



## **ISSUES**

- (1) Did the District fail to appropriately identify the Student as a Student with a disability during the 2005-2006, 2006-2007, and/or 2007-2008 school years,
- (2) Did the District fail to evaluate Student in all areas of suspected disability during the 2005-2006, 2006-2007, and/or 2007-2008 school years,
- (3) Did Student's Individualized Education Plans (IEPs) for the 2005-2006, 2006-2007, and/or 2007-2008 school years fail to adequately address Student's suicidal ideation and attempts, aggression, and other social difficulties, or
- (4) Did the District fail to offer Student an appropriate placement for the 2005-2006, 2006-2007, and/or 2007-2008 school years, and
- (5) If so, what remedies, if any, are the parents entitled to.

## **EVIDENTIARY RULINGS**

Exhibits D1 through D25 were admitted without objection. Exhibits P1-P3, P102 through P178, P180 through P182, and P185 through P187 were admitted without objection<sup>2</sup>. Exhibits P4 through P101, P179, and P183 were voluntarily withdrawn. Exhibit P184 was excluded upon the District's objection that it was offered outside the time limitations of 34 CFR §300.512(a)(3).<sup>3</sup>

## **FINDINGS OF FACT**

(1) Student has been a resident of the District since at least 1999 when s/he entered kindergarten in the District. Student has a communication disorder, an articulation problem with certain letters. S/he received special education services under IEPs from kindergarten through the end of the 6<sup>th</sup> grade, June 2006. (Testimony of Mother; Exhibits P102, P105, P109.)

(2) Mother and Father are college graduates in professional occupations. (Exhibit P164.)

(3) Mother had been provided with copies of the parental rights brochure which didn't read. She did not ask any one any questions about her parental rights. (Testimony of Mother, Transcript page (T)827.) That brochure advised Mother, among other things, of her due process rights and of the requirements for unilateral placement by parents of children in private school at public expense. (OAR 581-015-2315.)

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<sup>2</sup> The Transcript's list of exhibits at page 16 fails to note P186, a two-page Care Team referral of May 4, 2006, and P187, Principal Grove's student discipline log for the 2005-2006 school year.

<sup>3</sup> It should be noted that the letter dated May 17, 2006, the MTA SNAP-IV assessment questionnaires, and the Achenbach assessment questionnaires discussed by Dr. White in his testimony were not offered as exhibits or entered into the record.

(4) At Student's elementary school there is one English teacher, one science teacher, one math teacher, and one social studies teacher for 5<sup>th</sup> and 6<sup>th</sup> grades. Those four teachers were known as the "5-6 team." Student had the same teachers in his/her 5-6 team during both the 5<sup>th</sup> and 6<sup>th</sup> grades. It is a small school with a tight-knit faculty, particularly the 5-6 team. (Testimony of all staff.)

(5) Ms. Peterson, Student's elementary school counselor, chaired a weekly CARE team meeting. The CARE team consisted of the counselor, the principal, the speech-language pathologist, the learning specialist, and any regular education teacher who might be interested in the student(s) subject to that week's CARE team meeting. Any teacher or other staff member could refer any student for consideration at a CARE team meeting. The CARE team would deal with a variety of issues for students, both regular ed and special ed, including drafting formal §504 accommodation plans and informal accommodation plans, developing and giving input on draft IEPs, problem solving bad behaviors, etc. (Testimony of Ms. Peterson, T41-43.)

(6) Student has a longstanding behavioral disturbance. S/he has exhibited "odd" behaviors and has had socialization problems since pre-school. Despite great effort by his/her family, Student has had few, if any, friends in or out of school. Mother frequently, at least weekly, discussed with Student's teachers and/or principal Grove Student's social and behavioral problems and slow processing speed problems as well as giving them advice on how to teach to and otherwise help solve these problems. Mother believes that the District, as well Student's peers and their parents, generally failed to help Student with, and sometimes exacerbated, those problems. Her anger about that is great and palpable. (Testimony and demeanor of Mother [e.g., T. 777, 784-85]; Testimony of Deter T237; Exhibits P135, P185.)

(7) Student has organic cognitive disorders: visospatial and perceptual deficits, complex visual material memory deficits, and a very low average processing speed index – the 28 point discrepancy between his/her WISC-IV Verbal Comprehension and Processing Speed scores is of a rare magnitude. With the exception of those neuropsychological deficits and psychomotor slowing, Student's performance in intellectual testing was in the average to high average range and was likely underestimated by the testing due to his specific deficits. (Exhibit P135.)

(8) Since May 2006, Student has been evaluated by at least four mental health professionals, two on an ongoing, treating basis over the two year period, resulting in the following diagnoses: intermittent explosive disorder; major depressive episode with psychotic features; major depressive disorder, recurrent, moderate to severe; pervasive developmental disorder NOS; mood disorder NOS; and bipolar disorder. (Testimony of Dr. White and therapist Petersen; Exhibits P135, P177, P180, P182 )

(9) Student was assessed by the Oregon Department of Education in June 2005 as meeting Grade 5 mathematics, reading/language arts, and science performance levels. (Exhibit P111.)

(10) Student was assessed by the Oregon Department of Education in September 2006 as meeting Grade 6 performance levels in mathematics and exceeding performance levels in reading/language arts. (Exhibit P142.)

(11) Student's "overall" trimester grades during the 2005-06 school year were:

	1 <sup>st</sup>	2 <sup>nd</sup>	3 <sup>rd</sup>
Language Arts	B	B	B
Social Studies	B	A-	A
Math	B	B	B
Science	B	B	B

In addition to the "overall" grade, each subject had sub-category grades for tests and quizzes, homework, etc. Student's sub-category grades in each class were generally A – B and showed an improvement as the year progressed.

