine whether the annual goals for the child are being achieved; and
- (b) Revise the IEP, as appropriate, to address:
 - (A) Any lack of expected progress toward the annual goals described in OAR 581-015-2200 and in the general education curriculum, if appropriate;
 - (B) The results of any reevaluation conducted under OAR 581-015-2105;
 - (C) Information about the child provided to, or by, the parents;
 - (D) The child's anticipated needs; or
 - (E) Other matters.
- (2) Agreement to amend or modify IEP
 - (a) In making changes to a child's IEP between annual IEP Team meetings, the parent of a child with a disability and the school district may agree not to hold an IEP Team meeting to make these changes, and instead may develop a written document to amend or modify the child's current IEP.
 - (b) If changes are made to the child's IEP in accordance with subsection (1), the district must ensure that the child's IEP team is informed of these changes.
- (3) Amendments to IEP
 - (a) Changes to the IEP may be made either by the entire IEP team at an IEP team meeting, or as provided in subsection (2) by amending the IEP rather than by redrafting the entire IEP.
 - (b) Upon request, the parent must be provided with a revised copy of the IEP with the amendments incorporated.

This rule does not prohibit a school district from developing an IEP for a period of less than one year. The District staff members of the IEP team favored the shorter time period because Student 2 had not attended public school since March 2006, when Student 2's parents removed him/her to a home school setting. The District staff members wanted to see how Student 2 functioned in a public school. The time period selected was the period when all students were assessed formally and informally at the beginning of the school year.

When the District held IEP meetings for Student 2 in August and September 2007, Student 2's statement of eligibility for special education services, prepared on March 24, 2006, remained in effect. The parents gave the School District extensive work samples and PLAAFPs for Student 2. The levels of achievement reflected by the PLAAFPs were significantly different from the abilities Student 2 had previously demonstrated when enrolled in public school, but this could have resulted from Student 2's growth over the past one and one-half years and the father's abilities as a teacher. Nevertheless, the School District staff believed that the change from home school to public school could impact Student 2's school performance. The staff reasonably wanted to evaluate whether Student 2 could maintain his/her current level of achievement in a very different setting, and continue to progress. The purpose of the interim IEP was to allow the School District to collect additional data relating to Student 2's performance in public school and then evaluate whether the IEP should be changed.

The parents note that the School District could have accomplished the same purpose by taking advantage of the option described in OAR 581-015-2225(2), quoted above, for making changes to an IEP between annual IEP team meetings. The parents are correct. However the District “may,” but is not required, to agree to that procedure. The District did not violate the law by failing to plan to make changes to the IEP by electing that option in the future, or by establishing an IEP for Student 2 for the period from September 5 through November 2, 2007. See Letter to Boney, 18 IDELR 537 (1991).

7. *At the IEP meeting of August 29, 2007, did the School District decline to finalize, or specifically require implementation of, modifications identified in the IEP of August 29, 2007, in violation of legal requirements?*

OAR 581-015-2200 states in relevant part:

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

* * * * *

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

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

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

(C) To be educated and participate with other children with disabilities and non-disabled children;

At the IEP meeting on August 29, 2007 the parents presented an extensive list of proposed accommodations and modifications which they requested for Student 2. They culled the items requested from a list provided by Oregon Parent Training and Information Center (OrPTI). OrPTI advised, “When reviewing these ideas, keep in mind that any accommodations or modifications an IEP team chooses must be based on the individual needs of students.”

The parents wanted very specific modifications and accommodations because in a previous due process hearing the ALJ ruled that if their child’s IEP did not require that the child be given homework, then failure to assign homework was not a lapse in the provision of a FAPE. The IEP team went through the parents’ list and discussed the proposed modifications and accommodations in detail. The District staff on the team accepted the majority of the parents’ suggestions but pointed out potential difficulties with implementing some of the others.

The parents assert that those accommodations or modifications which, when adopted, included language such as “as appropriate,” “when available” and “when feasible” had not been finalized, as teachers and service providers should not have any discretion as to whether they provide them. (Parents’ Closing Statement at 12.) There are three such items on the final list in the IEP. One is that “When available, a set of books will be provided for home,” and another is that “When available and feasible audio tapes of textbooks will be provided.” The parents

agreed to these conditions at the IEP meeting. The fact that they allow for some teacher discretion, or depend upon the availability of materials, does not mean they do not represent a final agreement between the members of the IEP team as to what accommodations should be offered.

The parents comment, in relation to this issue, that they had requested that Student 2 not have to perform timed tests. That proposal was included in the list of accommodations and modifications which the parents offered at the IEP meeting for Student 2. The IEP team agreed that Student 2 would be permitted as much time as needed to finish tests. Nevertheless, that accommodation was not included in the final statement of accommodations and modifications in the IEP. Should an IEP team for Student 2 have an opportunity to revisit the list of accommodations and modifications, this apparent oversight should be noted.

Of more concern is the parents' well-founded assertion that the principal stated repeatedly that he would not agree to various proposals, including those relating to accommodations and modifications, without consulting one or more teachers who were not currently participating in the IEP meeting. This occurred at least in part because Ms. Leaton, the only regular education teacher at the August 29, 2007 meeting, left before the meeting ended.

OAR 581-015-2210, concerning the IEP Team, provides in relevant part:

(1) School districts must ensure that the IEP Team for each child with a disability includes the following participants:

* * * * *

(c) At least one regular education teacher of the child, if the child is or may be participating in the regular education environment, consistent with section (4) of this rule;

* * * * *

(e) A representative of the school district, who may also be another member of the team, who is:

(A) Qualified to provide, or supervise the provision of, specially designed instruction;

(B) Knowledgeable about the general education curriculum;

(C) Knowledgeable about district resources; and

(D) Authorized to commit district resources and ensure that services set out in the IEP will be provided.

* * * * *

(3) IEP team attendance:

(a) A member of the IEP team described in subsection (1)(c) through (1)(f) is not required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the school district agree in writing that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed at the meeting.

