

On February 25, 2010, the District filed the District's Motion to Compel Discovery and Production of Documents. On March 4, 2010 the Parents filed a Response and Opposition to Dallas School District's Motion to Compel Discovery. On March 23, 2010, ALJ Messecar issued a Ruling Denying District's Motion to Compel Discovery, finding that the information requested was privileged and waiver of the privilege had not been established at that time.

A hearing in this matter was held from April 19 through 30, 2010 at the OAH in Salem, Oregon. Jeris Clark of Clark & Brown Court Reporting performed real-time transcription of the hearing.¹

The Parents participated in the hearing with counsel, Kevin Brague. Both Parents testified. The following witnesses were called by Parents and gave testimony:

John D. Hawkins, Attorney at law.
Brooks Cooper, Attorney at Law.
Carla Koepf, Administrator Lake Country Academy
Ryan Opp, Special Education Teacher, Dallas School District
Susan Gartland, Special Education Director, Dallas School District
Barbara Fawns, Special Education Teacher, Dallas School District
Carmel Haynes, School Psychologist, Willamette Education Services District
Gary Mac Kendrick, Counselor
Brian Green, Assistant Principal Dallas School District
Clark Reinke, Superintendent, Plymouth Joint School District (appearing via telephone)
Lynn Hurt, Expulsion Hearing Officer, Dallas School District
Frank Parker, Special Education Case Manager and teacher, Dallas School District
Michael Beck, Assistant Principal, Dallas School District
Yvette Nelson, Psychologist, Dallas School District
Wade Taylor, Psychologist, Provo Canyon School, Provo, Utah (appearing via telephone)
Diana Cornaby, Teacher and Guidance Counselor, Provo Canyon School (appearing via telephone)
Christy Perry, Superintendent Dallas School District
Dr. Scott Senn, Psychologist testified as an expert witness in juvenile sex offender psychological evaluations (appearing via telephone)

Christy Perry, Dallas School District Superintendent, was present on behalf of the District throughout the hearing and testified for the District. Noor represented the District. The following witnesses were called by the District and gave testimony:

Peter Tarzian, Falls City School District, Superintendent.
Max Wall, Deputy District Attorney, Polk County.
Susan Garland, Special Education Director, Dallas School District
Barbara Fawns, Special Education Case Manager and Teacher, Dallas School District

¹ Information within the transcript will be referred to as page numbers for ease of reference. i.e. (Testimony of Mr. Parker p1275.)

Frank Parker, Special Education Case Manager and Teacher, Dallas School District
Tim Larson, Assistant Principal, Dallas School District
Pamela Carroll, Special Education Teacher, Dallas School District
Michael Beck, Assistant Principal, Dallas School District
Carmel Haynes, School Psychologist, Willamette Education Services District
Yvette Nelson, Psychologist, Dallas School District
Therese Mohler, Teacher, Dallas School District
Eivind-Erik Sorensen, Autism Specialist, Willamette Education Services District
David Flugum, Teacher, Dallas School District
Renay Barnes, Teacher, Dallas School District
Shana Lavier, Special Education Teacher, Dallas School District
Jared Tesch Teacher, Dallas School District
Mary Montella-Smith, Educational Assistant, Dallas School District
Richard Robison, Juvenile Probation Officer, Polk County
Richard Brown Clinical Director, Polk Adolescent Day Treatment Center
Judy Stuck Tutor, Teacher, Morrison Alternative High School
Elizabeth Thiessen, Education Assistant, Dallas School District
Dr. Jeremy Wilson Whittaker, School Psychologist Salem Keizer School District, testified as an expert witness in sexualized behavior and adolescent sexual misconduct

The record was left open to allow for the receipt of the hearing transcript and closing arguments. The hearing transcript was provided via e-mail on May 14, 2008 and in written form on May 18, 2008. Written closing arguments from both sides were received on the deadline of May 26, 2010. The deadline for issuance of the Final Order was June 16, 2010, and this Final Order was issued by that date.

ISSUES

I. Should the allegations of Parents' complaint dealing with acts or omissions occurring on or after September 1, 2008 be dismissed for lack of jurisdiction?

II. Did the District fail to provide a FAPE to Student as required under IDEIA, based on the following alleged violations:

A. Regarding a December 18, 2007 Individualized Education Plan (IEP) by:

1. Failing to provide Prior Written Notice of an IEP team meeting;
2. Failing to convene an IEP team meeting;
3. Withholding or failing to provide specially designed instruction and related services to Student;
4. Failing to conduct and adequately interpret necessary and appropriate evaluations to address Student's emotional and behavioral disabilities; and

5. Failing to evaluate, determine, and implement IEP that addressed Student's emotional and behavioral disabilities.

B. Regarding a January 23, 2008 expulsion by:

1. Failing to conduct a manifestation determination in December 2007;
2. Failing to create and adopt a behavior intervention plan for Student; and
3. Failing to conduct a functional behavioral assessment when unilaterally changing Student's placement for more than 10 school days.

C. Regarding an April 11, 2008 IEP by:

1. Failing to provide Prior Notice of Special Education Action;
2. Failing to create or implement a behavioral plan despite knowledge of Student's behavior;
3. Withholding or failing to provide specially designed instruction and related services to Student;
4. Failing to include data in Present Level of Academic Achievement and Functional Performance (PLOP), assessments, and progress towards Student's goals;
5. Failing to evaluate, determine, and implement an IEP that addressed Student's emotional and behavioral disabilities; and
6. Failing to create an IEP that was reasonably calculated to enable Student to receive meaningful educational benefit.

D. Regarding a June 4, 2008 IEP by:

1. Failing to provide Prior Notice of Special Education Action;
2. Failing to create or implement a behavioral plan despite knowledge of Student's behavior;
3. Failing to include data in PLOPs, assessments, and progress towards Student's goals;
4. Failing to evaluate, determine, and implement an IEP that addressed Student's emotional and behavioral disabilities; and
5. Failing to create an IEP that was reasonably calculated to enable Student to receive meaningful educational benefits.