Student received marks of "M," meets standard, in his electives of Spanish, Art, PE, and Music during the year, with the exception of Music in which he received "W," working towards standard, the first two trimesters and an "M+" for the final trimester. Student's report card notes for PE under the heading, "Days prepared:" 21/21, 22/24 and 20/22 and for Music, 20/22, 23/26, and 25/25. Student had no attendance problems.

(Testimony of Principal Grove; Exhibit P132.)

(12) Student is extremely slow in her/his school work. It took her/him a long time to do work in class and a long time to do work at home. S/he was allowed to turn in work late, an informal accommodation in all of her/his classes in the 5<sup>th</sup> and 6<sup>th</sup> grades. Student was placed on "an individual program" in math class in the 6<sup>th</sup> grade. Student also had great trouble with organizing and beginning a school assignment. Student's teachers accommodated that by breaking assignments into smaller components for him/her ("chunking" an assignment) and utilizing various prompts. Student's teachers also modified his assignments by having him do fewer problems or shorter papers. There was discussion during Student's grade 5 of administering testing in reading to Student. However, the District eventually determined that testing was not warranted given Student's average to above average academic performance. (E.g., Testimony of Mother, T 733; Peterson, T65; Black, T79-80; Reece T139, 141, 143-144; Grove, T196; Deter T228-29, 230-232; Exhibit P136.)

(13) During grades 5-6 Student was socially awkward with peers. Student functions adequately socially in formal classroom situations and organized events but is generally socially inadequate in informal, unsupervised situations. Student does not understand humor very well. Student process social conversations and interactions as slowly as s/he does academics. Student attempted to make peer friends by teasing and being mean to intended friends. Student did not understand that peers would be put off by a sarcastic, demeaning, and angry demeanor. Student was often alone at recess and other unsupervised times. (E.g. Testimony of Mother; Black T82-83, 106,; Reece T145,-147, 152, 159-161; Deter T235, 242; White, 338-339; Exhibit P107)

(14) Student developed suicidal ideation in the 5<sup>th</sup> grade, began talking about where and how one might commit suicide. Mother reported this, as well as Student's apparent depression,

to Mr. Black and Principal Grove and asked all of his teachers to give her updates on how Student was doing. Mother sought help for Student from mental health professionals. She was not satisfied with any of the help. (Testimony of Mother T728-730, 737; Exhibits P107–109.)

(15) On or about December 13, 2005 while Student's family was packing for a month-long vacation, Student told Mother that s/he had just attempted suicide by hanging and showed Mother the rope burns on his/her neck. (Testimony of Mother, T 735-37.)

(16) Student and his/her family returned home on or about January 9, 2006. Student's triennial Individuals with Disabilities Education Act (IDEA) re-evaluation had been done during the period December 13 2005 through January 9, 2006. (Exhibits P115 – P118.)

(17) Mother was sent a notice on January 6, 2006 scheduling an IEP meeting for January 10, 2006. Another copy of the parental rights brochure was included with the notice. The IDEA eligibility and IEP meeting was held on January 10, 2008. The evaluation and the IEP covered only Student's speech impairment. Student was found eligible. Mother attended the meeting. She signed the IEP which addressed only student's articulation impairment and which noted, among other things, that Student did not exhibit behavior that impedes his/her learning or the learning of others. The Student's placement was, as it had been for the previous year, regular education classrooms with pull-out for speech therapy services of 30-40 minutes weekly. There was some discussion during the meeting of Student's slow processing speed and the informal accommodations being made for him by his individual teachers. (Testimony of Mother e.g., T 735-39; Exhibits D4, P105, P119.)

(18) At the end of the IEP meeting, Mother informed the participants that Student had attempted suicide in December, 2005 and that she was seeking new mental health professionals for her/him. District staff at the meeting assured Mother that Student's behavior was serious and that seeking professional help for student was a good idea. They told Mother that the school counselor would be contacting her and told Mother that a §504 plan might be developed for Student. In Ms. Johnson's career, only three parents have ever divulged a student's suicide attempt to her. (Testimony of Mother T 741-743, Ms. Johnson, T296.)

(19) The school counselor, Ms. Peterson, telephone Mother on January 11, 2006 and asked how the District might help. Mother requested that Ms. Peterson and Student's classroom teachers advocate for Student and assure him that he is valued at school. Ms. Peterson agreed and immediately e-mailed Mr. Black asking that he make special efforts to connect with Student and offer her/him support. (Testimony of Mother, Ms. Petersen, and Mr. Black; Exhibits P122-123.)

(20) On January 28, 2006 Mother informed Ms. Peterson that Student was working with a psychologist. Student did not like the psychologist. Student's parents became displeased with the apparent lack of progress with the new psychologist and with Student's ongoing medication regimen which they blamed for his/her suicidal ideation. In April 2006 they took Student off his medications and began looking for a new mental health professional for Student. As he tapered off his medication, he became more impulsive, a condition which had caused problems in school in previous years. (Testimony of Mother T755-758; Exhibit P 124.)

(21) On February 22, 2006 Student got into a fight with another student. The incident

was reported to Principal Grove who disciplined Student by contacting Student's Mother. The elementary school had approximately 330 students. Students were reported to Principal Grove for disciplinary reasons 80 times during the 2005-06 school year. Student was the subject of 3 of those reports. When Principal Grove "semi-retired" from the District, he took the only copy of the school's discipline log for 2005-2006 home with him on a flash drive "in case any questions arose." He keeps in his desk drawer. (Testimony of Ms. Peterson T33; Testimony of Principal Grove, T204, 210-211; Exhibit P187.)

(22) On April 18, 2006 Mother e-mailed Principal Grove and Mr. Black, reporting that Student was off his medication and exhibiting impulsivity and asking for any help they could give Student. Mr. Black replied that Student seemed better in class. Principal Grove replied that he would share the information with the entire 5-6 teaching team and ask them to keep an eye on Student.