(b) A member of the IEP team described in subsection (1)(c) through (1)(f) may be excused from attending an IEP meeting, in whole or in part,

when the meeting involves a modification to or discussion of the member's area of curriculum or related services, if:

- (A) The parent and school district consent in writing to the excusal; and
 - (B) The member submits, in writing to the parent and the IEP team, input into the development of the IEP before the meeting.
- (4) The regular education teacher of the child must participate as a member of the IEP team, to the extent appropriate, in the development, review, and revision of the child's IEP, including assisting in the determination of:
- (a) Supplementary aids and services, program modifications and supports for school personnel that will be provided for the child; and
 - (b) Appropriate positive behavioral interventions and supports, and other strategies for the child.

Ms. Leaton, the regular education teacher, left the August 29, 2007 IEP meeting before the discussion of modifications and accommodations was completed. There was no evidence that there was a written consent to her "excusal," or that Ms. Leaton submitted written input about the development of the IEP before the meeting. By continuing the meeting after the regular education teacher departed the District was in violation of OAR 581-015-2210(3)(b).

It is understandable that Mr. Williams, as a new principal at Elementary School C, wanted to consult one or more regular education teachers before agreeing to the modifications and accommodations. But at least one of those teachers should have been at the IEP meeting. Any discussions with a regular education teacher which were required before the modifications and accommodations could be approved by the IEP team should have taken place in the course of the IEP meeting. A regular education teacher is required to be present for that purpose. Also, the above-quoted rule requires that Mr. Williams or another member of the IEP team be authorized to commit district resources and ensure that services set out in the IEP will be provided. That would include making commitments about accommodations and modifications in the course of an IEP meeting.

These are potentially serious procedural violations which could have interfered with the provision of a Free Appropriate Public Education (FAPE) for Student 2. But Student 2's IEP meeting was continued after August 29, 2007 and the modifications and accommodations were ultimately approved at an IEP meeting attended by one or two regular education teachers. Mr. Williams did not return to the IEP meetings in September 2007 with objections to the proposed modifications and accommodations resulting from his private consultations. There is no evidence that the accommodations and modifications would have been different had the regular education teacher remained at the meeting on August 29, 2007. Implementation of the IEP was not delayed by the principal's unwillingness to make a commitment, as the IEP was not completed until September. Therefore these procedural violations did not affect the provision of a FAPE to Student 2.

8. Did the School District fail to meet legal requirements to provide one or both parents with an opportunity to participate in the IEP meeting for Student 2 on November 27, 2007?

OAR 581-015-2195, entitled Additional Parent Participation Requirements for IEP and Placement Meetings, provides in relevant part:

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

- (a) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (b) Scheduling the meeting at a mutually agreed on time and place.

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

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

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

- (A) Detailed records of telephone calls made or attempted and the results of those calls;
- (B) Copies of correspondence sent to the parents and any responses received; and
- (C) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

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

- (A) Communicates directly with the parent and arranges a mutually agreeable time and place, and sends written notice required under OAR 581-015-2190(2) to confirm this arrangement; or
- (B) Sends written notice required under OAR 581-015-2190(2) proposing a time and place for the meeting and states in the notice that the parent may request a different time and place, and confirms that the parent received the notice.

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

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- (5) The school district must give the parent a copy of the IEP at no cost to the parent. If the parent does not attend the IEP meeting, the school district must ensure that a copy is provided to the parent.
- (6) When conducting IEP team meetings and placement meetings, the parent of a child with a disability and a school district may agree to use alternative means of meeting participation, such as video conferences and conference calls.

The District scheduled an IEP meeting on November 7, 2007 which was cancelled that day because a participant (teacher) became ill. The meeting was rescheduled for November 13, 2007. When the parents informed Mr. Sullivan on November 8 that they needed at least 10 business days to consider their options, the District rescheduled the meeting to take place on November 27, 2007.

The District sent the parents a Notice of IEP Team Meeting dated November 15, 2007, inviting them to an IEP meeting for Student 2 on November 27, 2007 at 3 p.m. The notice stated that if the parents could not attend or wished to discuss a different meeting location or time, or would like to participate through alternate means, they should contact Ms. Gray at a specified telephone number. Due to an oversight, the notice stated the parents should contact Ms. Gray by November 2, rather than November 20. The parents unreasonably assumed – or claimed to believe -- that the District established a contact date before the notice was issued as another instance of retaliation against them.

On November 26, 2007 the mother gave the Mr. Williams a letter indicating the parents were withdrawing Student 2 from Elementary School C. On November 27, 2007 at 11:14 a.m. the father sent Mr. Williams an e-mail stating that the parents would not attend the IEP meeting that day, and that they understood Mr. Sullivan had agreed with ODE that the meeting would only address eligibility for Student 2

The mother then decided to attend the November 27, 2007 meeting with the understanding that it would only be about eligibility, but her daughter, who was to watch the younger children, had a bicycle accident coming home and was unavailable. The mother sent Mr. Sullivan an e-mail at 2:58 p.m. explaining that the parents wanted to attend the meeting but could not due to a family emergency, and requesting that the meeting be rescheduled. Mr. Sullivan had already left his office when the e-mail was received.

At the start of the IEP meeting at 3 p.m. the participants waited to see whether the parents would appear, following discussions between Mr. Sullivan and the ODE which indicated that might happen. The IEP team was aware of the father's message to Mr. Williams and the parents' decision to withdraw Student 2 from the school. Eventually the District IEP team members began the meeting without the parents. A facilitator conducted the meeting.³³

³³ Once again the District failed to identify a meeting participant – the facilitator – on the meeting notice. In addition the District listed the two regular education teachers as invited, although at least one was required to attend.

The District made sufficient attempts to convince the parents to attend the meeting by sending a written notice which complied with the requirements of OAR 581-015-2195, except for the typographical error about the “November 2” contact date. In addition Mr. Sullivan, through Ms. Linden, made an effort to secure the parents’ attendance. The District confirmed that the parents had received the meeting notice due to the contacts from the parents on November 27. *See* OAR 581-015-2195(3)(b)(B), quoted above. The parents had at least a week before the date of the meeting on November 27 to contact the District. The parents did not request in that the meeting be rescheduled until two minutes before the meeting was scheduled to begin.

The District took sufficient steps to ensure that both parents attended the meeting. The mother apparently waited until the last minute to decide she would attend and then was unable to do so when there was a delay in her daughter’s return home to babysit, due to a bicycle accident. In addition, the District did not learn that the mother wanted, but was unable, to attend until the meeting had been in progress for about an hour.