E In connection to the October 10, 2008 IEP by:

1. Failing to provide Prior Written Notice of an IEP team meeting;
2. Failing to timely convene an IEP meeting;
3. Failing to create or implement a behavioral plan despite knowledge of Student's behavior;
4. Failing to include Student's proper basis for eligibility for special education services;
5. Failing to evaluate, determine, and implement an IEP that addressed Student's emotional and behavioral disabilities; and
6. Failing to create an IEP that was reasonably calculated to enable Student to receive meaningful educational benefits.
7. Whether the District waived any rights under the October 10, 2008 IEP when it removed Student from its special education program on or about November 4, 2008

III. If any of the above violations occurred as alleged, what, if anything, is the appropriate remedy or remedies?

EVIDENTIARY RULINGS

The District offered Exhibits D1 through D21, D23 through D300, and D302 through D316. D1 through D21, D23 through D62, D64 through D74, D76 through D241, D243 through D265, D267 through D294, D297 through D300, and D302 through D310 were admitted into evidence without objection. D22 and D301 were withdrawn by the District. Parents objected to D63 on the basis of lack of authentication and that objection was upheld. Parents objected to D295 and D311 on the basis of relevancy, that objection was overruled on the record, and the exhibits were admitted. Parents objected to D75, D296, D315, and D316 on the basis that the documents are privileged as juvenile court records, that objection was overruled on the record, and the exhibits were admitted.

Decisions on the following exhibits were deferred to the Final Order. Exhibit D242 pages 1-2 are admitted because it was authenticated by Student's father and is relevant and material. Exhibit D266 is admitted as relevant and material. Student's objections to Exhibits D271, D272, D274, and D283 as irrelevant and immaterial are sustained, and those exhibits are not admitted.

The Parents offered Exhibits S1 through S12, S14 through S36, S38 through S47, S49 through S60, S62 through S79, S81 through S83, S85, and S86. Exhibits S1 through S12, S14 through S18, S21 through S23, S24 pages 1-40, S25, S26 pages 2-12 (Page 1 was withdrawn), S27 through S36, S38 through S47, S49 pages 5-7 (Pages 1-4 were withdrawn) through S56, S58 through S60, S62 through S79, S81 through S83, and S85 were admitted into evidence without objection. S13, S3, S48, S61, and S80 were withdrawn by the Parents.

The District objected to S57 on the basis of relevancy, that objection was overruled on the record, and the exhibit was admitted.

Decisions on the following exhibits were deferred to the Final Order. Exhibit S19 is admitted as relevant and material and District's objection is overruled. Exhibit S20 is not admitted as irrelevant and immaterial and District's objection is sustained. Exhibit S24 pages 41-54 is admitted as relevant and material and District's objection is overruled.

The District objected to Parent's attorney asking Ms. Mohler questions about her discussion with District attorneys in preparation for hearing on the basis of relevance and attorney-client privilege. Parent's attorney indicated that he did not believe that the attorney-client privilege extended to Ms. Mohler. Parent's attorney also stated that the question was relevant to determine whether Ms. Mohler's testimony was biased. The testimony was determined to be relevant for the issue of bias and the ruling on attorney-client privilege was reserved for the final order. The ALJ allowed Parent's attorney to ask Ms. Mohler about her conversations with District attorneys. However, Parent's attorney did not ask such questions. Therefore, the issue need not be addressed any further.

At the end of the hearing, the parties indicated to the ALJ Messecar that certain documents would be subject to a qualified protective order. The parties indicated that they were in discussion about what documents would but subject to the order and would provide the information to the ALJ by Friday, May 7, 2010. The parties were unable to come to an agreement. On May 6, 2010, Parent's attorney filed a Motion for Qualified Protective Order and a proposed Qualified Protective Order. On May 7, 2010 the District's attorney filed a Motion for Qualified Protective Order and a proposed Qualified Protective Order.

Under OAR 137-003-0573 an ALJ may issue a Qualified Protective Order based on the Federal HIPPA² rules to protect a person's health information from unnecessary disclosure. Both parties ask that Student's Juvenile court records and health records be protected by a Qualified Protective Order. While both parties agree that Student's educational record should be protected, the parties disagree over whether Student's educational records should be protected by a Qualified Protective Order. The District correctly notes that Student's educational records are confidential and protected from disclosure under FERPA.³ Therefore, a Qualified Protective Order is unnecessary to protect Student's educational records. The Qualified Protective Order provided by the District will be issued along with this order.

FINDINGS OF FACT

(1) Student is an 18 year-old who was adopted from a Romanian orphanage when he/she was approximately three years old. Student's family lived in Wisconsin until the fall of 2006. Student's family consists of his/her adoptive parents and a sister who was also adopted from Romania, but who is not a blood relative. (Ex. D218 at 3.) From Student's early childhood his/her family sought and received extensive mental health treatment for Student. (Ex. D217 at 2.)

(2) While in Wisconsin, Student entered the Plymouth Joint School District as part of

² Health Information Portability and Accountability Act of 1996.

³ Family Education Rights Privacy Act.

the Early Start program and began receiving speech/language services. In 1999, Student qualified for IDEA services as learning disabled and an IEP were developed each year Student was at Plymouth Joint School District. (Ex. D216.) In January 2003, a Functional Behavioral Assessment (FBA) was performed. The assessment indicated that Student was receiving private counseling and that Student needed a great deal of structure for behavior and academics. (Ex. D216 at 68.) The IEP included goals and specialized instruction addressing Student's behavioral issues (Ex. D216 at 36.)

(3) On November 24, 2004, Dr. Norris conducted a psychiatric evaluation of Student and diagnosed Student with Bipolar Disorder. During the evaluation, Student's mother reported onset of symptoms during the prior three to four years. (Ex. D220.) Student participated in behavioral/mental health visits with Dr. Norris through July 2006. (Ex. D221.)

(4) Student moved with his/her family to Dallas, Oregon during the Labor Day weekend in 2006. (Testimony of Student's mother p26.) Prior to moving to Oregon, Student had most recently attended Lake Country Academy, a private school in Sheboygan, Wisconsin. (Testimony of Student's mother p380.)

