

of student services; Eric Schutz, math teacher; Roxanne Warren, autism specialist; Marthetta Severson, tutor; Karla Tibbits, counselor; Daryl Stickles, teacher; Laura Lethe, math specialist; Jeffrey Allen, teacher; Kathleen Andrews, academic support teacher; Jay Elders, instructional assistant; and Rebecca Lund, special education teacher.

The record was left open to allow for the receipt of the hearing transcript and closing arguments. District provided the hearing transcript by the deadline of November 21, 2008. Written closing arguments from both sides were received on the deadline of December 5, 2008. The deadline for issuance of the Final Order, as extended, was December 26, 2008, and this Final Order was issued by that date.

ISSUES

(1) Whether the District failed to provide a Free Appropriate Public Education (FAPE) when proposing to place Student in the Academic Support class for math instruction. More specifically, whether such placement was calculated to provide educational benefits.

(2) Whether Parent was denied a meaningful opportunity to participate in the May 28, 2008 and August 28, 2008 IEP meetings, so that District did not provide a FAPE to Student.

EVIDENTIARY RULINGS

District offered Exhibits SD1 through SD129, SD59A, SD109A, and SD121A. Parent did not object to their admission, so these exhibits were admitted into the record. Parent offered Exhibits ST1 through ST43. District did not object to their admission, so these exhibits were admitted into the record. The ALJ took official notice of all filings in the procedural file.

The ALJ approved issuance of a Subpoena Duces Tecum to Reid Thurston, LCSW, as limited consistent with the ALJ's directions at a pre-hearing held by telephone on October 22, 2008, and in compliance with a Stipulated Qualified Protective Order to protect confidential information provided by counselor Thurston.

During the hearing, Roxanne Warren, autism specialist for District, was qualified as an expert in autism.

CREDIBILITY DETERMINATION

Parent and Student testified that Student could only learn math through exclusive one-on-one tutoring. Their claim raises an issue of credibility regarding how much weight should be given to their testimony. A determination of a witness' credibility can be based on a number of factors. Besides the manner of testifying, other factors include the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically incredible.

Tew v. DMV, 179 Or App 443, 449 (2002).

Parent was uncooperative and evasive during the hearing, especially while being questioned by District's attorney. Parent did not directly answer some questions from District and provided little or no information when responding to other questions, often claiming no memory. Parent's demeanor was combative and dismissive, like someone who is more interested in prevailing than in telling the truth. Parent was not direct and truthful when responding to a discovery order to provide specific documents to District. Parent was required by the Discovery Order to provide all communications by Parent relating to Student's education and to provide all psychological, medical, or educational evaluations referring to Student. (Ex. SD121 at 1.) In response to the first part, Parent provided three short notes (Ex. SD123 at 3-5) and later some copies of a calendar that contained a couple appointments. Parent has been very involved in Student's education for many years. Parent's claim of having no other communications is very implausible.

In response to the other part of the Discovery Order, Parent did not provide a copy of a report (Ex. SD124 at 32) that counselor Thurston prepared at Parent's request (Ex. SD124 at 28).¹ In Parent's request to counselor Thurston, Parent and Student falsely reported that Student was attending the disputed math class. When counselor Thurston heard that Student had never attended the math class, he withdrew the recommendation in his report of exclusive one-on-one tutoring for Student. (Test. of Thurston, tr. 767:18-23; 769:11-771:11.) Counselor Thurston testified he faxed his report to Parent/Student's attorney and was not sure if he also sent it to Parent, although "I may well have . . ." (*Id.*, tr. 780:11-13.) In regards to counselor Thurston's report, Parent first claimed no memory of receiving the report and then claimed it was two years old, despite whatever counselor Thurston claimed. Parent later testified that the report was provided to District and not to Parent. (Test. of Parent, tr. 818:12-820:23.) Parent requested the report from counselor Thurston and Parent's denial of receipt is not credible.

Also detracting from Parent's credibility is Parent's initial testimony that there were many reports from counselor Thurston, which Parent testified caused Parent to be confused. However, Parent denied keeping any of the reports. (*Id.*, tr. 818:20-25.) Parent's alleged failure to keep any reports does not square with her role as a strong advocate for Student. It is hard to believe Parent did not keep any such reports because the reports would assist Parent in advocating for Student. Parent's claim that Parent had no other reports is not plausible or credible and supports a conclusion that Parent intentionally withheld information requested in the Discovery Order. The intentional withholding of this report, along with Parent's very uncooperative attitude and demeanor and Parent's repeated claims of lack of memory when asked questions by District's attorney, severely detracts from the reliability of Parent's

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During the hearing, Parent/Student's attorney did not offer a reason for not providing counselor Thurston's report to District as required by the Discovery Order. In Student's Closing Argument, Parent/Student's attorney first argued that the report was privileged as his work product, but the report was not requested by him, not prepared by him, was addressed to the school district and not him, and did not contain anything that could be interpreted as the attorney's work product. Furthermore, if it were his work product, the proper procedure in order to comply with the discovery order would have been to notify District about the existence of the report, but move to quash disclosure, based on the alleged privilege. Parent/Student's attorney further argued that the failure to provide the report was not detrimental to District's case because it did not rely on the report. Evidence of the failure to provide this document was not offered for the substance of the report, but to establish Parent's lack of cooperation. Parent's failure to provide this document begs the question of what other documents were not provided.

testimony, so that it cannot be relied upon for any significant finding unless it is contrary to Student's interest.

Student's demeanor was very serious, and Student clearly believed in telling the truth, but Student had a poor memory of many facts. For example, Student testified very emphatically that the Learning Resource Center would not work, but Student gave various details of when Student visited the Center and what specifically happened. Student appeared to be testifying about a visit to the Center during freshman year, but the varying descriptions of what happened detracts from Student's reliability as a witness, especially when Student's perception appeared to be overly influenced by Parent, who had a strong bias against District. Also, Student testified about only one visit to the LRC, Kathy Andrew's classroom, but Student's transcript reveals attendance in the class for two quarters. (Ex. SD116.) Also supporting this conclusion of Student's poor memory is Parent's eventual concession that Student's perceptions are sometimes not accurate, testifying at one point when confronted with an apparently contradictory testimony by Student, "Welcome to [Student]'s world." (Test. of Parent, tr. 811:10-18.)

FINDINGS OF FACT

(1) Student is 17 years old and a senior at North Salem High School, a District school. Student lives in the area served by District and has attended District schools since elementary school. During at least his last two years, Student has participated in regular and advanced education classes and earned good grades, except for mathematics. (Ex. S32; test. of Smith, tr. 15:19-16:6.) Student has already met the math requirements for graduation and needs only a one-half credit in physical education to receive a regular diploma. (Test. of Tibbits, tr. 451:25-452:13.)

(2) While in high school, Student has been eligible to receive special education services based on diagnoses of autism spectrum disorder and a specific learning disorder in mathematics. (Test. of Smith, tr. 87:11-14; Ex. ST7 at 3-11.) Student's individualized education plans (IEPs) during high school called for specially designed instruction to meet autism needs and specific math goals. (Test. of Smith, tr. 16:15-17:12.)

