



In addition to Parent, the following witnesses testified on behalf of Parent: Russell Pickett, principal of School B, and director of curriculum and instruction for District (Principal). Parent also called the District's witness, Kristin Carrico, in Parent's case in chief.

In addition to Ms. Carrico, the following witnesses testified on behalf of the District: Kris Norby, instructional assistant (IA); and Patty Douglas, special education teacher (SE teacher) and case manager for Student.

## **ISSUES**

Whether the District failed to provide a Free Appropriate Public Education (FAPE), based on the following alleged violations of Individuals with Disabilities Education Improvement Act (IDEIA 2004 or IDEIA):

(1) Whether the District convened IEP meetings on October 25, 2006 and May 30, 2007 without necessary IEP team members present, specifically, failing to include a District representative with the authority to commit District funds and failing to include a general education teacher or providers of support services as listed on the Individualized Education Plan (IEP);

(2) Whether the District reduced the level of speech therapy on the May 30, 2007 IEP from the level previously provided to Student without explanation or notice to the parent; and

(3) Whether the District failed to implement the current IEP of May 30, 2007, and the subsequent Mediation Agreement of November 15, 2007, as alleged by Parent based upon the following: failing to provide progress notes to Parent; failing to communicate with Parent on a daily basis; failing to assist with study supports for homework; failing to provide support via a name tag/identification badge for school provided transportation; and failing to provide one-on-one instructional support.

## **EVIDENTIARY RULINGS**

Parent objected to what was marked and offered as District's exhibits D1 through D15, for lack of foundation. D1 through D15 were admitted into evidence at the conclusion of hearing, following the District's establishing proper foundation, without further objection from Parent.

On June 11, 2008, Parent submitted a request to subpoena two witnesses, along with documents intended to be offered into evidence. The documents were sent by facsimile and arrived after 5:00 p.m. The deadline for submission of documents was on or before close of business June 11, 2008, thus the documents were not filed timely. However, Parent made a good faith effort to submit all documents by the deadline and

the District did not object to Parent's documents on the basis of lack of notice or untimely filing. Following proper foundation, Exhibits S1, S2, and S3, offered by Parent, were admitted into evidence, without objection. Parent withdrew the remaining documents which were previously faxed on June 11, 2008. The documents were therefore not marked as Exhibits but are retained as part of the file.

Parent's request to subpoena Russ Pickett and Lisa Taylor, employees of Northwest Regional Educational Service District (ESD) dated June 11, 2008, and received after the close of business, was untimely and was too close in time for disposition prior to the start of hearing. At hearing, Mr. Pickett was made available for testimony by the District. After Parent clarified the subject matter of testimony he wished to establish through Ms. Taylor, the parties agreed that the evidence Parent sought could be obtained through the testimony of witnesses already scheduled to appear and Parent withdrew his request to subpoena Ms. Taylor.

### **FINDINGS OF FACT**

(1) Student is a resident of District attending School B. Student was determined eligible for special education services as of September 19, 2002. (Ex. D1) Prior to attending School B, Student attended School A and received services in a different school district. The District contracted with the other district to provide services to District resident students, eligible for special education services under IDEIA, at School A for grades K-6. (Test. of Carrico, Tr. at 419, 420, and Parent, Tr. at 249.) An evaluation of May 24, 2005 determined Student was eligible for services under IDEIA as Category 10, Mental Retardation. Student was served by School A at the time the May 24, 2005 evaluation was completed. An evaluation of Student in May 2008 determined Student continued to be eligible for special education under Category 10 as the primary eligibility category and added eligibility under Communication Disorder, Category 50. (Ex. D1.)

(2) Student's IEP, dated October 24, 2005, was written when Student attended School A. The 2005 IEP meeting team members included Parent, the special education teacher who was also the person providing interpretation of evaluations, a District representative, a regular education teacher, a physical therapist (PT), an occupational therapist (OT), and a speech and language pathologist (SLP). The 2005 IEP provided, under the category for other related services, "Speech/Language Pathologist/Assistant" at 100 minutes per week delivered in a self-contained classroom. Student also received transportation services as a related service and, as support for school personnel, student received occupational therapy services, at 30 minutes per month, and physical therapy services, at 5 hours per year. District provided Student with a "Low Teacher-Student ratio" under Supplementary Aids and Services; Modifications and Accommodations. There was no provision for one-on-one instructional assistance. (Ex. D14 at 1.)

(3) Parent believed that Student received continuous one-on-one student aid services at School A. (Tr. at 360.) Each goal/objective included on Student's October 24, 2005 IEP provided for progress to be reported to Parent on "quarterly written progress reports at regular report card dates." Progress reports were to be reported on "IEP Progress Notes sent home on 11/05, 1/06, 4/06 and 6/06." (Ex. D14 at 6-23.) Although not required by the IEP or by any

other means, the entire IEP team at School A met with Parent on a quarterly basis to discuss Student's progress and progress notes were sent home, written on copies of the IEP, under the area labeled "Student's Progress Towards Goal." (Test. of Parent, Tr. at 374-375, 383.)