(5) Shortly before moving to Oregon, Student's mother contacted the Dallas School District about Student's enrollment in special education. (Ex 79.) Prior to the beginning of the school year, Student's mother told Ms. Gartland, the Dallas School District special education director, and Ms. Fawns, Student's special education teacher and case manager, that Student was learning disabled and had difficulty with reading and learning. (Exs. D5 at 1-2; D7.) Starting in the fall of 2006, Student attended a middle school in the Dallas School District. Ms. Fawns asked Student's mother if Student had any behavioral issues. Student's mother said that there were none. (Testimony of Ms. Fawns p793.) Student's mother did not tell anyone at the District that Student had previously received been provided received mental health treatment for behavioral/emotional problems. (Testimony of Student's mother p456.)

(6) On August 25, 2006, Lake Country Academy faxed some documents regarding Student to the Dallas School District. Ms. Fawns reviewed Student's file and believed that it was incomplete. (Testimony of Ms. Fawns p792; Exs. D9, D10.) Around September 5, 2006, Ms. Fawns sent Parents a Prior Notice About Evaluation/Consent for Evaluation form asking them for consent to evaluate Student. Student's mother signed it. The form stated that the documentation for determining eligibility was incomplete. (Ex. D10.)

(7) The evaluations were completed and an IEP team meeting was held on October 24, 2006. Both Parents attended the IEP meeting. (Ex. D19.) The IEP team agreed that Student was eligible for special education services because of a specific learning disability. A copy of the statement of eligibility was given to the Parents. (Ex. D20.) The Parents did not express any concerns about Student's ability to focus nor did Parents ask that the District perform any further evaluations of Student. (Testimony of Ms. Fawns p799.) Both Parents signed the Prior Notice and Consent for Initial Placement Into Special Education Form that stated that Student was eligible for special education services under the category of specific learning disability, in math, reading, and writing. (Ex. D19 at 13.)

(8) During the school year, Student was disciplined for insubordination and other infractions of the school rules. (Exs. S3; D49.) Ms. Fawns has worked with children with an emotional disturbance disability and considered Student's behavior throughout the year to be

typical [child] behavior. She did not see any deviant or oppositional pattern that she considered indicative of emotional disturbance. (Testimony of Ms. Fawns p800.)

(9) On March 23, 2007, Student brought to school a wine bottle opener that had a small knife blade (instrument). The school prohibited possession of knives at school. Student was caught with the instrument and suspended. (Testimony of Ms. Fawns p810; Ex. S3 at 26.) On April 3, 2007, the District sent a Notice of IEP Team Meeting to Student and Parents, scheduling a manifestation determination meeting on April 6, 2007. (Ex. D33.)

(10) On April 6, 2007, the District held a manifestation determination team meeting and Parents participated. (Ex. D33.) At the meeting, Student admitted bringing the instrument to school because someone else had brought a knife and he/she wanted to show the other person a knife too. (Ex. D34.) The team determined that Student's conduct was not a manifestation of Student's disability. (Ex. D35.) Parents told the other team members that they disagreed with the team's determination and said that there was "something more." The Parents did not explain what they meant by "something more", nor provide any medical diagnosis or mental health/behavioral issues to the team. (Ex. S28 at 5-6.)

(11) The school expelled Student for a period of up to one year based on his/her bringing the instrument to school. The school agreed to allow Student to return to school early if he/she met some requirements. (Testimony of Student's father p560.) Student was allowed to return to school early and resumed his/her classes. (Testimony of Mr. Green p1196; Ex. D108 at 4.)

(12) In the fall of 2007, Student began attending a High School as a freshman. His/her case manager was Frank Parker. At that time, Mr. Parker had 33 years experience as a teacher and 17 years in special education. Mr. Parker taught students with a wide range of disabilities from mildly disabled to severely disabled. (Testimony of Mr. Parker p1275.)

(13) On October 4, 2007, Student was found with tobacco in his/her possession and was suspended out of school for two days. (Ex. D56.) Mr. Green chose not to reinstate Student's prior expulsion even though Student had violated the early return agreement. (Testimony of Mr. Green p1213.)

(14) On October 15, 2007, Female Student 1 was visibly upset and asked to speak to an administrator. She told Mr. Green that on October 2, 2007, Student had grabbed her buttocks and when she told Student to stop, Student had stopped. Female Student 1 also told Mr. Green that a few days after the grabbing incident Student had pushed her up against the wall and told her to have her friends leave him/her alone. Female Student 1 then stated Student had grabbed her between her legs yesterday and she had felt embarrassed and violated. (Ex. D71.)

(15) Mr. Green, the High School Assistant Principal, questioned Student about grabbing Female Student 1. Student denied knowing who Female Student 1 was and denied any wrongdoing. Mr. Green confronted Student with evidence that Student had not been in the location he/she claimed at the time of the incident on October 15, 2007. Student then admitted that he/she had cupped his/her hand between the legs of Female Student 1 and knew it was wrong. Student was suspended for five days pending the results of a manifestation determination. Student's mother was called and when she picked him/her up, Mr. Green explained that the administrative team would be deciding whether to ask that the previous expulsion be reinstated. (Ex. D71.)

(16) On October 17, 2008, Officer Vidrio with the Dallas Police Department interviewed Student's about his/her contact with Female Student 1. Officer Vidrio arrested Student for Sex Abuse III and a petition was filed with the Juvenile court. (Exs. D75; D316.)

(17) On October 17, 2007, the District sent a Notice of IEP Team Meeting, scheduling a manifestation determination meeting on October 19, 2007, to Student and Parents. (Ex. D72.) On October 19, 2007, the District held a manifestation determination team meeting and Student's mother participated. At the meeting, Student admitted grabbing a girl's buttocks and crotch. (Ex. D78.) The team determined that Student's conduct was not a manifestation of the Student's disability. Student's special education eligibility at the time was under the category of specific learning disability (reading, math, and language arts). (Ex. D77.) Student's mother did not agree with the team decision but she did not express her disagreement to the team. (Testimony of Student's mother p469.)

(18) On October 23, 2007, the District held an IEP team meeting. Mr. Parker, Ms. Mohler, Student, and Student's mother attended the meeting. (Ex. D92 at 1.) An IEP was created that acknowledged that Student was not attending regular classes at the high school due to discipline and was receiving special and general educational services through tutoring. The PLOP described Student's current reading score as at least a 4.4 grade equivalency but did not describe Student's current math or writing levels. (Ex. D92 at 2.)