The District did not learn until November 28 that the parents intended to home school Student 2 (rather than attempt to enroll him/her in a different elementary school). Therefore the provisions of OAR 581-021-0029, describing procedures when a school district learns that a child will be home schooled, were inapplicable to the meeting conducted on November 27.

9. Did the School District require, at the IEP meeting on August 29, 2007, that Student 2 be re-evaluated for eligibility for special education, in violation of legal requirements?

OAR 581-015-2130³⁴ establishes the requirements for a child to be eligible for special education services due to autism spectrum disorder. For school-age children, school districts and

³⁴ That rule provides:

- (1) If a child is suspected of having an autism spectrum disorder, the following evaluation must be conducted:
 - (a) Developmental profile. A developmental profile that describes the child's historical and current characteristics that are associated with an autism spectrum disorder, including:
 - (A) Impairments in communication;
 - (B) Impairments in social interaction;
 - (C) Patterns of behavior, interests or activities that are restricted, repetitive, or stereotypic; and
 - (D) Unusual responses to sensory experiences.
 - (b) Observations. At least three observations of the child's behavior, at least one of which involves direct interactions with the child. The observations must occur in multiple environments, on at least two different days, and be completed by one or more licensed professionals knowledgeable about the behavioral characteristics of autism spectrum disorder.
 - (c) Communication assessment. An assessment of communication to address the communication characteristics of autism spectrum disorder, including measures of language semantics and pragmatics completed by a speech and language pathologist licensed by the State Board of Examiners for Speech-Language Pathology and Audiology or the Teacher Standards and Practices Commission;

juvenile and adult corrections education programs are the public agencies responsible for evaluating children and determining their eligibility for special education services. OAR 581-015-2100(1). OAR 581-015-2105 states in relevant part:

- (1) General: A public agency must conduct an evaluation or reevaluation process in accordance with this rule and 581-015-2110 before:
 - (a) Determining that a child is a child with a disability under OAR 581-015-2130 through 581-015-2180;
 - (b) Determining that a child continues to have a disability under OAR 581-015-2130 through 581-015-2180;
 - (c) Changing the child's eligibility, or
 - (d) Terminating the child's eligibility as a child with a disability, unless the termination is due to graduation from high school with a regular diploma or exceeding the age of eligibility for a free appropriate public education under OAR 581-015-2045.

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

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- (d) Medical or health assessment statement. A medical statement or a health assessment statement indicating whether there are any physical factors that may be affecting the child's educational performance;
 - (e) Behavior rating tool. An assessment using an appropriate behavior rating tool or an alternative assessment instrument that identifies characteristics associated with an autism spectrum disorder.
 - (f) Other.
 - (A) Any additional assessments necessary to determine the impact of the suspected disability:
 - (i) On the child's educational performance for a school-age child; or
 - (ii) On the child's developmental progress for a preschool child; and
 - (B) Any additional evaluations or assessments necessary to identify the child's educational needs.

- (2) To be eligible as a child with an autism spectrum disorder, the child must meet all of the following minimum criteria:
 - (a) The team must have documented evidence that the child demonstrates all of the characteristics listed under subsection (1)(a). Each of these characteristics must be:
 - (A) Characteristic of an autism spectrum disorder;
 - (B) Inconsistent or discrepant with the child's development in other areas; and
 - (C) Documented over time and/or intensity.
- (3) For a child to be eligible for special education services as a child with an autism spectrum disorder, 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.

- (A) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
- (B) If the child's parents or teacher requests a reevaluation.
- (b) A reevaluation for each child with a disability:
 - (A) May occur not more than once a year, unless the parent and public agency agree otherwise; and
 - (B) Must occur at least every three years, unless the parent and public agency agree that a reevaluation is unnecessary.

As indicated by the above-quoted rules, an eligibility determination is part of the evaluation and reevaluation process. In this case, the District had most recently determined Student 2's eligibility on March 24, 2006, and therefore another determination was not required until 2009. Furthermore, there was no real dispute between the parents and District staff about whether Student 2 remained eligible to receive special education services under the category of "autism spectrum disorder."

When Student 2 returned to public school the District insisted on another eligibility determination for Student 2 based on its repeated, and mistaken, assertion that Student 2's eligibility had "lapsed." Yet the District conceded at the IEP meeting of August 29, 2007 that Student 2 remained eligible, although it also insisted that it needed a current medical statement to make that determination. The parents thought it was obvious that Student 2 remained eligible³⁵ and did not understand why eligibility had to be reviewed. Nevertheless they agreed at the August 2007 IEP meeting to get a medical statement for Student 2, acquired it from Student 2's doctor, and then, after offering on November 5, 2007 to provide it to the District the next day, failed to do so. Even if a new eligibility determination was necessary, the parents and the other members of the IEP team could have agreed, pursuant to OAR 581-015-2115(4)(a),³⁶ that no

³⁵ The father offered to bring Student 2 to the meeting so that the team members could talk to him/her for two minutes and know she was eligible for services. (Ex. B29, CD 1 at 32.)

³⁶ OAR 581-015-2115, entitled Evaluation Planning, provides in relevant part:

- (4) Requirements if additional data are not needed.
 - (a) *If the child's IEP or IFSP team determines that no additional data are needed to determine whether the child is or continues to be a child with a disability, and to determine the child's educational and developmental needs, the public agency must notify the child's parents:*
 - (A) *Of that determination and the reasons for it; and*
 - (B) *Of the right of the parents to request an assessment to determine whether, for purposes of services under this part, the child continues to be a child with a disability, and to determine the child's educational and developmental needs.*
 - (b) The public agency is not required to conduct an assessment of the child unless requested to do so by the child's parents.

(Emphasis added.) The wording of the rule is rather curious given that the parents are members of the IEP team. Nevertheless, although the rule applies literally when the IEP team determines no additional data are needed to determine eligibility "and" the child's educational and developmental needs, it seems reasonable that it would also apply if the team concluded no additional data were needed to satisfy either requirement.

additional data was necessary to determine whether Student 2 continued to be a child with a disability

The District staff reasonably believed that a reevaluation of Student 2 was necessary because he/she had been out of the public school system for one and one-half years. It was the District's obligation, pursuant to OAR 581-015-2105(4)(a), quoted above, to ensure that such a reevaluation was conducted. But the eligibility issue could have been resolved immediately by referring back to the March 2006 statement of eligibility.