(4) Student's placement under the October 24, 2005, IEP was in a "Self-contained Education Classroom with inclusion into Regular Education with assistance." (Ex. D14 at 24.) Student attended School A during the 2005-06 school year. (*Id.* at 1.) Sometime prior to the 2006-07 school year, District redesigned its plan to provide special education services to students in grades K-5. The service change was to be implemented for the District in the 2007-08 school year. At Parent's request, the District placed Student at School B for the 2006-07 school year as a "test run." (Test. of Parent, Tr. at 250-253.) After Student moved to School B, District held the IEP meeting on October 25, 2006 for Student. The placement determination, as agreed upon in the IEP developed on October 25, 2006 was "[f]ull-time self-contained special ed. [c]lassroom with pull-out for reg Ed [e]lectives, lunch and recess. (Ex. D2 at 24.)

*Attendance by team members at Student's IEP meetings on October 25, 2006 and May 30, 2007*

(5) On October 25, 2006, the District convened an IEP meeting for Student. (Test. of Parent, Tr. at 235, and Test. of SE teacher, *Id.* at 134; Ex. D2.) Student's SE teacher attended, acting as Student's special education teacher and as the District Representative, with authority to commit District resources and to ensure services mandated on the IEP were provided to Student. (Test of SE teacher, Tr. at 134, 135.) Parent, Student's regular education teacher, and student's then-current instructional assistant (IA) attended the October 25, 2006 IEP meeting. (Ex. D2; Test of Parent, Tr. at 260, 261, and SE teacher, *Id.* at 134.)

(6) Carrico prepared the notice for the October 25, 2006 IEP meeting. (Test. of SE teacher, Tr. at 152, 153.) The providers for SLP, OT and PT services were invited but did not attend. (*Id.*, and Parent, Tr. at 241.) The SLP, OT, and PT provided written input prior to the meeting. No team member attending the meeting, including Parent, requested postponement or reconvening the IEP meeting due to the absence of the SLP, OT, and PT service providers. (Test. of SE teacher, Tr. at 156, and Parent, *Id.* at 241.) The District provided team members with a draft copy of an IEP and the team members used the draft when discussing Student's present levels of performance and proposed goals and objectives. (Test. of Parent, *Id.* at 245.) Parent was satisfied that the present levels of performance for Student provided by the OT, PT, and SLP providers were accurate and were sufficient to allow the team to write goals and objectives for the IEP. (*Id.* at 359, 360.)

(7) The October 25, 2006 IEP as written provided, under Specially Designed Instruction, for Speech/Language Services at 60 minutes per week in the SLP office and, under Related Services, services of the SLP for 50 minutes per week in the classroom, for a total of 110 minutes per week of Speech/Language Services provided to Student. (Ex. D2; Test. of Carrico, Tr. at 422-423.) The IEP also provided, under Supplementary Aids/Services: Modifications and Accommodations, for "1:1 I/A Support" for 10 hours a day, and, under Support for School Personnel, for the services of an OT for 30 minutes per month in the classroom and the services of a PT for 3 hours per year. (Ex. D2 at 1.) Carrico later added a hand written note on the IEP to indicate the 1:1 I/A Support to read 10 hours per week to correct a scrivener's error. Carrico's conclusion that there was a scrivener's error was based on her memory of the IEP team's

agreement and on the fact that there are not 10 hours in a school day. (Test. of Carrico, Tr. at 207)

(8) The October 25, 2006 IEP provided for “how” progress notes would be reported to the parent by requiring “quarterly written progress reports at regular report card dates” and “when” progress was to be reported to parents by requiring “IEP progress notes sent [on] regular report card dates.” (Ex. D2 at 6-22.)

(9) Parent was concerned that some methods for teaching Student were too fast or were not appropriate for Student's level of competence. Parent did not express those concerns at the IEP meeting of October 25, 2006 because he attributed the changes to the new school setting and Student having new teachers. Parent thought he would have quarterly meetings, as he had in the previous placement, with the IEP team, including the OT, PT, and SLP service providers, and he planned to express his concerns at future meetings. (Test. of Parent, Tr. at 371-375.)

(10) District provided progress notes as mandated under the October 25, 2006 IEP. Parent was surprised when he received written progress notes, as provided for in the October 25, 2006 IEP, rather than having a team meeting at three months. (Id. at 376; Ex. D2.) Parent did not request an IEP team meeting from the District when quarterly meetings were not convened as he had expected at three months after the October 25, 2006 IEP. He expressed frustration to Carrico and asked if an IEP team meeting would be convened. Carrico told Parent that the District had held the meeting on October 25, 2006. Parent continued to express frustration that the team was not automatically meeting every three months as Parent had come to expect but Parent did not ask the District to convene another IEP meeting. (Test. of Parent, Tr. at 301-305.) Parent requested IEP progress meetings to discuss Student’s progress on IEP goals and the SE teacher met frequently with Parent to do so. (Test. of Carrico, Tr. at 415.)

(11) The annual review of the October 25, 2006 IEP was due on or before October 25, 2007. (Ex. D2.) Near the end of April 2007, Parent made it clear to the District that he was requesting another IEP team meeting. The District scheduled an IEP meeting on May 30, 2007 as a result of Parent’s request. (Test. of Carrico, Tr. at 413-414.)