(23) On May 1, 2006 Student began treatment with Dr. White who is still Student's treating psychiatrist. Dr. White is a board certified general psychiatrist and child and adolescent psychiatrist, and he is the medical director of System of Care for Children and Families Multnomah County Mental Health and Addictions Services, consults for the Children's center and Catholic Community Services in Vancouver Washington, and he has a private practice. (Testimony of Dr. White, Exhibit P1.)

(24) Dr. White interviewed Student, thought him have suicidal ideation with a plan, diagnosed him with Major Depressive Disorder, moderate to severe, and immediately put Student on a new medication. Dr. White sent MTA SNAP-IV and Auchenbach assessment questionnaires to Student's English, math, science, and social studies teachers who completed and returned them to Dr. White by May 16, 2006. The Auchenbach assessment questionnaire has 112 questions to respond to. Dr. White interpreted the completed questionnaires to indicate that in school Student was a very slow worker, had low self-esteem, had social skills problems, seemed depressed, was shy and withdrawn, and appeared hypersensitive. (Testimony of Dr. White T313, 320-323, 327, 374. 390)

(25) Student was scheduled, along with the rest of his/her class, to attend Outdoor School, an annual, week-long cabin retreat and environmental study program for 6<sup>th</sup> grade students. Mother telephoned Ms. Peterson on May 4, 2008 to inform her of Student's new medication and dosage instructions and to alert her that the medication might cause agitation. Mother asked Ms. Peterson to direct camp staff to withhold the medication and contact Mother if they noticed such symptoms. Ms. Peterson provided that information to Mr. Black and Ms. Reece who would be supervising at the outdoor school. (Testimony of Ms. Peterson, T44, Mr. Black, T104; Exhibit P128.)

(26) During the May 4<sup>th</sup> conversation with Ms. Peterson, Mother also advised Ms. Peterson of Student's continuing problems completing his school work. The information about Student's school problems and new medication with potential for aggressive behavior prompted Ms. Peterson to again suggest formalizing the existing accommodations and modifications in a §504 plan. Ms. Peterson asked Mother to obtain documentation of a diagnosis for Student and told Mother that the school's CARE team would meet May 16<sup>th</sup> to discuss a possible accommodation plan for Student. Ms. Peterson made a referral to the CARE team on that date.

She noted on the referral, “1. Consider 504 Plan – academic issues[,] depression – need documentation 2. Psychological Support – changing dr. [undecipherable] upset w/family medication decisions.” The referral form listed Ms. Peterson, Principal Grove, and Ms. Johnson as the referral sources. (Testimony of Ms. Peterson T44-49; Exhibits D12, P186 (T308-309.)

(27) Student attended outdoor school the following week and got into a pushing and shoving match with another student in the bathroom during evening ablutions. Although the usual rule required any student(s) fighting to be sent home immediately, Student and the other student were allowed to remain after promising not to step out of line again. This incident is not reflected on the disciplinary log. (Testimony of Mr. Black, T105-108; Exhibit P187.)

(28) Ms. Peterson drafted a §504 accommodation plan for the May 16, 2006 CARE team meeting. The draft and the adopted plans noted that Student’s impairment substantially limited Student’s “emotional well-being<sup>4</sup>,” and was “substantial” in that “Academic performance and speed of academic tasks [are] affected.” (double underlined in original.) The final plan specified the following accommodations (the only accommodation in the final plan not in the draft plan is in italics):

Preferential seating as needed.

Monitor/Support, as needed.

Break down large tasks into smaller tasks, as needed.

*Redirect around physical inappropriateness.*

Monitor specific responsibilities (re: assignments) closely.

Make certain adequate time is allotted for assignment/assessment completion.

Communicate and involve parents (or appropriate parties) in order to inform them of concerns/problems/failures.

A CARE team consisting of Ms. Peterson, Principal Grove, Mr. Black, and Ms. Johnson met on May 16, 2006, discussed and finalized the plan, and signed it. Mother did not attend the meeting. A copy was left at the front desk of the school and she signed it later. (Testimony of Ms. Peterson, T68-73; Exhibits D13, P129.)

(29) On May 17, 2006 Ms. Peterson realized that Student’s accommodations necessary due to his emotional disturbance should be part of his IEP and not part of a separate §504 plan. She asked Student’s speech pathologist to convene an IEP meeting to review and amend Student’s IEP. (Testimony of Ms. Peterson T51-52; Exhibit D14.)

(30) Dr. White drafted a letter to Ms. Peterson to be mailed May 17, 2006 stating that

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<sup>4</sup> “[We meant by that term] how he was feeling about himself, his self-concept, and how he felt about his interaction with other peers.” (Testimony of Principal Grove, T216.)

Student had major depressive disorder, specific learning disabilities, and social skills deficits. He recommended psychological testing and accommodations for Student's emotions and behavior volatility and slow processing speed. He volunteered to assist in developing a plan to meet Student's needs. More likely than not, Ms. Peterson did not receive that letter. (Testimony of Ms. Peterson, T57-58; Testimony of Dr. White, T 317-19, 378-79; Exhibit D13.)

(31) The accommodations Dr. White had in mind for the District to implement for Student were: giving Student preferential seating, allowing Student to avoid classmates who were upsetting; checking with Student to make sure Student got the assignment correctly, breaking down larger projects into smaller ones for her/him, allowing extra time to complete assignments, giving Mother weekly updates, and provide structure, support, coaching, and accountability. (Testimony of Dr. White, T336-337, 396-99.)