(3) During fall term in 2007, Student was a junior and took a general education class in math, Algebra I. (Test. of Smith, tr. 24:7-10; test. of Schutz, tr.251:18-20.) Student did well during the introduction and the first couple of weeks when the concepts of Student's prior math class, Fundamentals of Mathematics, were reviewed. (Test. of Schutz, tr. 256:20-24.) The principles of the Fundamentals class were reinforced by one-on-one tutoring during Extended School Year (ESY) services. (Test. of Severson, tr. 405:16-18, 415:19-23.) Eric Schutz taught the Algebra I class and advised Student and the other students that he was available before and after classes for help. (Test. of Schutz, tr. 257:10-258:16.) During class, teacher Schutz often asked Student how it was going, but Student never contacted him for help outside of class. (*Id.*, tr. 259:2-6.) Student's grade in Algebra I fell during the semester and Student received a final grade of D, which was passing, but below the grade required to continue on with Algebra II. (*Id.*, tr. 264:6-17, tr. 273:7-10.)

(4) In early October 2007, Parent asked for the math tutoring that Student had received during the prior school year. (Test. of Smith, tr. 24:15-18.) Amanda Smith, Student's special education coordinator, looked into whether an hour of tutoring per week could be arranged. (Ex. SD16-1.) District advised Parent that it had funds available for one-on-one math tutoring through a private third party (Club Z) for Student. Parent did not apply for that tutoring because the funding for such tutoring was limited for each student and because the tutoring would be focused on meeting general benchmark standards and not Student's IEP goals. (Exs. SD16-2 and SD17; test. of Smith, tr. 26:16-19, 27:1-9.)

(5) Student's IEP team met on November 9, 2007, to discuss services to help Student do better in Algebra I. Parent and Parent/Student's attorney claimed that Student would learn math only with exclusive one-on-one tutoring and nothing less. Parent and Parent/Student's attorney provided extensive input, but a final decision was deferred until the next meeting scheduled for November 29, 2007. (Exs. SD21 and SD23; test. of Smith, tr. 27:19-28:18, 29:25-30:21.) On November 27, 2007, Parent filed a due process hearing request (DP 07-126), claiming that Student was not receiving a FAPE. (Ex. ST4 at 1.)

(6) On November 29, 2007, Student's IEP team met to discuss Student's math goals and services to attain those goals. (Ex. SD25.) Student attended the meeting and reported an inability to learn in District's Learning Resource Center (LRC) and a refusal to go to the tutorial center if other students are there because Student did not want to be identified as needing help. (*Id.* at 4.) District prepared a list of available math tutoring resources and provided it to Parent during the meeting. (Ex. SD24 at 5.) All the resources were discussed. Only two of the seven resources were exclusively for special education students. (Test. of Smith, tr. 35:2-14.) Parent expressed concern that Student could not attend tutoring after school because Student had to work on other classes and that parent was sure Student would not go to the LRC because Student did not want others to know of Student's problems with math. (*Id.*, tr. 35:15-36:6.) District set up an education assistant to work one-on-one with Student (Ex. SD28), but before starting with Student, the assistant was hired as a teacher and could not provide the instruction. (Test. of Smith, tr. 37:10-15, 38:9-18.) In early December 2007, Student missed school for a week due to a shoulder injury and was anxious about falling behind. (Exs. SD29 and SD30.) As a result of these complications, the start of one-on-one tutoring was delayed until after Christmas break. (*Id.*; test. of Smith, tr. 39:2-11.) The tutoring was delayed further due to negotiations over Student's due process request for hearing. (Exs. SD30 and SD31; test of Smith, tr. 39:24-40:1.)

(7) District members of Student's IEP team met on January 18, 2008, for one hour to prepare for the upcoming IEP meeting. District's attorneys were present. (Ex. SD32; test. of Smith, tr. 42:11-15.) They had also held a pre-IEP meeting prior to the IEP meeting on November 29, 2007. They do not always schedule pre-IEP meetings. The purpose of the pre-IEP meetings was to prepare for the IEP meetings and to gather information to develop options for discussion at the IEP meetings, so that the options could be addressed within in the limited amount of time of the meetings. (Test. of Smith, tr. 40:5-41:20.) No decisions were made at these pre-IEP meetings because the entire IEP team was not there. (Test. of Smith, tr. 41:1-5.) On May 23, 2008, Smith emailed District's class scheduler, asking for the schedule of math classes for the next school year in anticipation of the discussion of Student's placement at the IEP meeting scheduled for May 28, 2008. (Ex. ST43 at 119.) District members of the IEP

team did not attend a pre-IEP meeting prior to the May 28 IEP meeting. (Test. of Schutz, tr. 278:11-15; Exs. SD76 and SD77.) District members of the IEP team did not meet prior to the August 28, 2008 IEP meeting because the meeting was just before school started and there was no time to get together beforehand. (Test. of Warren, tr. 191:21-192:14; test. of Smith, tr. 61:7-21.) Before the IEP meetings, special education coordinator Smith often prepared a draft IEP to work off of, usually based on the last IEP. (Test. of Lund, tr. 542:16-22.) These drafts were intended to be a starting point in order to save time, and special education teacher Lund usually wrote the final IEP. (*Id.*, tr. 567:19-570:12, 570:23-572:14.)

(8) On January 23, 2008, Parent and Parent/Student's attorney met with other members of Student's IEP team to review Student's eligibility, which is required every three years, and to review Student's IEP, which is required each year. (Exs. SD37 and SD38 at 1.) They participated fully in the hearing. (Ex. SD40.) Student's eligibility for services, based on autism spectrum disorder and a specific learning disability in mathematics calculation and problem solving, was reevaluated and continued. (Exs. SD38 and SD39.) Based on a May 6, 2005 Summary of Assessment by District's school psychologist (Ex. SD38 at 4-10), the team again found in regards to Student's autism spectrum disorder:

[Student] is easily overwhelmed by noise and sounds. [Student] especially dislikes lower tones, for example, the hum of fluorescent lighting or computers. *
* *

It may be difficult for [Student] to concentrate on instruction and work when there is a lot of background noise or noise from peers. * * *
* * * * *

[Student] may have difficulty working in groups with peers [Student] is not comfortable or familiar with. * * *
* * * * *

[Student] gets very focused on certain topics or ideas. Change can be overwhelming or create anxiety if [Student] is not given warning ahead of time. [Student] responds well to routine. [Student] has difficulty regulating emotion and daily stressors. * * *

[Student] would benefit from consistency in [Student's] routine or a system to warn [Student] ahead of time about potential change. Structure might help alleviate some of [Student's] anxiety in this area. [Student] may get "stuck" on a topic and it may be beneficial to allow [Student] time to move on so there is closure. * * *

(*Id.* at 3.)

(9) The present levels of Student's math performance and the appropriate math services were discussed during the January 23, 2008 meeting. Teacher Schutz and Laura Lethe, math specialist for District, recommended that a Math Foundations class would be good for Student, based on Student's current math skills. Parent replied that Student would consider Math Foundations a regression. (Ex. SD40 at 3.) Parent stated that Student needed to complete Algebra II and Geometry in order to apply to four-year colleges, where Student could earn a degree to be a teacher of history for special education students, his career choice. (Test. of

Smith, tr. 44:13-45:6.) District recommended that Student take a Math Foundations class with a familiar teacher, Mr. Clarkson, and a Foundations lab with teacher Schutz, so that Student would have math every day. (Ex. SD40 at 4.) A final decision was deferred to an IEP meeting to be held on January 31, 2008. (*Id.*)

(10) On January 24, 2008, Parent and Parent/Student's attorney requested that Student be dropped from all math classes in anticipation of discussing Student's placement at the IEP meeting the following week. (Ex. SD44.) The same day, Parent/Student's attorney sent a letter to District, expressing concern about Student's lack of progress in math and Student's retaking of a class (Foundations) because it would raise concerns to college admission committees. (Ex. SD46 at 1.) On January 29, 2008, District's attorney provided a copy of a draft IEP and the notes from the January 23 IEP meeting to Parent/Student's attorney. (Ex. SD47 at 1.)