(12) The District convened the IEP meeting on May 30, 2007. (Test. of Carrico, Tr. at 414; Ex. D4.) Student's SE teacher prepared the notice for the IEP meeting and, again, at the meeting, acted in a dual role as Student's SE teacher and as the District Representative. (Ex. D3; Test. of SE teacher, Tr. at 153, 154.) Student's regular education teacher attended part of the meeting but left for another appointment prior to the end of the meeting. Parent, a Department of Human Services (DHS) caseworker acting as Parent/Student advocate, Student's current IA, the PT and the SLP service providers also attended. (Ex. D4 at 1; Test. of SE teacher, Tr. at 154-156.) The regular education teacher provided input prior to leaving early and no one, including Parent, objected when the regular education teacher left the meeting. The teacher did not sign the IEP cover sheet because the teacher left prior to the sheet being signed by meeting attendees. (Test. of SE teacher, Tr. at 135-136, 157)

(13) For the May 30, 2007 IEP meeting, the OT was invited but did not attend. The OT notified the SE teacher approximately 10 minutes prior to the start of the meeting that the OT had another appointment. The OT provided information on Student's present levels of

performance and provided written proposed goals and objectives for the SE teacher to present to the IEP team. (*Id.* at 153-156.) The OT also proposed time for services to Student remain at the same level as the prior IEP. No one, including Parent, proposed postponing or reconvening the IEP meeting due to the failure of the OT to attend. (*Id.* at 155-158.)

(14) The May 30, 2007 IEP provided for Specially Designed Instruction in communication for 60 minutes per week to be provided by the Education Service District (ESD) at the SLP office. Under Related Services, the IEP required the SLP to provide services in the classroom for 50 minutes per week. (Ex. D4.) Supplementary aides and services included reminders for speech through mouth and for lip closure for 3 hours per day, District-wide, by the District and the ESD. The hours for those reminders was the team's best estimate of how many hours Student would be in a supervised setting where the reminders would be appropriate. (Ex. D4; Test. of Carrico, Tr. at 422, 423.)

(15) The IEP also provided for "how" progress notes would be reported to the parent by requiring "quarterly written progress reports at regular report card dates" and "when" progress was to be reported to parents by requiring "IEP progress notes [at] regular report card dates." (Ex. D4 at 1, 7-20.)

(16) The District provided progress notes to Parent as required under both the October 25, 2006, and the May 30, 2007 IEPs. (Test. of Carrico, Tr. at 435-436; Ex. D10.) The format of the progress notes was different from those previously provided by School A, which had been written in on a copy of the IEP. School B issued progress notes as separate documents but the types of information being reported remained the same. (*Id.*) Carrico added handwritten clarifications of the bus plan, at Parent's request, to the District's copy of the IEP, after an October 1, 2007 bus behavior plan meeting. (Test. of Carrico, Tr. at 436, 437; Ex. D4 at 7, 8.) Parent continued to receive progress notes as mandated under the IEPs but was frustrated that the District had not provided a in-person meeting for all the providers to explain the notes each time they were sent home. (Test. of Parent, Tr. at 372-376.)

(17) Student also received one-on-one instruction under the October 25, 2006 and the May 30, 2007 IEPs. (Exs. D2, D4.) The one-on-one instruction services were provided by an IA. Student's SE teacher schedules IAs to work with special education students according to the needs of the students as mandated on each student's IEP. (Test. of IA, Tr. at 73; Ex. S1) The Student's IA for 2006-07 school year has worked as an IA for 14 years and is a "highly qualified instructor" under the No Child Left Behind Act. The IA has attended specialized courses in teaching students with autism and Asperger's syndrome, in addition to other specialized training. (*Id.*, Tr. at 111, 130.) Student's IA for the 2007-08 school year was assigned to work, at various times of the school day, with Student and with two other students, "S" and "T." (*Id.* at 73-76.) The SE teacher directs and reviews the work of each IA with each special education student assigned to the SE teacher to ensure that each student is working on individual goals and objectives as set out in the IEP for each student. (*Id.* at 112-118.) The allocation of students to a particular IA was adjusted in January 2007 to account for a change of one student's IA assignment at School B. The change was unrelated, and did not affect services provided, to Student. (*Id.* at 84, 85.) Student had 1:1 instruction for approximately 3 hours and 30 minutes per day, totaling at least 10 hours per week. (*Id.* at 84.)

*Student's Transportation provided by the District*

(18) Due to the rural nature of the area, the District provides transportation to a majority of its regular education students. Students who are provided transportation through their IEPs may be transported on buses with regular education students or on buses designated for special education students. (Test. of Carrico, Tr. at 221, 222.) Buses for special education students are equipped with safety harnesses and seatbelts and additional equipment for transporting special needs students. Regular district buses are not equipped with safety harnesses or seatbelts, or additional equipment. (*Id.* at 228, 213.)

(19) The District adopted a policy regulating behavior of students riding District buses. The policy is published in the District Handbook. For safety, the policy requires, in general, that students remain in their seats while the on the bus, unless the student is entering or exiting the bus, and at all times the bus is in motion, that they sit facing forward, and that they keep their hands and their feet to themselves. Students who violate the policy may be suspended from the bus for some period of time, determined by the type of violation, the recommendation of the driver, and the agreement of the transportation supervisor. Appeals of bus suspensions may be made first to the student's principal and then to the school superintendent. (*Id.* at 215-217.)