(32) Ms. Reece went on maternity leave from early May through mid-June. Her substitute did not implement the accommodations in math. (Testimony of Mother, T782-84; Exhibit P134)

(33) On May 22, 2008 Student believed s/he had been slighted by a classmate and stabbed her in the back with a pencil in class. Principal Grove called Mother and had her take Student home for the rest of the day. On the morning of Student's first day back from his suspension, May 24, 2008, Student got into an argument with another student during an unsupervised time in the locker room and struck the other student on the back and on the hands with a long-handled metal shoe horn. Student was suspended for 3 school days, through May 30, 2006. Principal Grove wrote Mother on May 24, 2006 setting up a "re-entry meeting" with Mother and telling her, among other things:

I realize [Student] has had some recent struggles and changes in medication from your information in an e-mail. We will need to meet and work on a plan together that will help [Student] cope with social frustrations and classroom behaviors. \*\*\* We want to work in partnership with you to provide the school environment that will help [Student] be successful in [his/her] schooling years.

(Testimony of Mother and Principal Grove T189-190, 199-200; Exhibit P130.)

(34) Mother met with Principal Grove on May 31, 2006 for the re-entry meeting. Mother complained about Student being targeted in dodge ball games, feeling self-conscious when standing in the halls during time between classes, and having no specified person to check-in with during the school day to make sure he was OK. Principal Grove agreed to, and did, arrange to take care of those requests. He talked with the PE teacher, talked with Mr. Black, Student's home room teacher about Student's problems during recess, and met with Student and Ms. Peterson, informing Student that Student was to consider he and Ms. Peterson as Student's alternative support people in case of any problems. (Testimony of Principal Grove, T185-188; Exhibits D16, P185.)

(35) During the meeting Mother also expressed dissatisfaction and frustration in general with Student's situation both at home and in the school. She was not happy with the school and

stated that she was going to find a new school for Student where he could make a “fresh start.” Principal Grove mentioned several strategies the school could try with Student such as shortened days and tutorial services. He also told her the District could not be financially responsible for any private placement of student unless “we went through a process and a team thing” and if she chose to place Student in a private school “she would be paying for that herself.” Mother was, and recalls that she was, “bursting with anger while I was in the meeting.” (Testimony of Ms. Peterson T55; Testimony of Principal Grove, T189-190, 199-200; Testimony of Mother, T777; Exhibits D16, P185.)

(36) Student was disturbed, despondent, demoralized, volatile, and suicidal in June 2006. Student disappeared from home on June 3, 2006, leaving a suicide note behind stating that s/he was going to jump into the river. Student’s sister found Student later that day at a dock on the river with a rope attached to his/her foot trying to tie the other end to a cinder block. Student’s sister prevented Student from going through with the suicide. (Testimony of Mother, T778-780; Testimony of Dr. White T334.)

(37) Student did not speak of suicide to anyone other than family members and treating medical professionals prior to December, 2006.

(38) Mother never informed District staff of Student’s June 3, 2006 suicide attempt. (Testimony of Mother, T844.)

(39) An IEP meeting was held June 6, 2006, attended by Mother, the speech pathologist, Mr. Black, Mr. Nebert, and Student’s social studies teacher, The IEP was amended to add, under the heading, “Supplementary Aids/Services; Modifications & Accommodations:”

- 1) Preferential seating – as needed - in classroom
- 2) Redirection and monitoring around physical appropriateness – daily – at all school locations
- 3) Break down large tasks into small chunks – as needed - in the classroom
- 4) Monitor specific responsibilities closely, re: assignments – daily/as needed - in the classroom
- 5) Make certain adequate time is allotted for assignment/assessment completion – as needed - in the classroom
- 6) Communicate and involve parents (or appropriate parties) in order to inform them of concerns/problems/failures - as needed - in various school locations.

No other changes were made to the IEP. Student’s placement remained in regular education, other than the few minutes weekly for the pull-out speech therapy, at the elementary school. All meeting participants signed the IEP. Mother made no objections to the new provisions or to the continued placement. Mother did not understand that the IEP was now

dealing with things other than Student's speech impairment. (Testimony of Ms. Peterson T52-54; Testimony of Mother T829-830; Exhibit D7.)

(40) School B is an accredited private, alternative school serving 7<sup>th</sup> to 12<sup>th</sup> grade students. Class sizes are approximately 10 students per each teacher. It does not provide any special education services. It has no one on staff with special education certification. It has some students with IEPs whose special education is planned and provided by the responsible school district(s). It is relatively unstructured and designed for students with diverse and unique learning styles and personalities. One of Mother's friends suggested School B to her for Student. Mother visited School B and was impressed with its emphasis on creating a community of its students. She thought that, if it was accepting of students with spiked, purple hair and bizarre outfits, it might be more accepting of Student than she thought the District's elementary school had been. She applied to enroll Student in School B. (Testimony of Ms. Lukens, T415-419; Testimony of Mother, T794-97.)

(41) Student was interviewed, tested, and evaluated by Susan Johnston, a license clinical psychologist, during May 23 – June 18, 2006. Dr. Johnston's findings were used by Dr. White and therapist Petersen in their ongoing treatment of Student and in their recommendations to School B and School C staff regarding on Student's needs. Dr. Johnston charged Student's parents \$1,895. After insurance payment, the parents paid \$377.00. (Testimony of Mother, T816, Dr. White, T349-344, and therapist Petersen, T636-37; Exhibits P135, P166, P175.)

(42) Lael Petersen is a licensed clinical social worker providing individual and family therapy and counseling. She began treating Student on June 27, 2006. She saw Student and/or family members on a regular basis from August 2006 through /August 2007 when Student entered Dialectical Behavioral Therapy (DBT). She began seeing Student again in April 2008 after completion of DBT. Therapist Petersen's therapy has cost the parents \$1,587 after insurance payments. \$1,539.00 of that amount was incurred for services rendered prior to August 2007. (Exhibits P175, P182.)

(43) Mother asked Mr. Black to complete a recommendation for Student for School B. He did so. The recommendation form noted that School B students take their personal and community responsibilities seriously, are motivated, care about the school and each other, have their progress measured by evaluation and self-reflection rather than grades, and are required to be active and positive participants in the school community. Mr. Black noted that Student was not motivated by grades, and was very smart but "works very slowly." He rated Student as having high or very high abilities to work independently, work with others, show respect to others, follow through and complete tasks, and be self-motivated. He "strongly recommend[ed]" student for School B.. (Exhibit P136.)