(11) On January 31, 2008, Parent and Parent/Student's attorney met with other members of Student's IEP team to review the IEP. (Ex. SD50 at 1.) By then, Parent and District had reached a tentative resolution of the issues raised in Parent's due process hearing request and the services were discussed in conformance with the tentative resolution. Parent/Student's attorney, math specialist Lethe, and teacher Schutz confirmed that the listed math goals reflected Student's current levels and areas to work on. (*Id.*) The IEP team, including Parent, agreed that Student would receive specially designed math instruction of 425 minutes every two weeks and transition training 30 minutes each week. (*Id.* at 2.) The math instruction would be one-on-one with teacher Schutz in a room with no one else, or exclusive one-on-one tutoring.² The Present Levels of Educational Performance (PLEP) in math were discussed briefly, and Parent stated no objection to them. (Test. of Smith, tr. 48:11-14.)

(12) District and Parent signed a Resolution Agreement on February 5 and February 7, 2008 respectively. (Ex. ST4 at 3.) The Agreement provides in relevant part:

2. Waiver of Issues. * * * This Resolution Agreement fully resolves all issues regarding math instruction for 2007-2008 school year and summer of 2008 (except for Extended School Year services, which shall be determined later.)

3. One-to-One Instruction. The District shall provide [Student] with specially designed one-on-one math instruction through Eric Schutz at North Salem High School for the remaining 17 weeks of school during 7th period on "B" days, in an area that is conducive to [Student's] learning. This will equate to five 85-minute classes over a two-week period for a total of 425 minutes per two-week period. * * *

4. One-on-One Instruction During Summer 2008. The District shall provide [Student] with 12 hours of one-to-one math instruction during the month of August 2008. The instructor shall not be Eric Schutz.

² Throughout this Final Order, "exclusive one-on-one tutoring" describes what Student is seeking, the same tutoring Student received from February 2008 until June 2008 from a math teacher one-on-one in a room with no other students for 425 minutes every two weeks.

5. PSU Math Courses. The District shall pay the cost of one or more online math courses through Portland State University (tuition and textbook) in which [Student] enrolls and begins instruction prior to September 1, 2008, * * *

6. January 31, 2008 IEP Meeting. The IEP team will consider adding specially designed instruction on math goals at 425 minutes each two weeks. Placement to be considered will be regular education and math with LRC support until the end of the current school year.

7. 2008-09 School Year. The District and parent agree to meet and discuss [Student's] math instruction needs during May or June, 2008 to plan for the 2008-09 school year. The parties acknowledge that the current IEP of January 31, 2008, provides specifically designed instruction in [Student's] math goals with a regular education math teacher with LRC support from a special education teacher. That will be the starting point for the discussion in May or June, 2008 with the IEP team to determine [Student's] individualized needs for instruction in the area of math for the following school year.

* * * * *

11. Nature of Compromise. It is understood and agreed that this Resolution is in compromise of a doubtful and disputed claim and it is not construed as admission of liability on the part of the District, by whom liability is expressly denied. Likewise, the parent's waiver and release of claims mentioned above shall not be considered as an admission by parent. This release expresses a full and complete settlement of the liability claimed and denied, regardless of the adequacy of the above consideration.

(Exs. ST4 and SD52.)

(13) Tutoring with teacher Schutz began on February 5, 2008. Teacher Schutz had concerns the first day regarding the location of the tutoring because of Student's need for consistency. (Exs. SD54 and SD63; test. of Schutz, tr. 268:2-9.) During the tutoring, teacher Schutz primarily focused on the math goals in Student's IEP and not on the Algebra I curriculum. (Test. of Schutz, tr. 267:10-24.) He submitted bi-weekly reports on the tutoring to District and Parent. (*Id.*, tr. 268:19-23; Ex. SD 63.) He also provided bi-weekly summaries of progress in regards to whether Student was meeting the five math goals. (Ex. SD83.) Teacher Schutz concluded in his last report on June 10, 2008, that Student did not meet the target percentage for the first math goal in the IEP, met the second goal, did well on parts of goals three and four, and scored 100% on the final for goal five. (*Id.* at 8.)

(14) On April 16, 2008, Parent and Parent/Student's attorney met with other members of Student's IEP team to schedule make-up dates for tutoring and to review scheduling of ESY services during the upcoming summer. (Ex. SD66.) The IEP team agreed that Student would receive ESY services of math tutoring for one hour three times per week during the summer so that Student could better retain what was learned from tutoring. (*Id.* at 4.) They also agreed that District would provide autism protocol and consult services at the end of summer. (*Id.* at 2.)

(15) Parent and Parent/Student's attorney met with the rest of the IEP team on May 28, 2008, to discuss what math services District would provide to Student during the next

school term in relation to the specific learning disability in math. The team also discussed Student's current progress and grades. (Ex. SD78.) Special education coordinator Smith brought a copy of the prior Placement Determination for the team to work off. (*Id.* at 2-5.) The team reviewed Student's test scores and grades in math and concluded that Algebra I seemed appropriate for Student's skills, that ESY in math would be provided by Marthetta Severson, that Student would take an Algebra I course through Portland State University (PSU) during the summer, and that the IEP would not be changed. (Ex. SD79 at 1.) Parent expressed pride in Student's progress to date. (Ex. 80 at 2.) The IEP team, including Mother, agreed to defer the decision regarding math services in the fall until the next meeting on August 28, 2008, so that the team could review and consider Student's progress over the summer. (Test. of Smith, tr. 58:24-60:10.)

(16) During the summer, Student received ESY services of math tutoring from Marthetta Severson, tutor for the District, who was a friend of Parent and Student. Tutor Severson submitted a 2008 ESY report for Student and reported some progress after reviewing past progress. (Ex. SD95; test. of Severson, tr. 399:7-400:9.) After providing 12 hours of additional tutoring in August 2008 per the Resolution Agreement, she reported that Student had achieved some progress, but did not retain all that Student had learned from tutoring during the last half of the prior school year. (Ex. SD96.) Tutor Severson orally reported to special education coordinator Smith that Student had gaps in math learning at the start of ESY services and that Student needed constant review and practice, but even with such review and practice, Student had not relearned or retained all of it. (Ex. SD99 at 7; test. of Severson, tr. 411:22-412:7.) Severson had also tutored Student during the 2007 summer as ESY services in math. (Ex. SD7, her final report.) After the ESY services ended in August 2008, Severson continued to provide tutoring in math to help Student prepare to take the Scholastic Aptitude Test (SAT) on November 1, 2008. (Test. of Severson, tr. 407:4-9.) Severson mostly provided this tutoring Monday, Wednesday, and Friday mornings from 8 a.m. to 8:45 a.m. She provided it at no cost because of her friendship with Student and Parent. (*Id.*, tr. 408:3-8, 409:9-17.)