(20) Students on IEPs that mandate transportation as part of the IEP, have additional protections when violations of the District bus policies occur. The student, if on a regular bus, may be offered alternative means of transportation, including most frequently, transportation on a bus designated for special education students. (*Id.* at 218.)

(21) Transportation for Student was included under the IEPs of October 24, 2005, October 25, 2006, and May 30, 2007. The manner in which the transportation would be provided was not specified. (Test. of Carrico, Tr. at 221, 229; Exs. D14, D2, and D4.) Student rode the regular bus, along with other children in the family, prior to a bus incident in October 2007. (Test. of Carrico, Tr. at 221.)

(22) During the 2006-07 school year, Student waited for the regular school bus with four other children who were related to him and he got onto the bus along with those children. (Test. of Parent, Tr. at 274.) The driver that year reported to the District that Student required a lot of redirecting in order to stay seated and engaged, and to prevent Student from turning around his seat, touching, or grabbing other students. Although documented through notes, Student's behavior did not result in referrals or discipline because the driver and the District took into consideration Student's needs for extra help. (Test. of Carrico, Tr. at 427, 444.)

(23) For the 2007-08 school year, a new driver was assigned to the regular education bus which Student rode. (Test. of Carrico, Tr. at 444, and Parent, *Id.* at 270.) The four students, who were Student's relatives, that previously rode the bus with Student, changed residences and were no longer waiting for the bus with Student or riding the bus the entire distance home with Student. (Test. of Parent, Tr. at 270-274.) Student had long waits while other students loaded or unloaded during which Student, without assistance from the children related to him, had difficulty staying seated and following the rules. (*Id.* at 271.) Student required redirection to stay in his seat on more than one occasion. The transportation director had received several reports from Student's driver that the driver was having difficulty with Student's failure to follow

the rules. (Test. of Carrico, Tr. at 212, 429.)

(24) The final incident on the regular bus occurred when Student got into the driver's seat, while the bus was stopped, and started to pull levers and manipulate controls. The driver was helping other students at the time and had to come back and remove Student from the driver's seat. (Test. of Carrico, Tr. at 212, 213.) The District called Parent to report the incident and to inform Parent that, due to safety concerns, Student would be riding the special education bus on the following Monday. (Test. of Parent, Tr. at 278.) Parent was upset because Student perceived the removal as punishment and was unable to understand why he could not ride the regular bus. The District scheduled a meeting to discuss Student's removal and to implement a behavior plan to allow Student to return to the regular education bus. (*Id.*, and Test. of Carrico, Tr. at 428, 429.)

(25) On October 30, 2007, Carrico and the SE teacher met with Parent to discuss Student's removal from the bus. The District drafted a proposed plan of behavior modification and brought copies to discuss with Parent at the October 30, 2008 meeting. (Test. of Carrico, Tr. at 213, 214.) Parent requested that Student be assigned an aide to ride the regular bus. The District told Parent that it was not practical to provide an aide for the regular bus. The District proposed to work with Student and Parent to teach Student the skills needed for Student to ride the regular bus through the behavior plan. In the interim, District would provide transportation by means of the special education bus. (Test. of Parent, Tr. at 272, and Carrico, Tr. at 213.) Parent left the meeting because he did not agree with the District that Student should have been removed from the regular bus or that Student had to change his behavior to be allowed back on the bus. (Test. of Parent, Tr. at 280.)

(26) Following the October 30, 2007 meeting, Parent requested assistance from the Oregon Department of Education. (Test. of Parent, Tr. at 282.) Parent expressed his overall frustration with the District's education of Student, including Parent's belief Student was not getting one-on-one IA instruction as mandated on Student's IEP, that Student was being sent to swimming and physical education classes, where Student would have to change clothes, attended by a female IA rather than a male IA, and that District was not communicating with Parent in the manner Parent had experienced when Student was placed at School A. (*Id.* at 282-286.) Parent was informed of the range of available alternatives for concerns about special education, including filing a formal complaint with the Department, and mediation. Parent agreed to mediation with the District. Parent believed the mediation session would address his disagreement with the behavior plan for Student's return to the regular bus, and his other concerns about the District. (*Id.* at 282, 284.)

(27) On November 15, 2007, Parent, Carrico, Principal, and Parent's caseworker, met with a mediator provided by the Department. (Test. of Carrico, Tr. at 426, 427; Ex. D7.) Carrico brought to the meeting notes from the bus driver regarding Student's behavior the prior year. Carrico also explained Student's behavior during the current year and how the District had come to move Student from the regular bus to the special education bus. (Test. of Carrico, *Id.*) Parent explained that he had not been given information the prior year that Student was having any problems on the bus. (*Id.*) The parties discussed Student's self esteem related to his riding on the bus. Previously, Principal had had a badge made for Student, produced by the studio that takes student photographs and makes District's staff identification badges, for the bus and he

provided it to Parent the day of the mediation (Test. of Carrico, Tr. at 186-190, 430.)

(28) Parent also expressed his frustration with what he felt was a lack of communication between the District and himself, and with the failure of the OT, PT, and SLP to attend the prior IEP meetings when he had believed all service providers would be present. (Test. of Carrico, Tr. at 430-432.)