An eligibility determination is part of the reevaluation process and, as indicated in OAR 581-015-2105(4)(b), quoted above, a reevaluation may occur not more than once a year. Consequently, the District was entitled to require a new eligibility determination in August 2007 when the previous determination was completed in March 2006. Therefore the District did not violate any legal requirements.

10. Did the School District fail to engage in "evaluation planning" for the evaluation of Student 2 required on August 29, 2007?

OAR 581-015-2115, quoted in relevant part below, establishes the requirements for evaluation planning:

- (1) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation, the child's IEP or IFSP team, and other qualified professionals, as appropriate, must:
 - (a) Review existing evaluation data on the child, including:
 - (A) Evaluations and information provided by the parents of the child;
 - (B) Current classroom-based, local, or state assessments, and classroom-based observations; and
 - (C) Observations by teachers and related services providers; and
 - (b) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine:
 - (A) Whether the child is, or continues to be, a child with a disability;
 - (i) For a school-age child, under OAR 581-015-2130 through 581-015-2180; or
 - (ii) For a preschool child, under OAR 581-015-2780 or 581-015-2795;
 - (B) The present levels of academic achievement and related developmental needs of the child;
 - (C) Whether the child needs, or continues to need, EI/ECSE or special education and related services; and
 - (D) For reevaluation, whether the child needs any additions or modifications to special education and related services or, for a preschool child, any additions or modifications to ECSE services:
 - (i) To enable the child to meet the measurable annual goals in the child's IEP or IFSP; and
 - (ii) To participate, as appropriate, in the general education curriculum or, for preschool children, appropriate activities.

(2) Conduct of review. The team described in subsection (1) may conduct this review without a meeting. If a public agency holds a meeting for this purpose, parents must be invited to participate in conformance with OAR 581-015-2190 or, for parents of preschool children, with OAR 581-015-2750.

At the IEP meetings in August and September 2007 the IEP team reviewed the existing data provided by the parents and planned to reevaluate Student 2 to determine his/her needs in the public school setting. The IEP team identified what additional information was needed to determine Student 2's PLAAFPs in that setting and establish measurable annual goals, and whether he/she needed any additions or modifications to special education and related services to enable him/her to meet those goals, and enable him/her to participate, as appropriate, in the general education curriculum.

On September 6, 2007 the parent signed a Prior Notice About Evaluation/Consent for Evaluation for Student 2 indicating the evaluation procedures and assessments which the District planned to use in the reevaluation process. The notice states that the proposed evaluation was "based on the following evaluation procedures, test, records or reports: File review, including records and reports, parent reports." The IEP team thoroughly reviewed the extensive information provided by the parents, which included informal evaluations and classroom-based assessments, classroom observations, and observations by the teacher, the father. This was the only current information available that met the requirements in OAR 581-015-2115. But based on the evidence presented at the hearing, the parents are correct in asserting that there was no file review. The Prior Notice of September 6, 2007 was in error. Nevertheless, the School District completed the required evaluation planning.

11. Was the IEP team instructed to make an eligibility determination on November 5, 2007 based on a draft evaluation which lacked a medical statement from Student 2's doctor? Were assessments to determine the impact of autism on Student 2's educational performance, and evaluations to identify Student 2's educational needs, necessary, and if they were, were they omitted from that draft evaluation?

A medical or health assessment statement and, if necessary, assessments to determine the impact of autism on a child's educational performance and evaluations to determine the child's educational needs, are required as part of an evaluation for autism spectrum disorder. See OAR 581-015-2130(1), quoted above. At the IEP meeting on November 5, 2007 the parents assured the other team members that they would provide the medical statement for Student 2 the following day. Dr. Kordesch completed the Medical Statement or Health Assessment for Student 2 on November 5, 2007. On the form the doctor checked the statement, "There are physical or sensory factors that may affect the child's educational performance, If yes, please describe" and wrote in (only) "Autism." Dr. Kordesch provided no other information on the medical statement. The mother had indicated before the November 5, 2007 IEP meeting that there were no changes in Student 2's health.

The parents take the position that a) an eligibility determination was unnecessary, and b) the determination was flawed because the District did not have required information. In making the eligibility determination on November 5, 2007 the District reasonably relied on the parents'

assertion that they would provide the medical statement the next day, and the mother's earlier acknowledgement that there had been no change in Student 2's health. The District was not in strict compliance with eligibility determination procedures, as an eligibility determination was not necessary in 2007 and the medical statement was, as the parents asserted, available and did not indicate any change in Student 2's health. But if these were procedural violations they did not affect the provision of a FAPE to Student 2

The draft assessment included behavioral observations, a statement of functional communication, information from a parent interview and the Gilliam Autism Rating Scale completed by the mother, and comprehensive information about Student 2's impairments in communication and social action; patterns of behavior, interest and other activities that were restricted, repetitive or stereotypic; and unusual responses to sensory information. It was accompanied by a Functional Communication Evaluation Report. All of this information was helpful in determining the impact of autism on Student 2's educational performance and Student 2's educational needs. The evidence does not support the parents' claim that this information was omitted from the District's evaluation.

12. Was the draft evaluation [assessment] prepared by the School District for Student 2 based in part on invalid information from a psychologist which was inconsistent with information known to IEP team members (parents and others)? (Did the School District fail to ensure that information obtained from the psychologist was documented and carefully considered?)

OAR 581-015-2125, entitled Interpretation of Evaluation Data, states:

In interpreting evaluation data for the purpose of determining if a child is a child with a disability under OAR 581-015-2130 through 581-015-2180, and the educational needs of the child, each team must:

- (1) Draw upon information from a variety of sources, including but not limited to, aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background and adaptive behavior; and
- (2) Ensure that information obtained from all these sources is documented and carefully considered.

The parents object to the draft autism assessment summary prepared by Ms. Reiter, the school psychologist. Ms. Reiter thoroughly documented her personal observations and the information she had received from others as part of the assessment process. She reasonably offered the assessment to the IEP team as a draft and invited the other team members to make comments and changes.

The parents assert that many of the statements in the draft assessment summary were incorrect. See Parent's Closing Statement at 18-20. For example, they note that certain statements about Student 2's speech patterns and social interactions which were attributed to the parent are not in the record of the interview which Ms. Reiter conducted with the parent. They may, however, be in the Gilliam Autism Rating Scale which the parent completed for Ms. Reiter. One category on the scale is Communication and another is Social Interaction. The raw data upon which the summary was based is not in the record.