(19) The IEP included annual and short term goals in math, reading, and writing. Under the service summary, the IEP provided for specially designed instruction of one hour a day of tutoring for writing and math, and three hours a week of reading tutoring. (Ex. D92 at 8.)

(20) Mr. Parker believed that he was allowed to serve multiple roles at IEP meetings, including as the Special Education teacher, the District representative, and the individual interpreting evaluations. He acted in each of those roles at the October 23, 2007 IEP meeting. (Testimony of Mr. Parker p1285.)

(21) At the end of the meeting, Student left the room and Student's mother mentioned to Mr. Parker that Student had previously had several behavioral incidents and expressed concern about a behavioral diagnosis rather than learning disability. (Testimony of Mr. Parker p1286-1287, Ex. S30 at 56.) They discussed evaluations and what could happen with school suspensions if Student qualified as behavior disordered. (Testimony of Mr. Parker p1287; Ex. S74 at 32.) Student's mother stated that she thought that they should have something in place since Student was out of school for behavior problems. (Testimony of Student's mother p418.) On October 24, 2007, Mr. Parker e-mailed Ms. Gartland explaining that Student's mother might contact Ms. Gartland about a behavior diagnosis instead of a learning disorder diagnosis. Mr. Parker also stated that "it" was Student's third incident. (Ex. S30 at 56.) At that time, Mr. Parker did not see a pattern of behavior that he believed would indicate Student was emotionally disturbed. (Testimony of Mr. Parker p1287.)

(22) After Student's mother's comment, Mr. Parker reviewed the discipline file from La Creole Middle School and talked to a District employee about the expulsion incident. (Testimony of Mr. Parker p1289-1292.) Mr. Parker still did not see a pattern of behavior to indicate that he should do a referral for more testing. (Testimony of Mr. Parker p1293.) Mr. Parker did not know that Student's IEPs from the Wisconsin schools had contained behavior goals and plans. (Testimony of Mr. Parker p1358.)

(23) In Mid-October 2007, Mr. Green sent a memorandum to Mr. Hurt, Dallas School District Hearings Officer, describing the sexual touching incident and asking that Student's original on-year expulsion be reinstated. (Ex. D71.) A hearing was scheduled for October 30, 2007 but was rescheduled at the Parents request. The hearing was rescheduled numerous times at the Parents or Parents' attorney's request. The hearing was held on December 14, 2007. Mr. Hurt held the record open at the request of Parents' attorney until December 31, 2007 for Parents to provide written evidence from experts about a diagnosis for Student of post traumatic stress disorder. The deadline was extended for two weeks but Parents did not present any evidence by the deadline. (Ex. D108.)

(24) On November 6, 2007, Student's mother signed an agreement with the District for Student to begin tutoring with Ms. Dow through NovaNet and Ms. Stuck for reading. (Ex. D143.) Student attended NovaNet at the District's alternative high school campus. NovaNet is a computer program that students used to complete learning modules and take tests. Ms. Dow was available as a tutor to help students complete their work on NovaNet. (Testimony of Mr. Parker p1296-1297.)

(25) On December 11, 2007, Female Student 2 told Ms. Dow that on December 10, 2007, Student had asked her questions of a sexual nature while they were sitting near each other in the Nova Net class room. Ms. Dow informed Mr. Richardson, Principal of Morrison. Mr. Richardson asked Student if he/she had asked the female student questions of a sexualized nature. Student admitted that he/she had. (Ex. D97.) On or about December 19, 2007, Female Student 3 told Ms. Dow that she had seen Student viewing pornography on a NovaNet computer. Ms. Dow reported the allegation to administration. Student's NovaNet computer was checked and nothing was found. (Ex. S30 at 5.)

(26) On January 23, 2008 Mr. Hurt issued a hearing decision reinstated the expulsion and ordering at least five hours of tutoring a week. The expulsion was scheduled to be completed on April 16, 2008. (Ex. D108.) Mr. Parker did not participate in the hearing but was informed that Parents planned to present an evaluation and he expected to receive a copy of the evaluation once the expulsion hearing decision was issued. (Testimony of Mr. Parker p1377; Ex. D232.)

(27) Around February 4, 2008, Female Student 4 told Ms. Dow that Student had asked questions of a sexual nature. On February 4, 2008, Ms. Dow reported the allegation to Mr. Green. (Ex. D110.)

(28) In February 2008, Mr. Parker began documenting reports of Student's behavior by writing notes to himself. Based on the sexualized behavior Student had been exhibiting since October 2007, Mr. Parker began to see a pattern developing. (Testimony of Mr. Parker p1304; Ex. D113 at 1.)

(29) On February 12, 2008, the District sent Parents a Notice of IEP Team Meeting, scheduling a meeting for February 20, 2008. The notice indicated that the meeting was to review existing information about Student. The notice stated that Parents could call Sue Cacka if they could not attend the meeting or wished to discuss a different meeting time, or wished to participate through alternate means. The notice also stated that if Parents chose not to participate, the meeting might be conducted without them and asked Parents to provide information they wanted to be considered if they were not going to attend. (Ex. D114.)

(30) Around the end of February 2008, Student failed to attend tutoring for two and a half weeks. Student had been at home. (Ex. D123 at 1; D120 at 2.) Student's mother did not know Student had missed his/her tutoring sessions. (Ex. D120 at 2.) Mr. Parker believed Student missed a period of tutoring because he/she was working at a construction site with Parents' permission. (Testimony of Parker p1310.)