(29) At the conclusion of the meeting, the parties recessed while the oral agreements, reached by the parties, were reduced to writing. The parties reconvened to discuss the written mediation agreement. (*Id.*, at 432.)

(30) Paragraph "1" of the agreement states:

Rainier School District will arrange for [Student] to have an identification badge that designates him as a "bus helper [.]" [Student] will wear this badge on the bus when [Student] demonstrates safe bus behavior. [Student] will keep it at home and will have a place to keep it in the classroom. The badge will be made available by November 26, 2007.

(Ex. D7 at 3.)

(31) Paragraph "2" of the agreement states:

To ensure a positive and ongoing relationship between home and school during the 2007-2008 school year, [Parent], [Student's] special education teacher, and the special education director, and [\* \* \*] DD case manager will meet every three (3) months for a meeting to review and discuss [Student's] progress in school and any concerns that may have arisen. If other perspectives are needed, those people can also be invited. The first meeting will be held prior to January 31, 2008.

(*Id.*)

(32) Parent read the mediation agreement and asked that the mediator explain what was meant by the sentences speaking to "inviting" other people if needed, at the end of paragraph "2." The mediator explained that specialists providing services to Student under the IEP could be invited and that they would come, unless prevented by a prior obligation or an emergency. (Test. of Parent at 315-319, and Carrico, *Id.* at 432, 433.) Parent was not happy that the language did not require attendance of the specialists but he did not voice that concern. (Test. of Parent, *Id.* at 319-321, Test. of Carrico, *Id.* at 432.) Parent signed the agreement as written. (Ex. D7 at 3.)

(33) At the conclusion of the mediation, Parent believed that the parties had agreed to hold an IEP team meeting every three months, which would include the OT, PT, and SLP service providers. (Test. of Parent at 305, 314-315, 453.)

(34) The transportation badge, referenced in the mediation agreement, was formally presented later to Student during a special event to designate Student as a special bus helper, as

part of the behavior plan. (Test. of Carrico, Tr. at 189, 190, 430; Ex. D8.) Student misplaced the badge almost immediately. The District immediately ordered five replacement badges from the studio in the event Student misplaced one in the future. (*Id.* at 190.) District sent home samples of homework for Student and instituted a communication notebook for use between school and home. (Exs. D11, D12.)

(35) In compliance with the mediation agreement, the District scheduled a meeting for January 24, 2008. (Test. of Carrico, Tr. at 194.) A Notice of Team Meeting was issued on January 22, 2008 for the January 24, 2008 meeting. The box checked on the notice indicates the meeting will be to review existing information about [Student]. The boxes indicating the purpose of the meeting was to develop or to review an existing individualized education program for Student were not checked. (Ex. D15.) The SE teacher and Carrico anticipated the purpose of the meeting was to review Student's progress on IEP goals as each understood was required under the mediation agreement. (Test. of SE teacher, Tr. at 165-166, and Carrico, Tr. at 194.) Carrico understood that Parent wanted more individuals to attend but those individuals, such as the school superintendent, were not available. (Test. of Carrico, Tr. at 195.)

(36) When Parent received the January 22, 2008 meeting notice, Parent consulted with Principal about what the notice said. (Test. of Principal, Tr. at 172.) Principal sometimes assisted Parent with his communication with District staff about what Parent understood was happening with Student and about what Parent wanted the District to know about Student. (*Id.*, Tr. at 172-173.) On January 23, 2008, Principal met with Parent and then sent an email to Carrico about Parent's concerns regarding the meeting that was occurring the next day. (*Id.*; Ex. S2.) Principal stated that Parent was "requesting a quarterly update on [Student's] IEP and bus." (Ex. S2.) Parent had received notices that Parent believed indicated only the bus issues would be discussed and Principal stated "[Parent] wants a more inclusive meeting for [Student's] best interest." (*Id.*) Principal did not attend the January 24, 2008 meeting. (Test. of Principal, Tr. at 184.)

(37) At the time set for the meeting on January 24, 2008, Parent arrived and determined that Ms. Carrico and the SE teacher were the other parties in attendance. Parent had expected the OT, PT, and SLP providers to be at the meeting. (Test. of Parent, Tr. at 357, 358.) The SE teacher and Carrico were present when Parent entered the room. The SE teacher understood that the meeting was to update Parent on Student's progress and she came prepared with data to discuss regarding Student's progress. She did not believe the meeting was to be an IEP meeting. (Test. of SE teacher, Tr. at 163-165.) Parent told the SE teacher and Carrico that the meeting was not what he wanted and that he did not want to meet with only those two individuals. Parent then left. (*Id.*)

## **CONCLUSIONS OF LAW**

The District provided a Free Appropriate Public Education (FAPE) during the 2006-07 school year. District did not violate the provisions of IDEIA 2004 as alleged by Parent, specifically:

(1) The District convened IEP meetings on October 25, 2006 and May 30, 2007 that included necessary IEP team member, including a District

representative with the authority to commit District funds and a general education teacher.