The behavior of a child with autism may vary greatly, and one purpose of presenting the assessment summary as a draft was to get feedback from the IEP team and ensure that the information was correct. It was typical, in the District, that such assessments would be presented in draft form with amendments invited, especially in the case of children with autism.

The IEP team members carefully considered the draft assessment summary at the November 5, 2007 IEP meeting. When the parents and other team members commented that certain statements were inaccurate or presented an exaggeratedly negative view of Student 2, those statements were removed or corrected. On November 8, 2007 Mr. Sullivan, a trained and experienced school psychologist, listened at length to the parents' concerns about the draft assessment summary and offered in various ways to consider amending the report to satisfy those concerns. He also reviewed the revised assessment summary and made additional changes before it was put into final form. Ms. Reiter's assessment complied with the requirements of OAR 581-015-2125. The final evaluation reflected the observations and conclusions of the IEP team, including the parents.

The draft assessment summary was a "work in progress." It is not in Student 2's official file. There was nothing about it that resulted in a denial to FAPE to Student 2

13. Did the (final) evaluation prepared by the School District for Student 2 fail to include information relating to enabling Student 2 to be involved in and progress in the general education curriculum?

OAR 581-015-2110(3) states in relevant part:

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

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

* * * * *

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

The parents note that there are only three educational recommendations in the final evaluation prepared by the School District. However, the evaluation includes the autism assessment and the functional communication report. These documents provide extensive information which would be relevant in enabling Student 2 to be involved and progress in the general education curriculum, including information about Student 2's communication skills and social interaction, particular patterns of behavior, and unusual responses to sensory information.

14. *Did the School District fail to provide its (final) evaluation of Student 2 to the parents upon completion (and before the November 27, 2007 IEP meeting)?*

In a letter dated November 14, 2007 the parents requested that Mr. Sullivan provide all of the documentation which was used to prepare the draft assessment summary, noting they had requested that information for the second time on November 8, 2007. The parents did not explicitly request a copy of the final evaluation report.

The District must provide a copy of its evaluation report and the determination of eligibility to the parents. OAR 581-015-2125. The District provided the parents with the draft evaluation report (including Ms. Reiter's draft assessment and the functional communication report) on November 5, 2007 and had the final evaluation report available on November 27, 2007. The parents did not, however, attend the IEP meeting on that date. The parents received a copy of the final report on November 29, 2007.

OAR 581-021-0270, entitled Rights of Inspection and Review of Education Records, states in relevant part:

- (1) Except as limited under OAR 581-021-0290 [irrelevant here], each educational agency or institution shall permit a parent, an eligible student, or a representative of a parent if authorized in writing by the parent, to inspect and review the education records of the student.
- (2) *The educational agency or institution shall comply with a request for access to records:*
 - (a) Within a reasonable period of time and without unnecessary delay;
 - (b) *For children with disabilities under OAR 581-015-0051, before any meeting regarding an IEP, or any due process hearing, or any resolution session related to a due process hearing; and*
 - (c) In no case more than 45 days after it has received the request.

Mr. Sullivan stated in his November 21, 2007 letter that the District would accept the revised autism evaluation Student 2 and would provide a copy to the parents before the November 27, 2007 IEP meeting. The District did not provide the evaluation to the parents before that meeting. There is no documentation that the parents requested it, but as Mr. Sullivan stated he would provide it the parents could reasonably have assumed no request was necessary. However, as the parents did not attend the meeting, removed their children from public school on November 26, 2007, and received the evaluation on November 29, 2007, there is no indication that they suffered any harm.

15. *Did the School District improperly make an eligibility determination in November 2007 without a complete evaluation or a current medical statement?*

The School District made an eligibility determination on November 5, 2007 without a medical statement and using a draft evaluation. This determination did not result in denial of a FAPE to Student 2. See discussion of Issue no. 11, above. When the District repeated its

eligibility determination on November 27, 2007 it had the final evaluation, but still no medical statement. For reasons discussed in relation to Issue no. 11, this did not deny Student 2 a FAPE.

16. Did the School District Director of Educational Support Services personally determine Student 2's eligibility at the November 27, 2007 IEP meeting?

Mr. Sullivan informed the parents, in his letter of November 21, 2007, that as District representative he was required, if there was no consensus at the November 27, 2007 IEP meeting, to determine Student 2's eligibility. He repeated that statement in a letter of the same date to the ODE.

The eligibility decision is to be made by the IEP team, OAR 581-015-2120(1), and not the District representative. At the IEP meeting on November 27, however, Mr. Sullivan concluded that Student 2 was eligible after the team members unanimously agreed that he/she was eligible. Thus, although his statement in his letters misrepresented his authority, in reality the decision was made by the IEP team.

17. At the IEP meeting which began on August 29, 2007, did the School District fail to place Student 2 in the least restrictive environment in which his/her IEP could be implemented?

OAR 581-015-2240, entitled Requirement for Least Restrictive Environment, states:

School districts must ensure that:

- (1) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled; and
- (2) Special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The parents state that they did not return Student 2 to public school for academic reasons, but rather because they wanted the child to receive services for communication and social interaction. Another consideration was that Student 2 wanted to attend school with children his/her own age. The parents assert that they have repeatedly asked the District in the past whether their children could attend non-academic classes for social exposure and to receive services for social skills and speech therapy while being home schooled for their core classes (reading, writing and math), and the District's answer has always been no. (Parents' Closing Statement at 22-23.)

OAR 581-021-0029, entitled Home Schooling for Children with Disabilities, provides in relevant part:

- (5) District responsibilities for home schooled children with disabilities:

(a) When the district receives notice that a parent intends to home school a child with a disability or that a child with a disability is being home schooled, the district shall offer, and document to the parent;

(A) An opportunity for the child to receive special education and related services if the child were enrolled in the district; and

(B) An opportunity for IEP meeting to consider providing special education and related services to the child with a disability in conjunction with home schooling.

(i) *An IEP shall only be developed for a child with a disability if the IEP team determines that a free appropriate public education can be provided in conjunction with home schooling.*

* * * * *

(6) If the district permits partial enrollment of home schooled children in its regular education program, the district shall permit children with disabilities to participate to the same extent as non-disabled children, if appropriate, whether or not the child is receiving IEP services from the district.