(44) Student was accepted at School B. Mother notified the District on July 24, 2006 when she had her/his records transferred to School B. (Testimony of Mother, T 797, Exhibit P 139.)

(45) School B is in District 2, a different school district than Student's district of residence, the District. Student's family has always resided within the District and never within District 2. (Testimony of Johnson, T272.)

(46) At School B's 3-day outdoor school in August 2006 for new students prior to the beginning of classes, Student did not do well socially at that camp out. S/he made no friends and a few enemies. Mother was distraught. (Testimony of Mother, T798-99.A)

(47) Dr. White and therapist Petersen became concerned about Student at School B and suggested to Mother that School C, an accredited day treatment program also in District 2, might be a good fit for Student. They believed that Student needed an IEP from the District to get into School C. (Testimony of therapist Petersen T 630-633; Testimony of Dr. White T350-354.)

(48) Mother visited District staff, including Principal Grove, in early October 2006 asking for ideas on what to do with Student because School B "is a training ground for bullies." She was told that Student would have to be enrolled in the District before the District could help him. She left Principal Grove's office and asked the District secretary if what Principal Grove had said was true and was assured that it was. Mother then told the secretary that she did not want to re-enroll Student in the elementary school because he was suicidal there. (Testimony of Mother, T800-801.)

(49) Dr. White, assuming Student's home school district would be responsible for special education matters for Student, wrote Principal Grove on October 16, 2006 explaining that Student had emotional disturbances and neuropsychological processing problems which interfered with Student's ability to learn commensurate with Student's IQ and which also made it difficult for Student to respond positively to even minimal challenges. He also opined that Student tended to become angry at him/herself and others under stress, causing Student to put "[her/him]self in harms way." Dr. White stated that he was concerned that Student would put him/herself at risk if s/he had to return to the District's elementary school. He closed the letter with, "Please consider this during the evaluation process for [Student]. We have recommended a referral to [School C] primarily because of [Student's] reactivity and poor problem solving abilities both socially and academically. Call me if you have further questions." Principal Grove showed the letter to Counselor Peterson and Ms. Johnson. They decided that it was not a request for the District to perform any evaluation of Student, that they did not need to respond to Mother because "the Child Find responsibility was on [District 2]," and that they could not respond to Dr. White because they did not have a release of information from Mother. They did nothing. (Testimony of Ms. Johnson, T277-78; exhibit P 147.)

(50) School B was not an appropriate educational program for Student. Therapist Petersen met with School B staff on October 18, 2006 and explained Student's needs. Staff was receptive but made clear to her that they did not do special education. Student went downhill, "unraveled," at school B. S/he made no friends and became more suicidal. Student's medications were changed several times. School B "really wants to do right by [Student], but just - it's not set up for [Student.]" In May 2007, Student misinterpreted the actions of another student and punched him in the neck. Student refused to apologize appropriately. Student was expelled. (Testimony of therapist Petersen, T634-36, 660-680, 708; testimony of Ms. Lukens, t448-453; Exhibits P169, P182.)

(51) Student's parents paid \$8,330 for tuition for Student at School B for the 2006-07 school year. (Exhibit P175.)

(52) On May 21, 2007 the parents' attorneys wrote School B that they "represent [Student] for all issues pertaining to [her/his] education." This letter was followed up by two more in July and September 2007 before School B responded. (Exhibits P167, 171, 172.)

(53) Student was admitted to School C for the 2007-08 school year. School C serves 52 students in grades 5-8 with a staff of 13 including 9 teachers 5 of whom have special education certification. It primarily takes students with learning disabilities, such as Student's slow processing speed, and mental illness. It does not usually take students with behavioral problems involving physical aggression. Student had to interview twice with School staff before he, and Mother with Dr. White's help, could convince the school to take a chance on Student. Student has thrived at School C. Student has his/her first friend. Student's only physically aggressive act at School C has been a pencil stabbing incident in April 2008 for which s/he was suspended for a day. In addition to small classes, Student has benefited from daily counseling at lunch by the school's assistant director, Mr. Prank is who is a licensed clinical social worker. The counseling has been directed at Student's socialization problems, helping Student to read social cues and to not misunderstand or misassume what is going on in social interactions. Student maintained grades of A and B in his core subjects. (Testimony of Mr. Ball and Mr. Prank, Testimony of therapist Petersen, T 689; Exhibits P181, P182.)

(54) School C charged, and Student's parents have paid, \$12,600 for the 2007-08 school year. (Testimony of Mr. Ball; Exhibit P175.)

(55) Student underwent a five-month session of DBT during September 2007 through April 2008. Claimant's Global Area Functioning scores improved from a 42<sup>5</sup> to a 65<sup>6</sup>. (Exhibit P180.)

(56) Mother contacted Ms. Johnson in April 2008 to state the parents intended Student to return to school in the District in the fall of 2008. At that time the District began arranging for an evaluation – in the areas of academic or developmental assessment, emotional behavior/personality, behavior rating scales, and a speech/language assessment, and including psychological evaluation - and new IEP for Student for the fall of 2008. (Testimony of Ms. Johnson, T272; Exhibits D2, P178.)

## **CONCLUSIONS OF LAW**

- (1) The District did identify Student as a student with a disability during the 2005-06 school year.
- (2) The District failed to evaluate Student in all areas of suspected disability beginning in May 2006 and through the time of the hearing.
- (3) The District failed to offer Student IEPs and placements developed in accord with the IDEA in May 2006 and thereafter.

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<sup>5</sup> Serious symptoms or serious impairment in social or school functioning. DSM-IV-TR.

<sup>6</sup> Some mild symptoms or some difficulty in social and school functioning but generally functioning pretty well. DSM-IV-TR.