(2) The District did not reduce the level of speech therapy on the May 30, 2007 IEP from the level previously provided to student without explanation or notice to Parent; and

(3) The District implemented the current IEP of May 30, 2007, and the subsequent Mediation Agreement of November 15, 2007. The District provided progress notes to the parent, communicated with Parent on a daily basis, assisted parent with study supports for homework, provided support via a name tag/identification badge for school provided transportation, and provided one-on-one instructional support under the terms of the IEP.

### **OPINION**

#### *Burden of Proof*

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 Parent sought relief and bore the burden of persuasion. The standard of proof applicable to an administrative hearing is preponderance of the evidence. *Cook v. Employment Div.* 47 Or App 437 (1980) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

#### *Public Education requirements under the IDEIA*

The IDEIA provides for a free appropriate public education for children with disabilities. The purpose of the Act is to ensure that all children with disabilities are provided a free appropriate public education, emphasizing special education and related services designed to meet the unique needs of the child and to ensure the rights of children with disabilities and parents of those children are protected. 20 USC §1400(d)(1). The US Supreme Court, when considering requirements for education of special education students in *Board of Educ. Of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982), set out a two-part test for evaluating complaints about the content of an IEP:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"

(*Rowley*, 458 U.S. at 206, 207)

Student qualifies for, and is provided, special education services by the District under the provisions of IDEIA. Parent, *pro se*, requested a hearing in a due process complaint, where, in his own words, he alleged actions, or failures to take actions, by the District that constituted procedural and substantive violations of IDEIA. Parent acknowledged on the record that he has a condition that impedes his ability to communicate clearly. Parent's articulated complaints that pertain to what would be termed procedural violations of the IDEIA are addressed first.

*Alleged procedural violations of the IDEIA.*

Parent alleged that the District failed to include necessary IEP team members at IEP meetings held on October 25, 2006 and May 30, 2007, in violation of OAR 581-015-2210. In order for a District to be found in violation of the IDEIA for procedural violations, the violation must be more than *de minimis*, it must result in a substantive denial of FAPE to the student. The Ninth Circuit has held that only those “\* \* \* procedural inadequacies that result in the loss of educational opportunity \* \* \* or seriously infringe on the parent[s]’ opportunity to participate in the IEP formulation process \* \* \* clearly result in the denial of FAPE.” *W.G. v. Bd. Of Trustees of Target Range School D.* 960 F2d 1479, 1484 (9<sup>th</sup> Cir 1992). Further, relief is appropriate if there is a loss of educational opportunity or prejudice to the student or if there is a serious infringement on the parent's opportunity to participate in the formulation of the IEP. *Park v. Anaheim Union High School District*, 464 F3d 1025,1031 (9th Cir. 2006).

*The October 25, 2006 IEP Team Meeting*

Parent alleged that the IEP meeting convened October 25, 2006 did not have the necessary attendees to meet the criteria for an IEP team meeting. OAR 581-015-2210 sets out who must attend an IEP meeting, and who may attend, as a team member. OAR 581-015-2210 provides, in relevant part:

- (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

\* \* \* \* \*

(3) IEP team attendance:

\* \* \* \* \*

(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.

(Emphasis added.)

Parent alleged the October 25, 2006 IEP team did not meet the requirements of OAR 581-015-2210 because the providers of OT, PT, and SLP services to Student were not present at the meeting. The notice for the October 25, 2006 meeting was not produced for the evidence record at hearing.

However, the testimony of the witnesses and the written plan that resulted from the October 25, 2006 meeting established that the following required members for the IEP team were present pursuant to OAR 581-015-2210(1) subsections (a) through (d). Parent, Student's IA, and the regular education teacher attended. The SE teacher attended as both the special education teacher and the District representative, knowledgeable about the general education curriculum, district resources. The SE

teacher was also authorized to commit district resources and to ensure that services set out in the IEP would be provided. No attendee was identified as the individual interpreting evaluations, pursuant to OAR 581-015-2210(1)(f). The District failed to comply with OAR 581-015-2210(1)(f). However, as discussed below, the procedural defect was minimal and did not result in a denial of FAPE.

Prior to the 2004 revisions of IDEA, courts applying the requirements of IDEA determined that a procedurally defective IEP team would violate a District's obligation to provide FAPE only if the defect resulted in a loss of educational opportunity for the student or seriously infringed on a parent's opportunity to participate in the IEP process. *R.B. v. Napa Valley*, 496 F 3d 932, 938 (9<sup>th</sup> Cir, 2007) (citing with approval *M.L. v. Federal Way School District*, 394 F 3d 634 (9th Cir. 2005)). The harmless error standard, as reiterated in *R.B. v. Napa Valley*, was codified in the 2004 revisions, under the IDEIA 2004. Where a parent alleges a procedural violation, the hearing officer may find a denial of FAPE only if the procedural defect impeded the child's right to a FAPE, or significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the child or caused a deprivation of educational benefit. 34 CFR 300.513(a)<sup>2</sup> ORS 343.167(3).<sup>3</sup> The record at hearing does not support a finding that the lack of an individual being designated as the individual interpreting evaluations resulted in a substantive denial of Student's right to a FAPE or in a significant impedance of Parent's opportunity to participate in the decision-making process.