(17) On August 5, 2008, Parent/Student's attorney wrote District, arguing that the Resolution Agreement stated that Student would continue with the exclusive one-on-one tutoring in the fall that Student had received in the prior semester and that Student's ESY instructor had noted that Student "is not able to participate in a regular math classroom." (Ex. SD85 at 2.) District's attorney responded on August 8, 2008, noting in part:

You have made clear your client's position as to "one-on-one math instruction" as a requirement as well as your client's refusal to consider any less restrictive level of instruction such as a regular class, an LRC class or an academic support class.

(Ex. SD87 at 2.)

(18) On August 28, 2008, Parent and Parent/Student's attorney, along with Student's counselor (Reid Thurston), met with the IEP members from District, District's attorney, and the ESY tutor, Severson. (Ex. SD100 at 15.) They met to discuss what math services District would provide to Student in regards to Student's specific learning disability in math. (Ex. SD98.) Before the meeting, District IEP members had prepared and distributed a list of the range of

placements (four) to possibly meet Student's math goals and needs: 1) General education with special education consultation with the teacher; 2) General education with special education support--math instruction in classroom, with LRC class to reinforce (Academic Support class); 3) Special Education--Math instruction provided by special education staff as related to math goals in the IEP; 4) One-on-one instruction toward the math goals in the IEP. (Ex. SD99 at 3.) ESY tutor Severson reported that four weeks of tutoring was lost over the summer and Student needed practice to regain past levels and that Student did not achieve much progress during the tutoring because of problems with retention. (Ex. ST2 at 3.)

(19) From the start of the August 28 IEP meeting, Parent and Parent/Student's attorney insisted that they were there only to discuss how District would provide Student with the same math instruction received from February 2008 until June 2008, exclusive one-on-one math tutoring. (Test. of Parent, tr. 840:4-6; test. of Smith, tr. 66:15-19; test. of Lund, tr. 523:2-524:3.) During the summer, Parent/Student's attorney wrote three letters to District, saying that the only acceptable placement for Student would be exclusive one-on-one tutoring. (Exs. SD88 at 2, SD85 at 2, and SD90 at 1.) During the IEP meeting, all four potential placements were discussed, but Parent would not consider any placement other than placement number four, exclusive one-on-one tutoring. (Ex. SD100 at 16; test. of Smith, tr. 74:5-12, 75:20-76:11; test. of Parent, tr. 688-696.) District and Parent agreed with most of the other items in the proposed IEP, such as the amount of time and the schedule for the math instruction, the math goals, and the inappropriateness of Algebra I curriculum due to its format and fast pace. (Test. of Smith, tr. 68-75.) In the Request for Expedited Due Process Hearing, Parent requested exclusive one-on-one tutoring in mathematics of 425 minutes every two weeks "by a certified highly trained special education teacher in lieu of attending regular classroom environment." (Ex. SD127 at 2.)

(20) District members of the IEP team did not agree that placement option four, exclusive one-on-one math tutoring, was the only placement that would provide educational benefit to Student. (Test. of Smith 78:8-79:2.) District members recommended the placement option two, general education of Algebra I, with special education support in the Academic Support class, where four to ten students would receive individualized, but not exclusive, assistance from a special education teacher and an educational assistant. (Ex. SD100 at 17; test. of Smith, tr. 78:8-79:2.)

(21) Parent said that Student had already taken Algebra I and would not take it again. (Ex. SD100 at 16.) Because of Parent's objection to Algebra I, the District's IEP members changed Student from placement option two to placement option three in the Academic Support class during fifth period. (Test. of Smith, tr. 74:1-18.) They recommended this placement as the least restrictive environment because Student would have at least some contact with other math students, which would allow more generalization of math skills by teaching Student how to apply math skills in different situations besides the very restrictive and sterile continuous one-on-one tutoring. (Test. of Smith, tr. 78:8-79:2; test. of Warren, tr. 204:9-14.) The District members concurred that exclusive one-on-one tutoring would not allow Student to learn through mistakes because mistakes were usually avoided in exclusive tutoring and that the exclusive tutoring also prevented Student from learning from others by hearing their questions and realizing that others also had problems with math. (Test. of Smith, tr. 84:10-85:11.) Exclusive one-on-one tutoring with no interaction with others is quite restrictive and not typically offered, especially not for

students with autism, who have problems with generalizing and will acquire fewer skills in exclusive one-on-one tutoring. (Test. of Smith, tr. 85:12-24.)

(22) District's autism specialist Warren was qualified as an expert in autism at the hearing.³ She opined at hearing that it was not "fully" necessary for Student to have a one-on-one tutor for math. (Test. of Warren, tr. 171:12.) She noted that Student had received exclusive one-on-one tutoring from District, but hoped Student was able to move beyond that now. (*Id.*, tr. 172:15-18.) She opined that Student needed one-on-one assistance to progress, but not necessarily without peers present. (*Id.*, tr. 173:2-13.) She opined that assistance in a setting with other peers was more appropriate for Student at this time because exclusive one-on-one is not normally offered and is too restrictive to allow for Student to generalize math skills. (*Id.*, tr. 173:10-174:19.)⁴

³ Autism specialist Warren received her masters in speech-language pathology in 1983 and has worked as a speech-language pathologist since then. She has worked for District as an autism team leader since 1996. (Ex. SD118, her resume.) Since preparing her resume in 2003, she has attended 600 hours of training in teaching students with autism. (Test. of Warren, tr. 159:13-161:13.) She has known Student since freshman year and opined that Student is a mild, high-functioning autistic student. Her goal has been to teach Student organizational skills, such as making lists, breaking projects into smaller parts, and taking a break when frustrated. (*Id.*, tr. 170:2-10.)

⁴ Autistic specialist Warren provided the following expert testimony:

If I could answer further, that kind of a setting [one-on-one with no other students] is not thought to help generalize a student's skills. While it may help skill acquisition, it may help skill acquisition become a little faster, once the skills are acquired what research has shown is that sometimes those skills can be bound to that kind of an environment and they don't generalize to a greater environment.

Whereas if you have the student in a little less restrictive environment, though they may not acquire skills as quickly, that by the end of the time of skill acquisition they will be able to generalize those skills. So they're more—so in other words, the skills are actually more useful to them.

Question [by District attorney]: And so for a high-functioning autistic student like [Student] who's in the senior year, would that kind of generalization be important?

A: Yes.

Q: And why would it be particularly important for him?

A: Because it's his senior year. He's going out into the world.

(Test. of Warren, tr. 173:24-174:19.)

Q [by Parent/Student's attorney]: * * * So if [Student] was to continue, for instance today, with a one-on-one instructor where he's in – just [Student] and a math instructor alone in a room for one class a day, wouldn't the generalization that [Student] receives the rest of the day be sufficient for overall learning to, you know, advance say to college?

A: But you're talking about - - you're talking about generalizing - - what I think I hear you saying is talking about generalizing social skills. But when I was speaking earlier I was speaking about generalizing specific skills. For instance, math. And so for a one-on-one setting with a teacher the generalization is pretty the [sic] poor, because you don't have multiple instructors or any other context to bounce those off of.

Q: Okay. So for the generalization in math instruction, why is that so important that it be in either in a small group or a classroom setting versus the one-on-one just to acquire math skills?

A: When any skill is acquired just one-on-one, the skill acquisition becomes pretty rigid and bound to that exact set of criteria that is going on within that one-on-one instruction.