- (4) The District shall reimburse the parents a total of \$4,436.00 (\$377 for Dr. Johnston's evaluations, \$1,539 for Therapist Pedersen's psychotherapy and counseling services, and \$2,520 for the last two months of Student's tuition at School C).

## OPINION

### I

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Schaffer v. Weast*, 126 S Ct 528, (2005). In this case the parents are seeking relief and bore the burden of persuasion.

### II

In determining what happened during the May 31, 2006 re-entry meeting, I gave more weight to Principal Grove's recollections and notes than to Mother's recollections. Mother admits to being angry beyond description during that meeting. Principal Grove is a man who took home the school's discipline log for his years when he retired to cover his backside. He would likely have attempted to tell Mother that the District would not be responsible for the costs of Student's private placement. His notes of the meeting support his recollection of the issues discussed and remedies decided. They do not mention, and the attendance details on the report cards do not support, that it was decided at the meeting to have Student cease attending elective classes and PE as Mother recalls. If Student ceased attending those classes it was, more likely than not, at Mother's own initiation.

I did find Mother's recollections of speaking with Principal Grove in October 2006 likely to be generally accurate. His account correlates with Dr. White's letter of October 16, 2006. Mother provided corroborative details about other District staff being there which were not challenged by the District.<sup>7</sup>

### III

The Individuals with Disabilities Education Act is satisfied if the State complies with the Act's procedures and an "individualized educational program developed through the Act's procedures [is] reasonably calculated to enable the child to receive educational benefits." *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 890 (9th Cir. 2001) (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982)).

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<sup>7</sup> Even though we had an additional, subsequent day of hearing scheduled we did not use in which rebuttal could have been presented.

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Individuals with Disabilities Education Act relief is appropriate if procedural violations deprive [the student] of an educational opportunity (prejudice) or seriously infringe his parents' opportunity to participate in the formulation of the individualized education plan. *W.G. v. Bd. of Trs. of Target Range Sch. Dist, No. 23*, 960 F.2d 1479, 1484 (9th Cir.1992)

("Target Range").

- *Park v. Anaheim Union High School District*, 464 F.3d 1025, 1031 (9th cir. 2006)

34 CFR §300.148(a) provides, in relevant part:

(a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility.

34 CFR § 300.8(a)(1) provides the following definition:

Child with a disability means a child evaluated in accordance with Secs. 300.304 through 300.311 as \*\*\* a speech or language impairment, \*\*\* a serious emotional disturbance (referred to in this part as ``emotional disturbance"), \*\*\* or multiple disabilities, and who, by reason thereof, needs special education and related services.

OAR 581-015-2000 provides the following definitions:

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

including cochlear implants, in 34 CFR 300.34(b) and the definitions for individual related services in 34 CFR 300.34(c).

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(33) "Special education" means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including instruction in the classroom, instruction in the home and instruction in hospitals, institutions, special schools, and other settings. The term includes specially designed instruction in physical education, speech language services, vocational education, travel training, and orientation and mobility services.

(34) "Specially designed instruction" means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction:

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

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

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

(Emphasis added.)

34 CFR § 300.111 is entitled "Child find" and provides, in relevant part:

(a) General. (1) The State must have in effect policies and procedures to ensure that--

(i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated;

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(c) Other children in child find. Child find also must include--

(1) Children who are suspected of being a child with a disability under Sec. 300.8 and in need of special education, even though they are advancing from grade to grade.

34 CFR §300.131(a) clarifies that in the case of a child with disabilities placed in private school by its parents, it is the district in which the private school is located which is responsible for identifying and evaluating that child.

General. Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, in accordance with paragraphs (b) through (e) of this section, and Secs. 300.111 and 300.201.

Student's parents did not place Student in private school until late summer 2006. Student was clearly in the District's child find bailiwick through at least June 2006.

OAR 581-015-2120(4) provides, in relevant part:

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

(Emphasis added.)

OAR 581-015-2145 is entitled "Emotional Disturbance" and provides:

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

(a) Social-emotional evaluation. An evaluation of the child's emotional and behavioral status, including a developmental or social history, when appropriate.

(b) Medical or health assessment statement. A medical statement or a health assessment statement indicating whether there are any physical factors that may be affecting the child's educational performance;

(c) Behavior rating scales. The completion of at least two behavior-rating scales, at least one of which is a standardized behavior measurement instrument;

(d) Observation. An observation in the classroom and in at least one other setting by someone other than the child's regular teacher;

(e) Other:

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

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

(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 emotional disturbance, the child must meet the following minimum criteria:

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

(A) An inability to learn at a rate commensurate with the child's intellectual, sensory-motor, and physical development;

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

(C) Excessive behaviors which may include hyperactive and impulsive responses or depression and withdrawal;

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

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

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

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

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

disability;

(4) A child who is socially maladjusted may not be identified as having an emotional disturbance unless the child also meets the minimum criteria under this rule.

Student had been identified by the District for many years as a child with a disability, a child with a speech impairment who required special education and related services by reason of that speech impairment. The District had provided special education to Student for that speech impairment for many years. Student had been “found” and identified as a disabled child. The District re-evaluated Student in January 2006. The parents did not contest that the evaluation relating to Student’s speech impairment met the requirements of OAR 581-015-2135 for the evaluation of children with communication disorders. However, Student’s disabilities had been only partially identified.