Parent's focus during much of the hearing was addressed to the lack of attendance of the OT, PT, and SLP service providers at the October 25, 2006 IEP meeting. Parent had expected those providers to attend, based on his prior IEP meetings for Student at School A. Under OAR 581-015-2210(1)(g), those service providers *may* be, but are not required to be, invited. (Emphasis added.) Parent, having had those service providers appear at previous IEP team meetings, was not aware that the meeting could go forward without their attendance. From Parent's testimony at

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<sup>2</sup>32 CFR § 300.513 provides in relevant part:

(a) *Decision of hearing officer on the provision of FAPE.*

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

<sup>3</sup> ORS 343.167(3) provides:

- (3) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies:
  - (a) Impeded the child's right to a free appropriate public education;
  - (b) Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the child; or
  - (c) Caused a deprivation of educational benefits.

hearing, it was clear he did not know he could invite them or request another meeting when they could attend.

Despite the permissive wording of OAR 581-015-2210(1)(g) regarding their attendance, the OT, PT, and SLP provided services to Student, and their input on present levels of performance and goals and objectives was required for Student's IEP, as well as their proposals for times and places to provide services under the specific provisions of the IEP. It is therefore reasonable to infer that, under OAR 581-015-2210(1)(g), the OT, PT, and SLP providers would, therefore, be required to attend the IEP unless otherwise excused. But, the evidence at hearing supports the conclusion that the failure to include those providers did not result in a substantive denial of FAPE nor did it significantly impede Parent's right to participate in the decision-making process.

Parent clearly agreed with the current levels of performance that each of the service providers had submitted for consideration at the October 25, 2006 IEP team meeting and he agreed that the goals and objectives for those providers were appropriate and addressed Student's needs. Parent did not object to continuing the meeting as scheduled when he was informed that the OT, PT, and SLP providers were not able to attend. Parent did not ask that a second meeting be convened to allow the absent service providers to attend. Therefore, Parent failed to show that Student was denied a FAPE when the OT, PT, and SLP provided written input prior to, but did not attend, the October 25, 2006 IEP meeting.

#### *The May 30, 2007 IEP Team Meeting*

Parent, the caseworker, the SE teacher, the PT, the SLP attended the May 30, 2007 IEP team meeting and signed the IEP cover sheet. At the May 30, 2007 IEP meeting, the regular education teacher attended a portion of the meeting but left prior to the end of the meeting without a written and signed consent to her excusal. The regular education teacher did not sign the cover sheet because she left prior to the end of the meeting. In addition, although the regular education teacher attended the meeting and provided input prior to leaving, the District failed to obtain the written consent of both the District and Parent prior to the regular education teacher's leaving, as set out in OAR 581-015-2210(3)(b) regarding the attendance of the regular education teacher pursuant to OAR 581-015-2210(1)(c) and (4). There was no evidence that the regular education teacher submitted input into the development of the IEP, in writing, to Parent and to the IEP team, prior to the meeting. The District's failure to comply in full with the requirements of OAR 581-015-2210 resulted in a procedural violation of the IDEIA. However, the violation did not result in a denial of FAPE to Student.

The parties agreed that the regular education teacher provided input to the IEP team prior to leaving. No one, including Parent, objected to the regular education teacher leaving when the teacher did so. Parent was satisfied at the conclusion of the May 30, 2007 IEP meeting that Student's present levels of performance were adequately addressed and included on the IEP. Parent also agreed that the goals and objectives, the services provided, and the placement were appropriate. Thus, the

District's failure to obtain written consent for the regular education teacher to leave early, or prior written input from the teacher, did not result in a substantive denial of FAPE.

#### *District's compliance with requirements for holding IEP Team Meetings*

Parent expressed much frustration with the District's reporting on Student's progress after Student moved to School B. Parent was confused that District provided only written reports, mainly because the prior placement had voluntarily convened in-person meetings to discuss progress when quarterly reports were generated. Parent interpreted School A's method of reporting progress as holding quarterly IEP meetings and he believed those were required. In fact, all IEPs in evidence at hearing required only written quarterly reports on Student's progress. There was no requirement to meet in person to inform Parent of Student's progress. In addition, there was no requirement that District hold quarterly IEP meetings.

IDEIA requires Districts to convene IEP team meetings to review a student's IEP annually and under particular circumstances. OAR 581-015-2225(1), pursuant to IDEIA, requires that, once a student is placed on an IEP, the District must ensure an IEP team review the IEP "periodically but at least once every 365 days \* \* \*." An IEP team meeting may be convened at any time when requested by a parent or IEP team member to modify or amend an IEP under OAR 581-015-2225(2), unless the parent and the District agree to make the changes to the IEP by written agreement without holding an IEP team meeting. IDEIA does not require, nor is it common practice, that a District to hold quarterly IEP team meetings. When Parent clearly requested an IEP team meeting in April 2007, at a time other than the annual review date, the District complied with Parent's request. Parent did not prove, by preponderance of the evidence, that District failed to convene IEP team meetings when required or when requested. District did not fail in its obligation to provide reports of Student's progress, in the method and in the timing, as specified on the October 25, 2006 IEP and on the May 30, 2007 IEP.