(23) Autism specialist Warren opined that the benefits from a peer group were learning from the struggles of others, interactions with others about problems, and learning new skills based on others problems. (*Id.*, tr. 176:18-177:3.) Special education coordinator Smith agreed with these concerns regarding exclusive one-on-one tutoring. (Test. of Smith, 84:10-85:24.) Autism specialist Warren noted that Student is in regular education with minimal supports for Student's other courses, but that math is different because Student's skill level is much less than that of peers, so that Student will not get as far as peers. (Test. of Warren, tr. 177:13-178:3.) She also noted that Student lacks confidence and has anxiety in math and is more motivated in other classes and therefore more successful. (*Id.*, tr. 178:8-179:2.) Regarding the placement proposed by District during the August 28, 2008 IEP meeting, she noted that Student had shunned the Learning Resource Class (LRC) since starting high school, but maybe Student would not shun it if it was called something else. (*Id.*, tr. 180:20-25.) She had seen Student in the classroom where the Academic Support class would be offered when Student was attending a Youth and the Law class in that room and Student appeared to be doing well in a crowded and noisy classroom. (*Id.*, tr. 182:7-17; 226:17-25.) In comparison to exclusive one-on-one tutoring, she believed Student would do better in the Academic Support class with a special education teacher, who had an assistant and a low number of students. District has provided special math training to the assistant assigned to the Academic Support class. (*Id.*, tr. 184:20-23.) She opined that she did not share Parent's hope that Student would be able to attend and complete Algebra II, and Geometry so that Student could apply to a four-year college because of Student's math learning disability and the little time before graduation. (*Id.*, tr. 198:2-12 and 199:4-17.)

When you take that skill and put it in a more generalized setting and have other things happening in the setting and you have other instructors, then the skill does not become quite as bound to that exact set of criteria because the criteria then is much broader.

* * * * *

Q: So if you learn, say, 100 minus 56, you would end up with a remainder of 44. So - - and if you learn that in a one-on-one setting, what you're saying the generalization is if you went to the store and bought a 56 cent item and you gave them a dollar, then you need that generalization to realize that you needed 44 cents in change?

A: That would help. What you might have is you only can do that math problem with that particular instructor.

Q: Okay. So it could even be more restrictive?

A: It can be very restrictive.

Q: All right. Have you seen that kind of restriction in [Student], that absence of generalization?

A: Yes.

Q: To that degree?

A: I can't speak about that particular degree. I just know that [Student] acquires math skills slowly and in a specific setting, and then tends to regress on those math skills.

Q: Okay. Would that regression be tied also to his short-term memory issues?

A: Possibly, yes.

(*Id.*, tr. 206:18-208:20.)

Q: So four different instructors that have taught [Student] math skills. Would that be enough change then to have [Student] generalize those skills?

A: You know, I don't think so. Because they're all one-on-one kinds of instructions. And I think that's where the hang-up is. I think [Student] needs one-on-one assistance to take a concept and really understand it, because I think [Student] is—math is very complex for [Student]. I think [Student] gets bound to whatever environment [Student]'s in and that may be another part of the reason [Student] has regression, in addition to [Student]'s short-term memory problems.

(*Id.*, tr. 209:8-18.)

(24) Teacher Schutz believed Student had the skills to attend Algebra I again with support from the Academic Support Center, especially if the educational assistant was Jay Elders, who was District's best assistant in math. (Test. of Schutz, tr. 285:3-20.) Teacher Schutz understood that Student's goal was to complete Algebra II and Geometry, which are required by the four-year colleges Student wanted to attend. (*Id.*, tr. 286:7-12.) Teacher Schutz believed these goals were lofty and would be difficult to obtain due to Student's level of math ability and the short time before graduation. (*Id.*, tr. 286:13-17)

(25) At the end of the meeting, Parent/Student's attorney delivered the following statement to District:

I, [Parent], hereby revoke my consent, approval and signature to [Student]'s Individualized Education Program dated January 31, 2008 because it does not accurately reflect [Student]'s cognitive or executive function abilities.

(Ex. SD102.)

(26) After the IEP meeting that day, Parent filed a Request for Expedited Due Process Hearing against District, alleging violations of the District's requirement to provide a FAPE to Student in compliance with the IDEIA. (Ex. SD127.)

(27) After the IEP meeting, District continued Student's registration in the Academic Support class during the fifth period taught by Kathy Andrews, special education teacher for District. (Ex. SD103.)

(28) On September 2, 2008, District sent a letter to Parent/Student's attorney, confirming that:

[T]he District stands ready, willing and able to serve [Student] according to [Student's] Individualized Education Plan. As you know, the placement decision at the August 28 IEP meeting was that the least restrictive environment for delivery of [Student's] specialized instruction on [Student's] IEP math goals would be a classroom with a low student to teacher ratio and a teacher with special education training to assist him.

(Ex. SD104 at 1.) The letter also stated:

As to the accurate reflection of cognitive or executive function abilities, there has been no new data or information provided on [Student]'s abilities. [Student]'s placement on the January 31, 2008 IEP indicated that the least restrictive environment was general education with LRC supports, and for all classes (except math) [Student] has been in regular education and advanced classes. Based on the concerns that [Student] has in math, and the input from the team that the regular education environment does not work well for [Student] to work on his current IEP math goals, the placement decision at the August meeting was to put

[Student] in [a] more restrictive environment. That prior written notice will be issued shortly.

(*Id.* at 2.)

(29) On September 11, 2008, District sent a letter to Parent/Student's attorney, clarifying what was discussed during a resolution session held to resolve the issues in Parent's Request for Expedited Due Process Hearing. The letter listed the following two proposals by District to settle Parent's Request:

- 1) Payment for Portland State University math courses that would result in college credits; or
- 2) In addition to the current location and supports for [Student] in the Academic Support class on [Student]'s schedule for 5th period, the District would:
 - Deliver math instruction on [Student]'s goals from the Special Education Teacher
 - Provide a 1:1 classified educational assistant to work with [Student] for practice, feedback and repetition of math concepts
 - Provide training for that 1:1 with autism and curriculum District specialists in order to work with [Student]
 - Provide a separate space within or outside the classroom to minimize distractions for [Student]

(Ex. SD109A at 1.) The letter also stated;

The District has determined that the 5th period Academic Support class on [Student]'s schedule is the location for delivery of [Student's] specially designed instruction, and stands ready, willing, and able to serve [Student] there. The District encourages [Student] to attend.

(*Id.* at 2.)

(30) Student did not accept either proposal and did not attend the Academic Support class. (Test. of Andrews, tr. 371:15-23.) On September 21, 2008, Student formally dropped the class, without penalty, with District's permission. (Exs. SD110 through SD112.)

(31) On September 21, 2006, Student's prior special education coordinator noted that Student's placement was restrictive one-on-one tutoring in math with Don Clark. (Ex. ST43 at 2.) District noted in Student's IEP dated February 28, 2007, that "[Student] needs 1:1 instruction in math to increase [Student's] knowledge of basic skills." (Ex. ST11 at 4.) Amanda Smith became Student's new coordinator and noted on April 13, 2007, that tutor Clark "is doing some great work as a tutor." (Ex. ST43 at 78.)