(a) If the child is receiving IEP services from the district, the IEP team shall determine the appropriateness of participation and the IEP shall include necessary modifications and accommodations related to the participation. Notwithstanding subsection (5)(b)(A), if the IEP calls for participation in any part of the district's regular education program, the IEP team shall include a district regular education teacher in accordance with OAR 581-015-0066(3).

(b) If the child is not receiving IEP services from the district, the district shall consider the participation, and necessary modifications and accommodations for the child under Section 504 of the Rehabilitation Act.

* * * * *

(8) Parents of home schooled children with disabilities have the same procedural safeguards as children with disabilities enrolled in the district, except for the following:

(a) A parent is not entitled to an independent educational evaluation at public expense under OAR 581-015-0094 if the parent disagrees with an IEP team evaluation regarding satisfactory educational progress under this rule.

(b) A parent may not request a due process hearing under OAR 581-015-0081 to contest a district's decision not to provide special education and related services in conjunction with home schooling.

(c) Complaints that a school district has failed to meet any of the requirements under OAR 581-021-0029(5) or (8) may be heard under OAR 581-015-0054.

(Emphasis added.)

Mr. Sullivan testified that in the District “There are some buildings, some principals and some guidance that in fact we do allow homeschool as well as private school students to dual

enroll,” and “in the District it ranges from building to building.” (Tr 7 at 1082.) He also stated, “My approach was I think from the district point of view that we can’t give up our obligation to implement – or only implement part of an IEP, if that’s what the IEP team felt that Student 2 needed to benefit for special education services.” (Tr 7 at 1085.)

OAR 581-021-0029(6) applies to the entire school district. It would seem, under that rule, that a school district cannot have different policies in different buildings regarding permitting partial enrollment of home schooled children in its regular education program. Rather, the rule indicates that if that is allowed somewhere in the district it should be allowed throughout the district.

As stated in OAR 581-015-0029(8), above, the parents are not entitled to a due process hearing to contest the District’s decision not to provide special education and related services in conjunction with home schooling, or its apparent decision that it cannot develop IEPs for Student 2 and Student 3 which would offer them a FAPE in conjunction with homeschooling. Complaints that the District has failed to meet any of the requirements in OAR 581-015-0029(5) and (8) must be heard under OAR 581-015-0054.³⁷ To the extent this issue is related to the provisions of OAR 581-015-0029(5) and (8), it cannot be resolved in this hearing.

In the August-September 2007 IEP meetings the placement selected for Student 2 was General Education class with LC/RLC instruction in written expression, math problem solving, social skills, and speech/language services. Student 2 would be in general education classes for subjects including social studies, science, music and PE. All of the teachers and District staff members who expressed an opinion about this placement concurred that it was appropriate and necessary in terms of Student 2’s educational needs. They supported the selection of this over the less restrictive option of providing all instruction other than pull-out services for speech and language in the general education environment. Ms. Newberry, Ms. Leaton and Ms. Gray reported that Student 2 had difficulties in general education classes.

Although the District must seriously consider the parents’ wishes, it is ultimately the District’s responsibility to provide a FAPE for Student 2 if he/she is enrolled full-time in public school, *see* OAR 581-015-2040, and to select the least restrictive placement where that can be accomplished. The parents did not present convincing evidence to support their preference for Student 2 to be “placed in general education with goals developed to foster growth in the general education environment using the general education curriculum, modified considering the child’s lack of verbal skills.” (Parents’ Closing Statement at 23.) I conclude the placement was the least restrictive environment in which HB’s IEP could be implemented.

18. Did the School District fail to comply with legal requirements in responding to a request from the parents for Student 2’s education records?

OAR 581-021-0270, entitled Rights of Inspection and Review of Education Records, states in relevant part:

³⁷ That rule describes the ODE complaint process, and has been renumbered OAR 581-015-2030.

(1) Except as limited under OAR 581-021-0290 [irrelevant here], each educational agency or institution shall permit a parent, an eligible student, or a representative of a parent if authorized in writing by the parent, to inspect and review the education records of the student.

(2) *The educational agency or institution shall comply with a request for access to records:*

(a) Within a reasonable period of time and without unnecessary delay;

(b) *For children with disabilities under OAR 581-015-0051, before any meeting regarding an IEP, or any due process hearing, or any resolution session related to a due process hearing; and*

(c) In no case more than 45 days after it has received the request.

(Emphasis added.)

In an e-mail to Mr. Sullivan dated November 9, 2007 the parents reiterated a request made at a meeting the previous day for copies of all the materials used by Ms. Reiter to develop her draft autism assessment of Student 2. The parents stated, "You may mail them to us or we can pick them up at the children's school." Mr. Sullivan responded the same day that he would ask Ms. Reiter and the team to provide any information (including copies of the protocols) used to develop the evaluation in a timely manner, and as soon as possible. In a letter to Mr. Sullivan dated November 14, 2007, the parents reminded Mr. Sullivan that they were still awaiting the records requested. Mr. Sullivan did not provide the requested information until March 20, 2008, when he mailed the documents to the parents in accordance with the requirements for Corrective Action resulting from the parents' complaint in ODE Case No. 07-054-054.

The District should have made available the documentation requested by the parents before the IEP meeting scheduled on November 27, 2007. The District did not provide the documentation by that date or within 45 days. The District violated OAR 581-021-0270. But as the parents did not attend the meeting and withdrew Student 2 from public school on November 26, this procedural violation did not result in a denial of a FAPE.

19. On or after May 16, 2006, did the School District retaliate against Student 2 for his/her parents' interactions with, and complaints about, the School District, in violation of Section 504 of the Rehabilitation Act of 1973?

In their Closing Statement the parents make many allegations of retaliation relating to incidents which occurred before the statute of limitations period began, on May 16, 2006. (Parents' Closing Statement at 25-26.) Concerning the relevant time period the parents state that as soon as they enrolled Student 2 in the District in August 2007:

The district immediately retaliated against the family. Inviting their attorney to the IEP meeting in an effort to limit parental participation, creating lapsed eligibility so they could manipulate the parents into an evaluation, performing an unnecessary evaluation that greatly exaggerated or created symptoms of autism the child was not reported as having, requiring an interim IEP unnecessarily, creating modifications that were

constructed for benefit of the teachers not the child. The district held 2 eligibility meetings for the child who had eligibility on file and one of these meetings they held without the parents, and withheld records and information from the parents. We contend that every issue in this complaint is retaliation by the District. Every issue in this complaint could have been avoided if the District had not chosen to treat the parents and the child differently, because of the previous complaints.