(31) On February 20, 2008 Mr. Parker, Student's mother, Ms. Stuck, Ms. Dow, and Ms. Hanes participated in the IEP team meeting. During the meeting, the team discussed Student's progress. Ms. Dow reported that Student was completing the learning modules but was not completing the tests on the learning modules. Student's mother informed the team of Student's learning struggles and that one-on-one and small classroom settings helped Student learn. (Ex. D118.) She mentioned that Student had been in psychiatric counseling for years and a therapist had been working with Student since October 2007. Student's mother also informed the team that an outside psychosexual evaluation was being done and the family was waiting for the results. (Ex. D190 at 1.) The team discussed waiting for the results of the psychosexual evaluation before deciding what type of evaluation the school should do. Ms. Hanes provided information about the possibilities that could be addressed by the evaluations. The team then discussed evaluations for different types of issues. (Ex. D190 at 1.) Ms. Hanes believed that Student's mother would provide a copy of the psychosexual evaluation to the school when the family received a copy and the IEP team could then use that information to determine what if any other evaluations needed to be done. (Testimony of Ms. Hanes p959; Ex. D190 at 1.) At the meeting, Mr. Parker talked to Student's mother and asked for the evaluations that the family had done. (Ex. D121.)

(32) On March 3, 2008, Student returned to Ms. Dow's NovaNet class and began to talk about problems he/she was having with [] High School's administration. Ms. Dow believed that Student's conduct was disruptive and that he/she was not going to settle down so she asked Student to leave. After Ms. Dow discussed the situation with Student's mother, Ms. Dow believed that Student's mother supported Ms. Dow's decision. (Ex. D120 at 3.) The District began to explore other means of providing tutoring for Student. (Ex. D121.) On March 3, 2008 Ms. Gartland asked Ms. Stuck to add more hours of tutoring for Student. (Ex. D122 at 1.)

(33) On March 3, 2008, Student's mother called Ms. Gartland and informed her that the Parents were not going to share the behavioral assessment they had received. Student's mother also asked Ms. Gartland to proceed with the District's educational evaluation. (Ex. D122 at 1.) Ms. Gartland spoke with Student's mother about the educational evaluation. Student's mother stated that she felt the report the Parents had was not what the school needed and that she and Student's father were agreeing to allow the District to do behavioral testing. After speaking to Student's mother, Ms. Gartland sent an e-mail to Ms. Hanes asking her to start moving forward on testing Student. (Ex. D122 at 2.)

(34) Around March 4, 2008, Student sent a text message to another person that stated that he/she was so "pissed" that he/she could kill Mr. Green. The text was misdirected and actually received by a District employee. The District employee reported the message the next day. (Testimony of Mr. Green p1193; Exs. D123 at 3, D127 at 1.)

(35) The District referred the threatening text message matter for a Level 2 threat assessment. Mr. Whittier, a Willamette Educational Service District employee led the team that assessed the threat. The team determined that the level of potential for targeted violence

appeared low and the level of potential for affective/reactive physical aggression appeared low to moderate. (Ex. D127 at 1.) The team also gave recommendations for home and school.

(36) On March 11, 2008 the threat assessment team made recommendations, the most relevant are:

- a. For home, share information from Student's most recent behavioral evaluation with the District as it relates to past behavioral issues and successful interventions and programs.
- b. For home, sign consent to share and exchange information between District and any previous treatment programs in which Student was enrolled.
- c. For school to request a meeting with parents to discuss further behavioral evaluation and at that meeting, request consent for permission for school psychologist to evaluate Student.

(Ex. D127 at 5.)

(37) On March 5, 2008, Mr. Parker sent Parents a Prior Notice about Evaluation/Consent for Evaluation in the areas of behavior and autism. The notice explained that the team was proposing to reevaluate Student and listed the types of evaluations, tests, and other assessments that the District would use. (Ex. D171 at 1.) On April 16, 2008 Student's father signed the consent for evaluation. (Ex. D171 at 2.)

(38) In March 2008, Student's mother received a letter from her employer, stating that the division that she was working for was closing and her employment was ending. (Testimony of Student's mother p26; Ex. S11) Student's mother applied for other job openings at the employer. (Testimony of Student's mother p27.) Around June 13, 2008, Student's mother accepted a job with her employer that required that she move to Salt Lake City, Utah. (Ex. S12.) Around July 14, 2008, Student's mother began working in Salt Lake City, Utah and rented an apartment for herself. (Testimony Student's mother p29.) Student's father continued to live at the family residence in Dallas, Oregon. (Testimony of Student's father p147.) At the time, Student's mother believed the separation of the family members would be temporary until she could return to Dallas, Oregon. (Testimony of Student's mother p33.)

(39) In mid-March 2008, Ms. Gartland reviewed file and noticed it was incomplete. (Ex. D131.) Ms. Gartland saw an IEP from January 2004 and January 2005 from Plymouth Joint School District was in the file. She noticed that while Student had participated in a behavior program there was no indication of a past behavioral disability. (Ex. D226 at 1.) She called Plymouth Joint School District for more information. Ms. Gartland decided to hold another IEP meeting the second week of April to develop a transition plan to include behavioral goals for Student's return from expulsion. (Ex. D131.)

(40) On March 17, 2008, Ms. Gartland called Parents. On March 21, 2008 she sent a follow up letter to Parents that suggested setting up an IEP meeting to develop goals, supports, and resources for Students re-entry into a regular education program. Ms. Gartland also stated that it would be helpful to the District as they set up goals for Student to "have your ideas about what strategies have been effective in the past." (Ex. D132.)

(41) Dr. Senn completed a psychosexual evaluation of Student in March 2008. (Testimony of Dr. Senn p2299.) In his report, Dr Senn recommended that Student receive treatment from a qualified juvenile sex offender provider. (Testimony of Dr. Senn p2304; Ex. D218 at 10.) Parents did not share Dr. Senn's report with the District until September 14, 2008. (Ex. D242 at 1.)

(42) On March 31, 2008, the District sent Parents a Notice of IEP Team Meeting, scheduling a meeting for April 11, 2008. The Notice indicated that the meeting was to develop or review an IEP and placement for Student. The notice stated that Parents could call Sue Cacka if they could not attend the meeting or wished to discuss a different meeting time, or wished to participate through alternate means. The notice also stated that if Parents chose not to participate, the meeting might be conducted without them and asked them to provide information they wanted to be considered if they were not going to attend. The notice indicated Ms. Stuck was attending as a regular education teacher, Mr. Parker as a special education teacher, Ms. Hanes as the school psychologist, and Ms. Gartland as the special education director. (Ex. S46 at 18.)