(32) District has prepared a summary of Woodcock Johnson III assessments of Student's math ability. This summary provides in relevant part:

Standard Scores Based on Age (100 average)

	9/12/06 (15.3 yrs)	1/8/07 (15.7 yrs)	12/07/07 (16.5 yrs)
Broad Math	72	83	86
Math Reasoning	89	NA	NA
Math Calculations	NA	79	86
Calculations	55	80	87
Math Fluency	NA	80	87
Applied Problems	89	90	87

Standard Scores Based on Grade

	9/12/06 (15.3 yrs)	1/8/07 (15.7 yrs)	12/07/07 (16.5 yrs)
Broad Math	4.3	6.2	7.3
Math Reasoning	6.4	NA	NA
Math Calculations	NA	5.8	7.5
Calculations	3.2	5.7	7.3
Math Fluency	NA	6.1	7.7
Applied Problems	6.4	6.7	7.2

(Ex. SD4, based on raw data, ST24 to ST30; test. of Smith, tr. 130:11-131:16.)

(33) History teacher Jeff Allen has observed the Academic Support class this year and found it “fairly calm” with seven to eight students. (Test. of Allen, tr. 359:5-20.) Student attended Allen’s Youth and the Law class with about 30 other students and the general noise level was high due to student participation. (*Id.*, tr. 354:13-355:10.) Student did very well in that class and was earning an “A” grade at the time of the hearing. (*Id.*, tr. 357:23-25, 366:16-22.)

(34) Kathy Andrews, special education teacher for District, teaches the Academic Support class, with an educational assistant. (Test. of Andrews, tr. 369:21-23, 372:11-12.) Her assistant is Jay Elders, who has a stronger math background than other assistants. (*Id.*, tr. 375:11-20.) Twelve students are enrolled, but only about 10 show up regularly. (*Id.*, tr. 372:3-8.) The students have 70 minutes in the class to do their assigned work. Passes are available for students to work in other locations. (*Id.*, tr. 372:13-21.) Teacher Andrews taught Student for two quarters as a freshman and believes they had a good relationship. (*Id.*, tr. 377:16-19; Ex. SD116.) She has observed Student in the Youth and Law class and noted that Student participates fully and is very engaged, more than Student was as a freshman. (*Id.*, tr. 373:21-23.)

(35) Parent has attended of the Student’s IEP meetings, including the six in 2007 and 2008, and provided input at each meeting. (Test. of Smith, tr. 21:20-25, 22:1-4.) Parent also participated in special training of teachers in regards to implementing Student’s IEPs. Parent had

regular and frequent contact with District's members on the IEP team, especially Smith. (Test. of Smith, tr. 19:4-14, 21:10-14.)

(36) Student has received counseling from Reid Thurston, LCSW, since the end of middle school. (Test. of Thurston, tr. 765:8-10.) Student joined the school band last year, which was a "real stretch" for someone who generally did not like loud environments and avoided contact with others. (*Id.*, tr. 766:20-767:8.)

CONCLUSIONS OF LAW

(1) District's proposed placement of Student in its Academic Support class to learn math was calculated to provide educational benefits and a Free Appropriate Public Education (FAPE).

(2) Parent had a meaningful opportunity to participate in the May 28 and August 28, 2008 IEP meetings.

OPINION

The Opinion portion of this Final Order will first discuss the burden of proof and relevant law and then apply the burden and law to the specific issues in separate sections.

Burden of Proof

The burden of proof in an administrative hearing challenging an IEP is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005). In this case, Parent sought the relief of exclusive one-on-one math tutoring for Student, rather than the less-than-exclusive one-on-one math tutoring proposed by District and has the burden of proving by persuasive, preponderate evidence that the services proposed by District would not provide a FAPE. Student will not prevail in the event the evidence from both sides is equal or in equipoise.

Public Education Requirements Under the IDEIA

The IDEIA provides for a free appropriate public education (FAPE) for children with disabilities.⁵ The purpose of the IDEIA is to ensure that all children with disabilities are provided a FAPE, 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 United States Supreme Court first considered the requirements for education of special education students in *Board of Educ. Of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982) (*Rowley*) and set out a two-part test for evaluating complaints about the content of an IEP and the provision of a FAPE:

⁵ The IDEIA amended the Individuals with Disabilities Education Act (IDEA). The events contested by Parent occurred after the effective date of the IDEIA, so this Final Order refers mainly to the IDEIA, but may refer at times to the IDEA and relevant federal (34 CFR part 300 *et seq.*) and state law (ORS 343.146 *et seq.*) and rules (OAR 581-015-0001 *et seq.*).

[A] court's inquiry in suits brought under [§ 1415(i)(2)] is twofold. First, has the State complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. [Footnotes omitted.]

Rowley, 458 U.S. at 206-207.

Student qualifies for and has been provided special education services by District under the IDEA. The predecessor law, the IDEA, was a response to a finding by Congress that “[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” 20 USC §1400(c). One purpose of the IDEA was to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living. 20 USC §1400(d); 20 USC § 1412(a)(1); ORS 343.155(1).

1. Provision of a FAPE

The first issue is whether District’s proposed placement of Student in the Academic Support class to learn math and achieve math goals will provide a FAPE as required by the IDEA or more specifically, whether the placement is reasonably calculated to enable Student to receive educational benefit, the standard in *Rowley*.

A central feature of these laws, and the primary mechanism by which they work to ensure a FAPE, is the IEP. *Rowley*, 458 U.S. at 206. Schools are required to develop IEPs for students with disabilities, using IEP teams including parents, special education and general curriculum teachers, administrators and, where appropriate, the child. 20 USC § 1414(d); ORS 353.151; and OAR 581-015-0066. There are procedural requirements regarding the composition of the IEP team, the types of information that must be included in the IEP, and the notice provided to parents about the IEP meeting and plan. 20 USC § 1414(d); OAR 581-015-0068. The substantive requirement for a FAPE is set out above as explained in *Rowley*. District does not have to provide an optimal education for Student nor guarantee Student’s educational progress, but must provide a “basic floor of opportunity.” *Rowley*, 458 U.S. at 201. *See also, Iapalucci v. District of Columbia*, 405 F.Supp.2d 152, 161-162, 167 (2005), in which the court held.

The standard set out by the Supreme Court, in determining whether a child is receiving FAPE, or the “basic floor of opportunity,” is whether the child has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Rowley*, 458 U.S. at 201 [rest of citation omitted]. The IDEA, according to *Rowley*, imposes “no additional requirement that the services so provided be sufficient to *maximize* each child’s potential commensurate with the opportunity provided other

children.” *Id.* at 198 [rest of citation omitted] (emphasis added). Furthermore, if a public school placement is appropriate, a school district need not consider a private placement, “even though a private school might be more appropriate or better able to service the child.” *Jenkins v. Squillcote*, 935 F.2d 303, 305 (D.C. Cir. 1991). Rather, the analysis of the appropriateness of a public school placement “is not comparative.” *Id.*

OAR 581-015-0061 mirrors the federal regulation in addressing the placement of children for special education and provides parts relevant to this case:

School districts shall ensure that:

(1) The educational placement of a child with a disability:

(a) Is determined by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options;

(b) Is made in conformity with the Least Restrictive Environment (LRE) provisions of OAR 581-015-0059 to 581-015-0062;

(c) Is based on the child's current IEP;

* * * * *

(2) The alternative placements under OAR 581-015-0060 are available to the extent necessary to implement the individualized education program for each child with a disability;

* * * * *

(4) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs;

OAR 581-015-0059 provides:

School districts shall ensure that:

(1) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled; and

(2) Special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

There is no dispute that District is subject to the IDEIA and that Student is and was entitled to receive special education services as a result of the diagnoses of autism spectrum disorder and specific learning disorder in math. This dispute centers on whether District failed to provide a FAPE to Student in District’s proposed placement of Student in the Academic Support class for math instruction.