The District had the right and some legitimate reasons to have their attorney at the IEP meeting. The District's insistence that Student 2's eligibility had "lapsed" appears to have resulted from carelessness or ignorance, but in any case the District had valid reasons for wanting to evaluate Student 2 when he/she returned to public school after one and one-half years in home school. The decision to initially create an interim IEP for Student 2 while the District evaluated him/her was similarly based on valid reasons related to Student 2's protracted absence from public school. I find no evidence that the District retaliated against Student 2 or the parents in these or any other of the actions of which the parents complain.

STUDENT 3

20. After the parents requested an IEP meeting in July 2007, did the School District fail to have an IEP in effect for Student 3 at the beginning of the 2007-2008 school year, in violation of legal requirements?

The parents enrolled Student 3 in public school on August 20, 2007, the first day the school was open. The District offered the parents an IEP meeting on August 29, 2007 from 2 p.m. to 4 p.m., following a meeting for Student 3's sibling, Student 2. Unfortunately Student 2's meeting lasted for all of the time allotted on August 29, 2007 and for the next scheduled meeting day, September 4. Consequently the IEP meeting for Student 3 did not begin until September 6, and it continued on September 10 and 13, 2007.

August 29, 2007 was the first day that staff required for the IEP meetings were back at school. The IEP team, including the parents, decided to finish Student 2's IEP before beginning the IEP for Student 3. Student 3 started school on September 17, 2008, having missed eight school days. The father supported the idea that Student 3 would have a gradual transition to school, although he wanted Student 3 to go to school as soon as possible.

At the beginning of each school year a school district must have in effect an IEP for each child with a disability within the district's jurisdiction. OAR 581-015-2220(1). The District failed to have a current IEP in place for Student 3 when the school year began because he/she was not reenrolled until August 20; the school staff was on vacation in the summer; and there was a gross underestimation of the time required to prepare IEPs for Student 3 and Student 2. The IEP meeting for Student 3 was initially scheduled for the first date necessary staff were available. The staff devoted many hours to preparing the IEPs for Student 2 and Student 3 at the beginning of the school year. Student 3's IEP meeting was postponed with the concurrence of the parents, so that Student 2's IEP could be completed and he/she could start school at the beginning of the school year. I conclude that the District made diligent efforts to provide an IEP

for Student 3 as soon as possible. Although the failure to have that IEP in place at the beginning of the 2007-2008 school year was a procedural violation, there is no evidence that the provision of a FAPE to Student 3 was significantly compromised by the fact that he/she missed the first eight days of school. .

22.³⁸ *In evaluating Student 3 in or after July 2007, did the School District fail to comply with legal requirements?*

The parents' are concerned that the District did not complete an evaluation of Student 3 before the IEP meeting initially scheduled to take place on November 7, 2007. Parents' Closing Statement at 27. Before Student 3 was reenrolled in public school in August 2007, Student 3's eligibility for special education services was last established on May 17, 2004. (Ex. R9.) A reevaluation for each child with a disability must occur at least every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. OAR 581-015-2105(4)(b)(B). On September 6, 2007 the mother gave consent for an evaluation of Student 3. By Notice of IEP Team Meeting dated October 24, 2007 the School District informed the parents that a meeting was scheduled for November 7, 2007, and that the team would be developing an IEP for Student 3 based on information from a variety of sources including the recent evaluation.

Ms. Reiter was responsible for preparing the evaluation report. For reasons which she could not explain, Ms. Reiter had not written the evaluation report by November 7, 2007, although she claimed that all of the component activities had been accomplished other than her observation of Student 3. This failure could have significantly delayed the District's ability to provide a FAPE to Student 3 except that the District postponed the IEP meeting scheduled on November 7, 2007 due to the illness of a teacher on the IEP team, and the next day the parents revoked their consent for evaluation. Therefore the failure to complete the reevaluation in a timely fashion did not affect the District's ability to provide a FAPE to Student 3. To date Student 3 remains a home schooled student.

23. *Did the School District fail to engage in "evaluation planning" for the evaluation of Student 3 required in or after July 2007?*

The parents state almost the exact same concerns they expressed in relation to the evaluation planning for the evaluation of Student 2. These are addressed in the discussion of Issue No. 10, above. The District engaged in evaluation planning at the September 6, 2007 IEP meeting for Student 3.

24. *Has the School District failed to provide the parents with a copy of its evaluation of Student 3?*

The parents suspect the District completed an evaluation of Student 3 but it was "not delivered because of the issues with [Student 3's] sibling's evaluation." The preponderance of the evidence indicates that the evaluation was not completed.

³⁸ The parents withdrew Issue no. 21.

25. *For the 2007-2008 school year, did the School District fail to place Student 3 in the least restrictive environment in which his IEP could be implemented?*

The parents wanted to have Student 3 “placed in general education with goals developed to foster growth in the general education environment using the general education curriculum, modified considering the child’s individual needs.” Parents’ Closing Statement at 29. The parents did not disagree with the PLAAFPs or the goals and objectives on Student 3’s IEP. They have not presented evidence that those goals and objectives could be achieved exclusively in the general education environment. All of the District witnesses who testified (and who participated in one or more IEP meetings for Student 3) believed the placement selected was the preferred option to enable Student 3 to achieve his IEP goals.

In addition the parents object to Student 3 receiving some of his education in the RLC because, they say, “He had no behavior problems until he/she was removed from the classroom to a regional center.” Parents’ Closing Statement at 29. Yet Ms. Gray noted that Student 3 was brought to the RLC almost daily when he/she had difficulties in the regular education classroom, and Ms. Fields observed an occasion when he/she was brought to the RLC to calm down (and did). The parents have not provided persuasive evidence that being in the RLC caused Student 3 to have behavior problems.

OAR 581-015-2240, entitled Requirement for Least Restrictive Environment, is quoted above in the discussion of Issue No. 17. The evidence in the record does not show that Student 3’s IEP could have been implemented in a less restrictive environment.