(43) On April 2, 2008, Ms. Stuck e-mailed Ms. Gartland about Student. Ms. Stuck stated that Student was "very concerned" about returning to high school because he/she had received numerous threats from other high school students. (Ex. D133 at 1.)

(44) Due to the concerns about Student's behavior and Student's return to school from expulsion, Mr. Parker discussed Student's participation in classes and need for constant adult supervision with Ryan Opp, the New Options special education teacher, in early April 2008. (Testimony of Mr. Parker p1318; D133 at 1.)

(45) On April 8, 2008, Mr. Parker called Parents and spoke to Student's father about the upcoming IEP meeting. (Ex. D158 at 2.) Mr. Parker called Parents because Ms. Stuck had reported that Student said they would not be in town for the IEP team meeting. Student's father said the family was attending a wedding and could not participate in the IEP meeting on April 11, 2008. Mr. Parker and Student's father talked about meeting with the Parents on April 16, 2008 and going ahead with the IEP team meeting on April 11, 2008 without the Parents present. (Testimony of Mr. Parker p1322; p1412.)

(46) After the telephone call, Mr. Parker believed that he had the Parents' permission to hold the IEP meeting without the Parents and that they would discuss the IEP at the meeting on April 16, 2008. (Testimony of Mr. Parker p1322, p1412; Ex. D134 at 3.) Mr. Parker did not want to delay the IEP meeting because Student's return from expulsion was scheduled for April 16, 2008 and he believed that they were running out of time. (Testimony of Mr. Parker p1323.)

(47) On or about April 11, 2008 Mr. Parker created draft PLOPs and IEP behavioral goals with data and information from Ms. Hanes and District employees. (Testimony of Mr. Parker p1373.) Mr. Parker drafted additional language to be included in the IEP regarding Parents concerns based on his contacts with them in February and via the telephone. (Testimony of Mr. Parker p1324-2325.)

(48) The IEP team met on April 11, 2008. Parents did not attend. Ryan Opp, Yvette Nelson, Susan Gartland, Frank Parker, Judy Stuck, and Carmel Hanes were present for the meeting. (Ex. D135 at 1.) Ms. Gartland as the District's special education director who was

qualified to provide, or supervise the provision of, specially designed instruction, was knowledgeable about the general education curriculum, was knowledgeable about district resources, and was authorized to commit district resources and ensure that services set out in the IEP will be provided. The six special factor boxes describing specific reasons that a student might be having difficulty at school above the PLOP were not marked. (Ex. D135 at 2.) The IEP contained PLOP statements that said:

[Student] is a 16 year old freshman who was expelled for sexual misconduct and the expulsion ends on April 17, 2008. [Student] is a very social young [person] and for the most part makes friends relatively easily. [He/she] puts an effort in when attending regular classes and follows teacher's direction.

[Parents] are concerned that [Student] get the services [he/she] needs to get the best benefits from [his/her] education. The time out of school has not been productive educationally and they want to see [Student] earn credits and be as easily as possible reintegrated into the school setting. They have strong concerns about [Student] getting a quality education.

Currently, [Student] is being tutored in core subjects and participating, one on one, with a re[a]ding doing corrective reading. [Student] was in special education classes for math, language and language arts prior to [his/her] expulsion. [Student]'s most recent IQ places [him/her] with a full scale IQ of 83 (low average) while [his/her] verbal and perc[e]ptual scores are 91 and 90 respectively (average). [Student] qualified for special education under LD in basic writing skills. [He/she] is also low in reading at ap[pro]x. 4th grade level. These areas are particularly [a]ffected by [his/her] low average working memory and processing speed.

[Student] has a difficult time with the reading of * * * text books and following information given in class. Taking notes too would be difficult, particularly if given orally and not written on the board for [him/her] to copy. While out of school [his/her] regular classes were being done on Nova Net computer. [He/she] was not able to accomplish much on this medium. [He/she] went through the process but was not often able to demonstrate knowledge of the material just covered.

There have been several situations in school as well as out while [Student] was on expulsion that elicit[s] concern about [his/her] understanding of appropriate social behavior with * * * peers. Those concerns are to the level where further evaluation has been requested. [Parents] have agreed with that (sic) evaluation can take place. While that review is ongoing and there are concerns about [Student] earning credit this year, it would be best for [him/her] to be in a setting that has full time supervision and small group instruction where [s/he/she] can earn credit for work completed over the remainder of the school year. Small class sizes and direct instruction work best for [Student] to grasp meaning from instruction.

[Student] too has expressed some concerns about a return to a mainstream school environment. Those concerns [are] based on reported threats from high

school students [Student] sees in the community.” (Ex. D135 at 2-3.)

(49) The April 2008 IEP included annual goals and short-term objectives for Mathematics, Reading, Social Emotional, Written Language, Behavioral, and Sensory Motor. (Ex. D135 at 7-15.)

(50) The April 2008 IEP contained the following under the categories of measurable annual goals and related short term objectives:

(1) Mathematics Measurable Annual Goal: [Student] will understand numbers and ways of representing numbers, relationships among numbers and number systems by maintaining a C or above in current math class as measured by curriculum based measure and work sample.

Measurable Short Term Objectives:

(a) [Student] will apply the cumulative, associative, and identity problems of addition and multiplication.

(b) [Student] will develop and evaluate strategies for computing decimals and fractions.

(c) [Student] will recognize characteristics of odd, even, prime, and composite numbers. (Ex. D135 at 7.)

(2) Reading Measurable Annual Goal: [Student] will listen to and analyze words, recognize words, understand text, and learn to read grade level text fluently by maintaining a C or above in current reading class as measured by curriculum based measure and work sample.

Measurable Short Term Objectives:

(a) [Student] will complete comprehension questions with 80% accuracy.

(b) [Student] will improve reading from current 4.4 ge to 5.4 ge by October 2008. (Ex. D135 at 8.)

(3) Social Emotional Measurable Annual Goal: [Student] will use age appropriate social-sexual behavior at all times as measured by teacher and staff observation with 100% accuracy as measured by formal observation and informal assessment. (Ex. D135 at 9.)