Student had been receiving education benefit under the IEPs – earning mostly As and Bs and meeting or exceeding state academic standards. However, “\*\*\* educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization.” *County of San Diego v. Cal. S. Ed. Hearing O.*, 93 F.3d 1458, 1468 (9<sup>th</sup> Cir. 1996.) Student had social and emotional needs which significantly affected his/her school socialization. The District was aware by at least the end of the January 10, 2006 IEP meeting that Student had suicidal ideation and had made a suicide attempt. The District had been aware for some years that Student had some unevaluated deficit affecting the speed of his academic performance. It had been aware for some years that Student had socialization problems, some problem beyond his speech communication impairment. Although the District’s informal accommodations and modifications enabled Student, through much hard work, to maintain an adequate academic performance, he developed behaviors and deepened socialization problems which clearly threatened her/his ability to continue to maintain academic progress. Suicide attempts are serious and rare. Although Mother reported that she was seeking professional help for Student, she also reported in April that Student had been taken off of his medications and seemed to be returning to impulsive behaviors of many years past. Those behaviors became evident at school. S/he got into a fight at the outdoor school. S/he got suspended twice in two school days for assaulting other students with a pencil and a long-handled metal shoe horn - both potentially dangerous weapons. S/he was expelled for a total of three and one-half days. Student would not have received meaningful educational benefits if s/he had been killed or seriously injured in a suicide attempt. S/he would not likely have received meaningful educational benefits if s/he had been incarcerated or subjected to long-term expulsion for an assault or a battery.

District staff recognized that Student had an emotional disturbance and amended the IEP to formalize the previously informal modifications and accommodations her/his individual teachers had been making for Student. By at least the time of the §504

meeting on May 16, 2006 the District should have at least suspected<sup>8</sup> that Student was a student with an emotional disturbance requiring special education as well as related services. Thus, although the IEP after June 6, 2006 addressed his special education needs in the area of his emotional disturbance, the District had not evaluated him/her under that category.

The District should have begun evaluating Student for an emotional disturbance in accord with OAR 581-105-2120(4) and 581-015-2145, above. Failing to conduct the required evaluation of Student in emotional disturbance seriously infringed upon the parents' right to participate in the formulation of the June 6, 2006 IEP and placement. Without any evaluative materials to consult, Mother, as well as District staff, were flying blind in writing IEP provisions to cover Student's needs arising from the emotional disturbance – District staff were only vaguely aware of the emotional disturbance's precise diagnosis(es) and had none of the required evaluative materials about how the emotional disturbance affected Student. Student was denied a FAPE.

#### IV

If a school district fails to provide a FAPE, parents have an equitable right to be reimbursed for their costs of a unilateral placement obtained for their child during the period the district failed to offer an FAPE. *Burlington v. Dept. of Educ. Massachusetts*, 471 U.S. 358 (1985); *Florence County School Dist. Four v. Carter*, 114 S.Ct. 361 (1993). Procedural inadequacies which result in the loss of educational opportunity or seriously infringe parents' opportunity to participate in the IEP process will be considered violations of IDEA resulting in an equitable right to reimbursement of the parents by a district for the expense of providing an appropriate education. *W.G. v. Target Range School Dist.*, 960 F.2d 1479, 1484 (1992).

#### A.

OAR 581-015-2515 is entitled "reimbursement for private placement" and provides, in relevant part:

(3) If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or an administrative law judge may require the agency to reimburse the parents for the cost of that enrollment if the court or administrative law judge finds that the agency had not made a free appropriate public education (FAPE) available to the child in a timely manner before that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by an

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<sup>8</sup> Suspicion is all that is required under OAR 581-015-2120(4), above.

administrative law judge or a court even if it does not meet the State standards that apply to education provided by public agencies.

(4) The cost of reimbursement described in paragraph (3) of this section may be reduced or denied if:

(a) At the most recent IEP or IFSP meeting that the parents attended before removal of the child from the public school or ECSE program, the parents did not inform the IEP or IFSP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(b) At least ten business days (including any holidays that occur on a business day) before the removal of the child from the public school or ECSE program, the parents did not give written notice to the public agency of the information described in paragraph (4)(a) of this rule.

(5) The cost of reimbursement described in paragraph (3) of this section may also be reduced or denied if:

(a) Before the parents' removal of the child from the public school or ECSE program, the public agency informed the parents, through the notice requirements of OAR 581-015-2310, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(b) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(6) Notwithstanding the notice requirement in paragraph (4), the cost of reimbursement:

(a) Must not be reduced or denied for failure to provide the

notice if:

(A) Compliance with paragraph (4) would likely result in physical harm to the child;

(B) The public agency prevented the parent from providing the notice; or

(C) The parents had not received notice of procedural safeguards under OAR 581-015-2315 informing them of this notice requirement; and

(b) May, in the discretion of a court or an administrative law judge, not be reduced or denied for failure to provide such notice if:

(A) The parent is illiterate and cannot write in English; or

(B) Compliance with paragraph (4) would likely result in serious emotional harm to the child.

The District did not make a FAPE available to Student in a timely manner prior to Student's enrollment in School B in District 2. As discussed above, the District was required to have begun further evaluation of Student concerning his/her recognized emotional disturbance prior to the June 6, 2006 IEP meeting.

However, Student's parents did not, prior to enrolling Student in School B, provide the notice required by subsection (4), above. At the last IEP meeting on June 6, 2006, Mother did not complain about the placement. The parents did not provide any written notice to the District of their dissatisfaction with the placement prior to enrolling Student in School B. Their request on July 24, 2006 to transfer Student's records to School B for "educational planning/appropriate placement purposes" was not notice that they intended to enroll Student in School B at public expense.

There was no claim that compliance with the requirements would have caused either physical or emotional harm to the child. There was no claimant that the District prevented the parents from giving the required notice. The parents are literate. They had received copies of the procedural safeguards informing them of the notice requirement – they failed to read it.

I "may" "reduce **or** deny" reimbursement of tuition in the private placements<sup>9</sup> to the parents for their failure to provide the required notice. I may also reduce or deny reimbursement if I find their actions unreasonable. I may also deny reimbursement if the placements chosen by the parents were not appropriate.