26. *On or after May 16, 2006, did the School District retaliate against Student 3 for his parents’ interactions with, and complaints about, the School District, in violation of Section 504 of the Rehabilitation Act of 1973?*

Concerning Student 3 the parents give no specifics relating to retaliation but assert, as with Student 2, that “every issue in this complaint is retaliation by the District.” Parents’ Closing Statement at 31. I find that the District did not retaliate against Student 3 or his parents in any way, and that there was no causal connection between the parents filing complaints about the District and actions taken by the District toward Student 3 and the parents which might be perceived as adverse.

Remedies

In their due process hearing request the parents asked that their children be placed in the general education classroom using the general education curriculum in their neighborhood schools, utilizing supports, accommodations and modifications. They repeat this request in their closing statement. The parents requested this hearing on May 16, 2008. Due to procedural and timing requirements in the IDEA, the first pre-hearing conference in this matter was held on June 19, 2008. Therefore I can only consider the schooling of the three children in the 2008-2009 school year. As Student 1 was withdrawn from public school in 2006, and Student 2 and Student 3 were withdrawn in November 2007, the record does not contain any of the current information which would be necessary to determine appropriate placements for the children. The

information in the record indicates that the placement requested by the parents was not, in the past, the least restrictive environment in which the IEPs for any of the children could be implemented.

In their due process hearing request the parents asked for a number of remedies. They requested that many constraints be imposed upon the District – for example a prohibition on limiting the parents’ access to school staff; imitations on membership on IEP teams; a requirement that the District comply with parent requests relating to IEP meetings; and an order that if the parents do not agree with anything proposed by the District, the District will not make decisions without the parents’ approval. Imposing such constraints is beyond my authority and in some circumstances, inconsistent with applicable law. While parents have a right to be free from state interference with their choice of the educational forum for their children, that right does not extend beyond the threshold of the school door. *Fields v. Palmdale School District*, 427 F3d 1197, 1207 (9th Cir 2005).

The parents also requested an advance determination that “any future findings of violations by the district against this family will be considered retaliation,” which is not only beyond my authority but legally impossible. There is no rational basis for establishing in advance a legal conclusion that any future violation of the IDEA by the District is retaliation. The parents requested that the District be required to pay restitution for retaliating against the children and their parents. I do not find retaliation, and I do not have the authority to order what would in effect be punitive damages.

The parents also seek reimbursement for the parents’ teaching services to the three children. The parents voluntarily withdrew their children from school in the District. They have not proved any basis for providing such reimbursement, nor did they provide evidence of the extent or value of such services at the hearing.

The parents request, as an “alternative solution,” that the District completely fund the children’s education in home school. There is no basis for granting that request. As discussed above in relation to Issue no. 17, if the parents believe the District should prepare IEPS offering their children public education in conjunction with home schooling, or wish to contest a District decision not to provide special education and related services in conjunction with home schooling, their remedy is to file a complaint with the ODE.

The parents were advised, in the pre-hearing conferences, that most or all of the remedies they initially requested were unavailable. I conclude that the parents are entitled to the remedies described below.

The District has provided the parents with a significant number of legally or factually incorrect communications, including PWNs requiring the parents to notify the District before an IEP meeting notice was issued if they could not attend the meeting; a PWN indicating the District was refusing to change Student 1’s identification rather than Student 1’s placement; PWNs asserting that the District was refusing to provide a FAPE to Student 3 and Student 2; an IEP meeting notice omitting the names of four participants invited by the District; letters and other documents indicating that Student 2’s eligibility for special education services had

“lapsed,” and communications stating that Mr. Sullivan, as District representative, was prepared to make an eligibility determination for Student 2. These types of communications exacerbate an already difficult situation, in which the parents feel sorely mistreated by the District and are quick to consider any misstep evidence of retaliation. Therefore the District is required to seek training from the ODE for all employees of the District who may be required to provide PWNS to the parents. In addition, for the next year all (new) communications from a District staff person to the parents must be reviewed for content and typographical errors, before they are mailed or given to the parents, by another District staff person in the same or a higher position.

The District shall also seek training from the ODE for all employees of the District who may receive requests for education records from the District about the legal requirements and timelines for providing such information.

In their closing statement the parents write,

The district has testified that it does allow partial enrollment of home-schooled students, and the children do not need IEPs, they can access services under a section 504 plan. * * * The parents would happily provide the (core) academic portion of the school day at home, and the children would be allowed to participate in a school setting without segregation.

* * * The children could have been receiving IEP services or have a section 504 plan for accommodations and modifications. * * * they as well, if the district was willing, could have received social skills instruction and speech therapy. The things the children really need to have more success in life.

The District shall seek immediate written guidance from the ODE as to the meaning of OAR 581-021-0029(5), (6) and (8) and the obligation (if any) of the District under those provisions, or other applicable rules and laws enforced by the ODE, to provide partial enrollment for Student 1, Student 3 and Student 2 in public school.

ORDER

- a) The District shall provide training to all staff who might be required to prepare Prior Written Notices to the parents about the requirements for issuing such notices and the proper completion of the notice forms. This training shall be completed no later than 60 days from the date of this order.
- b) The District shall implement a procedure within 30 days of this order to provide review of any new communications sent or given by District staff to the parents, by another person in the same position as the author, or a higher position. The procedure shall remain in effect for one year. Each such document shall be initialed by the "peer reviewer."
- c) The District shall provide training to all staff who might receive a request from the parents for education records about the requirements and timelines for responding to such a request. This training shall be completed no later than 60 days from the date of this order.
- d) Within seven days of the date of this order the District shall seek guidance from the ODE as to the meaning of OAR 581-021-0029(5), (6) and (8) and the obligation (if any) of the District under those provisions, or other applicable rules and laws enforced by the ODE, to provide partial enrollment for Student 1, Student 3 and Student 2 in public school. The District shall request that the ODE provide a copy of any such written guidance to the parents. The District shall request that such guidance be provided as soon as possible.

Betty Smith, Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

NOTICE TO ALL PARTIES: If you are dissatisfied with this Order you may, within 90 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(i)(2). Failure to request review within the time allowed will result in **LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER.**

ENTERED at Salem, Oregon this 5th day of September, 2008 with copies mailed to:

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