(4) Social Emotional Measurable Annual Goal: [Student] will make appropriate decisions on a daily basis with 100% frequency as measured by: (teacher observation, checklist, anecdotal records, behavioral checklist, self-evaluation, etc.) with 100% accuracy as measured by informal assessment, see goal. (Ex. D135 at 10.)

(5) Written Language Measurable Annual Goal: [Student] will pre-write, draft, revise and edit papers by demonstrating the knowledge of spelling, grammar, punctuation and capitalization with increase [in] length of utterance to protest/refuse as measured by curriculum based measure and work sample.

Measurable Short Term Objectives:

(a) [Student] will correctly use regular and irregular verbs, adverbs and

prepositions.

(b) [Student] will write a three paragraph paper with topic, simple supporting facts and details, and a conclusion. (Ex. D135 at 11.)

(6) Behavioral Measurable Annual Goal: [Student] will follow directions the first time with 100% accuracy in 8 of 10 attempts of objective 1, with 100% accuracy in 8 of 10 attempts of objective 2, within 30 school days of completion of objective 1, as measured by daily tracking sheets.

Measurable Short Term Objectives:

(a) When given a direction, [Student] will comply within 60 seconds, including a quiet individual reminder.

(b) When given a direction, [Student] will comply within 30 seconds, including a quiet individual reminder.

(c) When given a direction, [Student] will comply within 30 seconds.

(d) When given a direction, [Student] will acknowledge the direction and comply immediately. (Ex. D135 at 12.)

(7) Behavioral Measurable Annual Goal: [Student] will accept responsibility for [his/her] behavior by identifying [his/her] role in negative interactions and identifying alternative behaviors leading up to the negative interaction with 100% accuracy in 8 of 10 attempts of objective 1, with 100% accuracy in 8 of 10 attempts of objective 2, within 30 school days of completion of objective 1, as measured by daily tracking sheets.

Measurable Short Term Objectives:

(a) When confronted about a behavior, [Student] will listen to the staff/peer without interruption.

(b) When confronted about a behavior, [Student] will listen to the staff/peer without interruption and acknowledge that [he/she] understands the experience of the staff/peer.

(c) When confronted about a behavior, [Student] will listen to the staff/peer without interruption, acknowledge that [he/she] understands the experience of the staff/peer, and re-state the staff/peer's experience of the behavior.

(d) When confronted about a behavior, [Student] will listen to the staff/peer without interruption, acknowledge that [he/she] understands the experience of the other person, and identify where or how [he/she] could have made the experience positive or neutral.

(e) When confronted about a behavior, [Student] will listen to the staff/peer without interruption, acknowledge that [he/she] understands the experience of the other person, and identify where or how [he/she] could have made the experience positive or neutral, and make amends or commitments to change the behavior if a similar situation arises. (Ex. D135 at 13-14.)

(8) Sensory Motor Measurable Annual Goal: [Student] will complete two interest surveys before November 1, 2008. From those and personal feelings [Student] will establish an area of interest for a future career plan and course of study at DHS. (Ex.

D135 at 15.)

(51) The April 2008 IEP provided for specially designed instruction of small group special instruction reading writing and math on a daily basis within the school schedule accounting for about 40% of the day in a special education classroom. The IEP also provided for specially designed behavioral instruction around social interaction with opposite sex on a daily basis with a counselor when available and as school schedule allowed in a special education classroom. (Ex. D135 at 16.)

(52) The IEP team agreed that the self-contained classroom at New Options Program was the most appropriate place for Student. The team planned to place Student at New Options once the intake into the program was completed. (Ex. D135 at 17.) Mr. Parker and the IEP completed the team meeting and completed an IEP for Student, which was signed by all of the team members present on April 11, 2008. There were not further plans made for another IEP team meeting because Mr. Parker believed the IEP generated was completed and fulfilled District's obligations under the IDEIA. (Testimony of Mr. Parker p1352.)

(53) On April 16, 2008, Mr. Parker, Mr. Opp, and Ms. Nelson met with Student's father to discuss the April 11, 2008 IEP. (Testimony of Mr. Opp p608) During the meeting, they discussed the New Options placement and what the program would involve. (Testimony of Mr. Parker p1324.) Student's father brought a signed copy of the March 5, 2008 request for consent to evaluate Student to the meeting and gave it to Mr. Parker. (Testimony of Mr. Parker p1323.) Based on the meeting, Mr. Parker believed that the main concern expressed by Student's father was that Student begins attending New Options on April 17, 2008 and not at a later date. (Testimony of Mr. Parker p1328.) Mr. Parker addressed that concern by making sure Student began attending New Options on April 17, 2008. Mr. Parker believed placing Student at New Options met the Student's need for a structured behavior plan. (Testimony of Mr. Parker p1379.)

(54) There were 10 to 12 students in the New Options program during the period that Student attended. (Testimony of Mr. Opp p629.) New Options Staff used tracking sheets to monitor each student's behavior throughout the day on classroom rules which addressed safety, respect, responsibility, and cooperation. (Ex. D161 at 17.) For Student, the tracking sheets were geared towards Student's behavior and social emotional goals, and how well he/she met the classroom rules and IEP goals. (Testimony of Mr. Opp p619; Ms. Nelson p1622.) Each student in the New Options program including Student were given a daily and weekly goal usually related to their IEP goals. (Testimony of Ms. Nelson p1620-1621.)

(55) Around May 13, 2008, the tracking sheets for all of the students were changed from a one sided sheet to a two sided sheet. The tracking sheet listed IEP goals and notes about the daily attempts of those goals. (Ex. D161 at 17.) Student's new tracking sheets contained the two behavioral goals from the April 2008 IEP and one additional goal of "The student will respect personal boundaries at all times." (Ex. D161 at 18.)

(56) Mr. Opp believed Student was doing well in the New Options program. Mr. Opp, Ms. Montella Smith, and Ms. Nelson used redirection throughout the day to inform the students in the classroom their behavior was unacceptable and that the behavior needed to stop. When a student's behavior was serious enough to raise the "hair on the back of [their] necks" about the student's issues and disabilities, the behavior was considered an incident and was reported to Mr. Beck for appropriate discipline. (Testimony of Mr. Opp p629-631.)