The evidence was overwhelming that School C was an appropriate placement for Student with small class sizes and special education certified teachers and a program designed for emotionally disturbed students. However, by at least May 21, 2007, the parents and Student had legal representation for "all matters pertaining to [his/her] education." If the parents had given the District the required notice at that time, the District could have easily taken remedial action prior to Student's enrollment in School C in the fall of 2007. There can be no reimbursement for School C's costs prior to January 10, 2008 when the District received the due process complaint and

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<sup>9</sup> The "costs of enrollment" in the private placements. OAR 481-015-2515(3)&(4).

hearing request stating the parent's dissatisfaction with, among other things, the Student's placement and asking for the District to fund the placement at School C. At that time the District had 60 days to evaluate Student and 30 days to formulate a new IEP/placement. OAR 581-015-2110(5)(b); 581-015-2220. The District shall reimburse the parents \$2,520.00 for the costs of School C from April 10, 2008 – the \$2,080.00 total for the monthly payment due April 15 and on May 15 and the \$440.00 pro-rata amount for two months of the \$2,200.00 deposit. (See, Exhibit P175,p. 3.)

The question of reimbursement for enrollment at School B is more complex.

Mother did tell Principal Grove on May 31, 2006 that she was dissatisfied with the school. However, Mother, not having read the parental rights brochure, did not know to couch her dissatisfaction in terms of rejecting the IEP/placement. The parents did tell the school that Student would be going to School B. Although Mother did not request any financial assistance with a private placement, Principal Grove did tell Mother not to expect any financial help from the District.

In October 2006, when Mother visited the school and spoke with Principal Grove about help for Student, he told her that Student needed to re-enroll before the District could do anything. Student was privately placed without the District's consent and the parents, not having read the parental rights brochure, had not given the required notice that the private placement involved a placement/IEP dispute. The District made a determination that Student's special education needs were the responsibility of District 2 at that time.

When District received and reviewed Exhibit P147, Dr. White's letter of October 16, 2006, they determined they legally did not have to do anything and therefore would not do anything. However, the letter gave important details of Student's emotional disturbance, details obviously of significant usefulness to whomever would determine Student's placement and IEP. The letter clearly stated that return to the District's elementary school would be harmful for Student and asked the District to "consider this during the evaluation process." Clearly Dr. White presumed the District would be performing an evaluation of Student. Common courtesy would seem to dictate that the District contact Dr. White and state that they needed a release of information before they could tell him anything and/or contact Mother and inform her they believed Dr. White needed to contact District 2. Student and his/her parents remained residents and ratepayers of the District. The District's inaction seems like a deliberate indifference to Student's educational needs, an indifference which should weigh heavily against the District in any equitable considerations.

Nevertheless, I can not find it proper to require the district to reimburse the parents for any of the costs of School B. It was simply not an appropriate placement for Student. School B informed Mother up front and at other times throughout the year that it did not provide special education. As Student's therapist noted in October 2006, School B was not the right place for Student. By January 2006 she noted Student was

unraveling in School B's unstructured environment. As she testified, School B was not an appropriate educational program for Student. The parents can not be reimbursed for School B's tuition.

B.

As with the tuition expenses for School C prior to April 2008, the DBT psychotherapy expenses incurred during the September 2007 through early April 2008 period might have been avoided if the parents had notified the District of their dispute about the placement, IEP and services in May 2007, or within a few weeks thereafter, when they acquired counsel and are presumed to have acquired full knowledge of their legal obligations to provide the specific required notice. The DBT services are related services and their costs are not the costs of enrollment in the private placement and are thus not covered by the specific private placement notice requirements of OAR 581-015-2515. However, they are covered by the long standing equitable notice requirements inherent in the Act. *E.g., Ash v. Lake Oswego Sch. Dist. No. 7J*, 766 F. Supp. 852 ( D. Or. 1991), *Forest Grove School District v. T.A.*, No. 05-35641 (9<sup>th</sup> Cir. 2008.) Because the parents did not provide any notice to the District after May 2007 and prior to January 2008, it is not equitable to force the District to now pay those expenses for the DBT psychotherapy.

However, the expenses for therapist Peterson prior to June 2007 and after April 1, 2008 are another matter. Psychotherapy and counseling are related services. Therapist Petersen provided reasonably necessary psychotherapy to assist Student's adjustment in Student's schools. Her therapy services helped Student with her/her socialization and behavioral needs caused by Student's emotional disturbance. Had the District evaluated Student in May/June 2006 or had the District given the parent some clue as how to proceed when it received Dr. White's letter of October 16, 2006, the parents might have been able to avoid these expenses because similar services may have been provided to Student, through therapist Peterson or some other therapist, at the expense of the District or of District 2. Here the equitable considerations greatly favor the parents. The District shall reimburse the parents for Therapist Petersen's \$1,539 for services rendered prior to August 2007. Like the DBT expenses and School C's tuition discussed above, the \$48 incurred after July 2007 for therapist Petersen's services not covered by insurance might have been avoided if the parents had given specific notice in May 2007. There was no evidence of the amount, if any, for her services after April 10, 2008.

Dr. Johnston's evaluations completed in June 2006 are clearly related services. They include many of the evaluations the District now plans on administering to Student and should have administered in May/June 2006. The parents are entitled to reimbursement of the \$377 of those expenses not covered by insurance.

The District shall reimburse the parents a total of \$4,436.00 (\$377 for Dr. Johnston's evaluations, \$1,539 for Therapist Pedersen's psychotherapy and counseling services, and \$2,520 for the last two months of Student's tuition at School C).

## ORDER

The Riverdale School District failed to offer Student a free appropriate public education during the period of May 2006 through the end of the 2007-08 school year. The District shall reimburse the parents \$4,436.00.

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Darrell D. Walker, Administrative Law Judge  
Office of Administrative Hearings

## APPEAL PROCEDURE

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

**ENTERED** at Salem, Oregon this 14th day of July, 2008 with copies mailed to:

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