The initial questions are whether the IEP proposed for Student by the District on August 28, 2008, was reasonably calculated to provide educational benefits and if so, whether

the District can provide such services. District's proposal was clarified and expanded in letters to Parent on September 2, 2008, and September 11, 2008. The September 2 letter stated:

As to the accurate reflection of cognitive or executive function abilities, there has been no new data or information provided on [Student]'s abilities. [Student]'s placement on January 31, 2008 IEP indicated that the least restrictive environment was general education with LRC supports, and for all classes (except math) [Student] has been in regular education and advanced classes. Based on the concerns that [Student] has in math, and the input from the team that the regular education environment does not work well for [Student] to work on his current IEP math goals, the placement decision at the August meeting was to put [Student] in more restrictive environment. That prior written notice will be issued shortly.

(Ex. SD104. at 2.)

The September 11, 2008 letter offered two options:

- 1) Payment for Portland State University math courses that would result in college credits; or
- 2) In addition to the current location and supports for [Student] in the Academic Support class on [Student]'s schedule for 5th period, the District would:
 - Deliver math instruction on [Student]'s goals from the Special Education Teacher
 - Provide a 1:1 classified educational assistant to work with [Student] for practice, feedback and repetition of math concepts
 - Provide training for that 1:1 with autism and curriculum District specialists in order to work with [Student]
 - Provide a separate space within or outside the classroom to minimize distractions for [Student]

(Ex. SD109A at 1.) The September 11 letter also stated;

The District has determined that the 5th period Academic Support class on [Student]'s schedule is the location for delivery of [Student's] specially designed instruction, and stands ready, willing, and able to serve [Student] there. The District encourages [Student] to attend.

(*Id.* at 2.)

Parent is challenging District's placement in the Academic Support class, as described above. Parent argues that Student needs exclusive one-on-one tutoring in math because it is the only placement in which Student will learn. Parent did not provide expert opinion to rebut the opinion of autism expert Warren, who was qualified as an expert at the hearing and who opined that the more appropriate placement is the placement that District proposed. Warren testified

consistently and directly. Her demeanor was earnest. Her opinion was supported by other District witnesses, who are educators and were familiar with Student's needs. Student's counselor first offered a contrary opinion in his report, but withdrew the opinion in his report after learning that he did not receive an accurate record of what happened. Warren's expert testimony is therefore credible and reliable. Her expert opinion establishes that the best learning option for Student in math is in District's proposed placement of the Academic Support class with a special education teacher and a specially trained educational assistant.

District's proposed placement is further supported as the least restrictive alternative, which is required by OAR 581-015-0061(1)(b) (set out above). Exclusive one-on-one tutoring requested by Parent is very restrictive. Per the persuasive testimony of Warren set out at length above in the findings, exclusive one-on-one tutoring does not allow for generalization of Student's math skills and therefore is not as effective for retention of math skills, a persistent problem for Student, as noted by Severson and District's members of the IEP team.

Even if the exclusive one-on-one tutoring were the most effective placement, District has in subsequent letters clarified its proposed placement to include the possibility of one-on-one tutoring in another room if the tutoring in the Academic Support class does not work. The last letter mailed on September 11, 2008 (Ex. SD109A) addresses most of Student's concerns. Although not a promise of exclusive one-on-one tutoring from a single teacher away from other students, it is a promise to implement an IEP that will provide Student with one-on-one instruction from a special education teacher and from an educational assistant, who had received training in order to work with Student. The proposed IEP will also guarantee a separate space for such instruction if separation is needed. Parent insists that such separation is needed, based on the school psychologist's opinion from May 2005, but since then, Student has participated in at least one very noisy classroom with many other students and joined the school band, so Student probably does not need the same amount of silence and separation as the psychologist recommended in May 2005 at the end of Student's freshman year. Student will be graduating next year and needs to use his skills when with other people.

District's proposed placement is clearly specialized instruction for Student. District's witnesses persuasively established that District can provide the services in the proposed placement, and Parent did not claim that it could not. Per the expert testimony of autistic expert Warren, District's proposed placement will provide educational benefit. Her opinion is supported by District's other witnesses. Although Warren opined that District's proposed placement will provide more lasting educational benefit in math than exclusive one-on-one tutoring, District does not have to establish that its placement will provide more educational benefit than exclusive one-on-one tutoring, only that its placement is reasonably calculated to enable Student to receive educational benefit. The IDEIA does not require a school district to provide the best placement or education. Moreover, the IDEIA does not guarantee a placement that Parent prefers, but only a placement that is reasonably calculated to provide Student with educational benefit. *Gregory K. v. Longview Sch. Distr.*, 811 F2d 1307, 1314 (9th Cir. 1987). Theoretically, different placements could both be reasonably calculated to enable the child to receive educational benefit.

Student argues that the increase in grade levels from 4.3 to 7.2 in math from September 12, 2006, to December 11, 2007 (Ex. SD4) establishes that exclusive one-on-one tutoring is the only option reasonably calculated to enable the child to receive educational benefit. Student did not provide expert testimony that attributed the reason for this increase to exclusive one-on-one tutoring. Without such testimony, the ALJ cannot infer that the increase was due to exclusive one-on-one tutoring and would not have occurred without it. Furthermore, the increase cannot be credited solely to exclusive one-on-one tutoring because the grade level in September 2006 was probably low due to Student's retention problems when away from school during the summer, despite ESY services over the summer, and the grade level in December 2007 was probably higher at the end of a term when Student had much better retention. Moreover, Student had no tutoring from September 2007 through December 2007.

Parent is insistent on exclusive one-on-one tutoring, believing that with such tutoring, Student may successfully complete Algebra I and II and Geometry and therefore be able to apply to four-year colleges to become a history teacher for special education students. Such a goal is admirable, but District's witnesses, including autism expert Warren and teacher Schutz, believe such a goal is not achievable before Student graduates at the end of this school year. In any event, Parent has provided no authority to support the claim that the IDEIA requires a school district to provide services to ensure a student's success in college.

Parent also alleged that Student has not completed a regular education class without exclusive one-on-one tutoring or instruction in math, but Student passed Algebra I without such tutoring. Moreover, District is offering one-on-one tutoring, just not exclusively with one teacher away from other students. Parent repeatedly asserted that Student will not attend special education classes (although paradoxically arguing at other times that District does not offer any services that are not also available to non-disabled students). The alleged reasons for Student's refusal to attend were apparently certain aspects of the Learning Resource Center (smelly, loud and unruly students, humiliation at the hands of the special education teacher--all witnessed apparently during one visit when a freshman) and the stigma of being identified as a disabled student. As explained in the Credibility Discussion above, the details provided by Parent and Student regarding these reasons were contradictory and inconsistent. They seemed at times to say that Student tried to go to the Academic Support class, but they could not provide any details of when Student did so and if Student did go, what happened. Their testimony was not reliable enough to establish a basis for refusing to go to the LRC. Even if their testimony was reliable, refusing to attend the LRC based on only one visit while a freshman is not reasonable.