#### *Allegations of Substantive Violations of IDEIA*

In his due process complaint, Parent alleged that the District, at the October 25, 2006 and at the May 30, 2007 IEP meetings, reduced the amount of SLP services previously provided from the October 26, 2005 IEP to Student, without notice and without sufficient reasoning or justification. Following testimony of District witnesses, Parent agreed that he had been confused as to how the time allocated for SLP services had been allocated on the IEPs in question. Parent agreed that he no longer contended that the District had reduced the level of SLP services. The evidence at hearing was that District had actually increased the level of services by ten minutes each week on the IEPs in question. Parent did not meet his burden to show that the District violated IDEIA by reducing SLP service levels without notice and without sufficient consideration by the IEP teams.

Parent also alleged that the District failed to follow the terms of a mediation agreement reached through a Department-provided mediator. The mediation occurred following Parent's contact with the Department to complain about the District's conduct. At hearing, there was evidence concerning the history leading to the mediation and to the terms of the agreement. Counsel for the District argued that because the mediation agreement was conducted under the terms of 34 CFR §300.506, and OAR 581-015-2335, jurisdiction for enforcement of the terms of the agreement lies with any state court of competent jurisdiction or in a district court of the United States, not with this tribunal. (District's Post-Hearing Brief, at 5, 6.) Regarding the compliance with specific terms of the mediation agreement, counsel is correct. Enforcement of the agreement itself is not within the jurisdiction of this hearing officer.

However, to the extent that Parent alleged the District failed to comply with IDEIA requirements by failing to implement the May 30, 2007 IEP in failing to report to Parent the Student's progress and by changing transportation as mandated under the May 30, 2007 IEP, the evidence regarding those matters, even if those matters subsequently came under the terms of a mediation, was relevant.

Parent, as discussed in the opinion above regarding procedural defects, misunderstood the progress reporting requirements of the May 30, 2007 IEP, and of the prior IEPs developed for Student. Parent desired, and clearly continues to desire, close communication with teachers and professionals who work with Student. The District was required to report Student's progress on a quarterly basis. District, to the extent that it was required, and in many instances, in excess of what was required, provided those reports to Parent. The District also sent home sample homework to facilitate Parent's helping Student with home work and created a communication notebook for staff/parent communication regarding Student's progress and needs. Parent continued to believe, incorrectly, that the District was required to provide in-person quarterly reports, including a full IEP team meeting. The District met its progress reporting obligations under the IEP in question. Parent did not prove that District failed to implement the May 30, 2007 IEP by failing to inform Parent of Student's progress.

Parent also alleged that District was not providing transportation to Student as required. Parent's concern was centered on the removal of Student from the regular education bus to the special education bus. That event triggered Parent's contact with the Department, eventually leading to a mediation agreement with the District. The agreement addressed certain details of Student's behavior plan implementation regarding his return to the regular education bus. To the extent that Parent alleged that District was required to transport Student on the regular education bus under Student's IEP, Parent was incorrect.

District was required, at all times, to provide transportation to Student. District chose to provide that transportation, at the request of Parent, via the regular education bus to allow Student to ride with his relatives. Due to safety concerns following an incident in October of 2007, Student was removed from the regular education bus and provided transportation on the special education bus. District followed its policy

regarding removal of a student from regular education bus transportation and provided Parent an opportunity to contest the removal to the special education bus. The District proposed a behavior plan to improve Student's skills so that he could return to the regular education bus in the future.

When a student is provided education under IDEIA and transportation is mandated on the Student's IEP, a bus suspension for that student can be considered a suspension for purposes of the disciplinary rules applicable to students under IDEIA unless bus service was provided to the student in some other way. See *Comments, Code of Federal Regulations*, 71 Fed. Reg. 46715 (Monday, August 14, 2006.) In the current matter, following a safety incident on the regular bus, Student was provided transportation on the special education bus. Student continued to be provided transportation as mandated under the May 30, 2007 IEP. Parent did not show that District failed to implement the May 30, 2007 IEP regarding transportation.

In summary, on each allegation where District was determined to have committed a procedural violation of the IDEIA, Parent failed to show that the procedural defect resulted in a substantive denial of a FAPE to Student or that the defect impeded Parent's ability to participate in Student's IEP. In addition, Parent did not show that District failed to comply with the terms of Student's IEP or that Student was denied a FAPE.

District is determined to have provided a FAPE to Student in accord with the requirements of IDEIA 2004. Specifically, District convened IEP team meetings for Student on October 25, 2006 and May 30, 2007 in compliance with 32 CFR §300.321 and OAR 581-015-2210 at which all required IEP team members were present, and District convened IEP meetings at times required under 32 CFR §300.324 and OAR 581-015-2225. District provided Student with services as mandated on the October 25, 2006 and the May 30, 2007 IEPs, including SLP services at the service levels mandated on the IEPs, transportation by District for Student, progress notes as mandated, and homework assistance as requested by Parent.

### **ORDER**

Having failed to show by preponderance of the evidence that the District did not provide Student with a FAPE as required under IDEIA, Parent's request for relief, pursuant to the request for due process hearing dated March 24, 2008, is **DENIED**.

Dated this 6th day of August, 2008

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A. Bernadette House, Senior Administrative Law Judge  
Office of Administrative Hearings

## **APPEAL PROCEDURE**

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

**ENTERED** at Salem, Oregon this 6th day of August, 2008 with copies mailed to:

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