While Student's concern about being stigmatized as disabled is understandable, such a concern is not reasonable if it interferes with an opportunity to learn despite a significant math learning disability. Also, despite the reasonableness of such a concern, the law requires the District to offer FAPE in the LRE and here, the offered FAPE is less restrictive than the isolated 1:1 tutoring Parent desires. District members were not required to address Student's concerns, but its members of the IEP team discussed Student's discomfort with being identified as disabled and during the IEP meeting on August 28, 2008, offered autism support to deal with other students. (Ex. SD 100 at 12.) Finally, in its letter of September 11, 2008, District offered to "provide a separate space within or outside the classroom to minimize distractions for [Student]."

This offer was intended to protect Student from distractions by other students. (Ex. SD109A at 1.)

2. Meaningful Participation

Parent alleged that District did not give Parent a meaningful opportunity to participate in IEP decisions, apparently by deciding placement prior to the IEP meetings and not agreeing to provide exclusive one-on-one tutoring as Parent demanded.

Parent did not allege a specific procedural violation, such as lack of notice or information or lack of attendance by necessary participants at an IEP meeting. Parent had many opportunities to provide input and did so. Parent attended the six IEP meetings for Student in 2007 and 2008 and provided input. Parent also participated in the special training of Student's teachers to implement Student's IEPs. Parent had regular and frequent contact with District's members on the IEP team, especially special education coordinator Smith. Parent was acting out of deep concern to obtain what Parent believed Student needed and has been a persistent and strong advocate.

Parent has provided significant input on all aspects of Student's education. An example of such input was during the IEP meeting on August 28, 2008, when District's members on the IEP team accepted Parent's input that Student could not take Algebra I and that Student's schedule should remain the same. More significantly, District accepted Parent's input in the past when granting Parent's request for exclusive one-on-one tutoring during the last half of the prior school year. The only significant disagreement has been what is at issue in this case, whether Student should again be placed in exclusive one-on-one tutoring as requested by Parent or be placed in the Academic Support class, as recommended by District. Just because District disagreed with Parent in regards to this placement does not mean that Parent did not have a meaningful opportunity for input regarding placement. Parent has been asserting the need for exclusive one-on-one tutoring for at least at least three years and District was well aware of Parent's request. Parent did not provide new evidence during the IEP meetings on May 28 and August 28 to further support this strongly held belief.

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 a 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 (9th Cir. 2007) (citing with approval *M.L. v. Federal Way School District*, 394 F 3d 634, 652 (9th Cir. 2005) and *W.G. v. Bd. Of Trustees of Target Range School Dist (Target Range)*, 960 F2d 1479, 1484 (9th Cir 1992) ("Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity [citations omitted] or seriously infringe the parents' opportunity to participate in the IEP formulation process [citations omitted] clearly result in the denial of a FAPE."). This harmless error standard adopted in *R.B. v. Napa Valley* was codified in the 2004 revisions in the IDEIA. When a parent alleges a procedural violation, the hearing officer may find a denial of a 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);⁶ ORS 343.167(3).⁷

In *R.B. v. Napa Valley*, the court noted a procedural violation by the school district in not including a special education teacher during the IEP meeting, but concluded the violation was harmless error because the child was not eligible for services. Parent did not allege or establish that a necessary member was not included in the IEP meetings, so the holding in *R.B. v. Napa Valley* does not apply in this case.

In *Target Range*, the court agreed with the district court that the procedural errors of preparing the final IEP beforehand and not including the current regular teacher on the IEP team resulted in a denial of a FAPE. Parent did not allege that an essential member failed to participate in the IEP meetings, so one of the reasons relied on by the court in *Target Range* is not present in this case.

Regarding the other reason in *Target Range*, Parent alleged that District members of the IEP team held pre-IEP meetings without Parent and decided Student's placement without Parent's input. District members admitted to two such meetings, but persuasively explained that the meetings were to gather information before the IEP meeting in order to save time at the meeting and that no decisions were made before the IEP meetings. In regards to the IEP meeting on August 28, 2008, where placement was decided, District members of the IEP team did not hold a pre-IEP meeting because it was soon after the teachers returned to work and there was no time to get together. In regards to the other IEP meeting in issue on May 28, 2008, District members of the IEP team emailed each other prior to the meeting to secure further information for the IEP meeting, but no pre-IEP meeting was held. District members of the IEP team also admitted that they usually prepared a draft IEP before each meeting, usually based on the prior IEP. Special education coordinator Smith usually prepared the drafts and credibly testified that no decisions were made at pre-IEP meetings and that the drafts were intended to be a starting

⁶ 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.

⁷ 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.

point in order to save time at the IEP meetings. Moreover, Parent has not established Parent's claim that the IEP proposed by District member of the IEP team on August 28, 2008, was not substantially different than the draft IEP. The placement proposed in the draft IEP was placement number two from the range of options, but District later agreed with Parent that Student should not take Algebra I and then proposed placement number three. Parent had ample opportunity to provide input at the August 28, 2008 IEP meeting and has not established that the court's holding in *Target Range* applies in this case.

Finally, even if the proposed placement was not different in the final IEP, drafts of proposed goals and objectives do not necessarily constitute pre-determination. See *J.D. v. Kanawha County Bd. Of Educ.*, (So.D. W. Va.) August 3, 2007, 48 IDELR 159, in which the court concluded that the school district did not "predetermine" services for the student because the IEP Team members read and considered information provided by the parents, took breaks to do so, and incorporated some of the suggestions of the parents and there were multiple meetings with evidence of extensive parental involvement. The District members of the IEP team read and considered information from Parent, incorporated some of Parent's suggestions, and Parent had extensive involvement.

Parent argued that District allowed Parent input only on the social aspect of Student's needs and progress, based on the testimony of Lund (tr. 480:24-481:8). This cited testimony was taken out of context and does not support Student's argument that Parent was not allowed any other input. Implicit in this argument is that District should have accepted Parent's decision on what was the best placement for Student for math instruction. In effect, Parent is arguing that the only way District can establish that it provided meaningful participation for Parent is for District to accept Parent's determination on how to provide math services for Student. As explained above, Parent failed to provide expert testimony to support Parent's claim that Student can only learn math in exclusive one-on-one tutoring.

Parent cites *Amanda J. v. Clark Cnty. School*, 267 F.3d 877, 892 (9th Cir. 2001) as support for Parent's claims that:

[F]ailure to develop an IEP in the manner specified does not serve the purpose of the IDEA and consequently also fails in the provision of FAPE. * * * Congress placed every bit as much emphasis upon compliance with procedures giving parents a large measure of participation in every stage in the process. Such procedural inadequacies result in the loss of educational opportunity, deprivation of educational benefits, or seriously infringe on the parent's opportunity to participate in the IEP – all of which clearly results in denial of a FAPE.

Student's Closing Argument, p. 9.

The court's ruling in *Amanda J.* does not support these claims. In *Amanda J.*, the court found a substantial procedural violation in the school district's failure to give the parents copies of evaluations of the child, which resulted in a denial of a FAPE. Parent has not established any such failure by District or the failure to receive any relevant information.

In summary, Parent has not established a procedural violation of the IDEIA. Even if there were a procedural violation, Parent failed to show that the procedural defect resulted in a 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.

ORDER

Parent has failed to show that District's procedures in implementing a proposed placement for Student and the placement offered by District violated the IDEIA and would not provide Student with a FAPE. Parent's Request for Expedited Due Process Hearing dated August 28, 2008, is therefore **DISMISSED**.

Lawrence S. Smith, Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

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

ENTERED at Salem, Oregon this 23rd day of December, 2008 with copies mailed to:

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