(57) Except for one sexualized behavior incident in May 2008, Mr. Opp believed Student was usually redirected for typical teenage student issues. (Testimony of Mr. Opp p631.) On May 19, 2008, Female Student 4 told Mr. Opp that Student was making sexually inappropriate questions and comments to her when none of the staff was around. (Ex. D161 at 22-23.) The staff reported the behavior to Mr. Beck. (Testimony of Mr. Opp p627.)

(58) Mr. Beck interviewed the Female Student 4 who reported that since May 9, 2008 Student had been asking her questions about her underwear. She also said that starting around May 12, 2008, Student had begun to ask her questions of a sexual nature. Mr. Beck interviewed Student who denied most of the allegations but did admit telling Female Student 4 if Student observed that Female Student 4's underwear was showing. (Ex. D168; Testimony of Mr. Beck p1553.) Mr. Opp believed Student was very cooperative with the investigation and, as a result Student was given a minor consequence for the incident. Student had to sit near the teacher, and was instructed not to have contact with Female Student 4. (Testimony of Mr. Opp p630; Ex. D161 at 25.)

(59) Mr. Opp believed Student did really well at New Options because even though he/she had problems with peer relations, he/she was connected to the program and felt safe. (Testimony of Mr. Opp p634.) When Student used an aggressive, bossy tone with other students, Mr. Opp and the staff at New Options worked to help Student recognize problems with his/her tone of voice. Mr. Opp believed that Student was beginning to recognize problems with his/her tone after the help from the staff. (Testimony of Mr. Opp p635.) On a daily basis, the staff at New Options provided Student some instruction in Language Arts, Math, and Writing. (Ex. D161 at 19.)

(60) New Options issued grades eight times a year covering periods of five weeks each. (Testimony of Mr. Opp p623.) For the period ending May 9, 2008, Student earned a B in Language Arts; a C in Math; a B in Writing; a B in Personal Finance; and a B in Health/Communication. (Ex. D170 at 2.) For the period ending June 3, 2008, Student earned a B in Language Arts; a B in Math; a B in Writing; an A in Personal Finance; and a B in Health/Communication. (Ex. D170 at 2.) Student made significant strides on his/her academic studies and was proud of his/her work. (Testimony of Mr. Opp p635.)

(61) On April 18, 2008, Ms. Hanes began Student's behavior evaluation, that had been discussed in the February 2008 IEP meeting, by sending out behavior checklists to Student's teachers and Parents. (Exs.D207 at 11; D190 at 3.)

(62) The period of April 17, 2008 through the end of the 2007/2008 school year gave Mr. Opp enough time to feel that he had a good sense of Students' behavioral needs in the classroom. (Testimony of Mr. Opp p655.) Mr. Opp believed that the pending evaluations would give him more information about how to assess Student's behavioral needs. (Testimony of Mr. Opp p656.) Based on his training and experience, Mr. Opp looked for a pattern of concerning or inappropriate behavior, i.e. three similar incidents, before he had a functional behavioral assessment (FBA) done. (Testimony of Mr. Opp p613.) Mr. Opp did not believe that Student's behaviors at New Options were such that he/she needed to have a FBA performed or a separate behavioral support plan created. (Testimony of Mr. Opp p666.)

(63) To build social skills and peer relationships, it is important for students to be able to participate in public interactions and then for the students to process their interactions with

counselors, teachers, and staff. The New Options Program was designed to implement these concepts. (Testimony of Mr. Opp p660.)

(64) In May 2008, Parents began to look at private schools for Student to attend. (Testimony of Student's father p732.) During their search, Parents reviewed information about many schools and visited a few places. (Testimony of Student's father p523-524.)

(65) On May 21, 2008, Mr. Parker gave Student's father several forms to sign including an authorization to disclose information from Student's counselor to aid in the District's behavior and autism evaluations. (Ex. D231 at 5.)

(66) In May 2008, Ms. Hanes asked Parents to sign the consent forms that Mr. Parker had given them. (Exs.D207 at 11; D190 at 3.) On June 11, 2008, Student's father refused to allow Ms. Hanes to have access to any information from Student's counselor that would be passed onto the Dallas School District. (Ex. D190 at 3.) Student's father did not inform Ms. Hanes that he was refusing to consent because he was afraid the information would not remain privileged and confidential. (Testimony of Student's father p581; Ex. S50 at 6.)

(67) On May 22, 2008, Mr. Parker sent Parents a Notice of IEP Team Meeting scheduling a team meeting for June 4, 2008. The Notice indicated that the meeting was to develop or review exiting information about Student and to develop or review an IEP and placement for Student. The Notice stated that Parents could call Frank Parker if they could not attend the meeting or wished to discuss a different meeting time, or wished to participate through alternate means. The Notice also stated that if the Parents chose not to participate, the meeting might be conducted without them and asked them to provide information they wanted to be considered if they were not going to attend. The notice indicated Mr. Opp would be attending as a special education teacher, Mr. Parker as a special education teacher, Mr. Beck as an administrator, Mr. Brown as a specialist to explain what Polk Adolescent Day Treatment Center (PADTC) offered, Ms. Hanes as the school psychologist, and Ms. Gartland as the District Representative. (Ex. D222.)

(68) Mr. Parker scheduled the meeting so that the team could discuss evaluations, eligibilities, and placement for the fall. (Testimony of Mr. Parker p1331; Ex. D224 at 1.)

(69) On June 4, 2008, the IEP team met. Student, Mr. Sorensen, Mr. Opp, Ms. Nelson, Ms. Gartland, Ms. Montella Smith, Mr. Parker, Mr. Beck, Ms. Schmidt-Powell, Ms. Hanes, and Student's father were present for the meeting. (Ex. D224 at 1.)

(70) During the meeting, Student's father explained that he had consulted with a mental health therapist and legal counsel and had some concerns about the IEP which he had noted on his copy of the April 11, 2008 IEP. He raised those concerns at the June 4, 2008 IEP team meeting. (Testimony of Student's father p564.) Student's father explained his concerns to the rest of the team. (Testimony of Student's father p564; Ex. D224 at 1.) Ms. Hanes prepared a summary of her findings to date that the team reviewed at the meeting. (Ex. D224 at 3.) Ms. Schmidt-Powell and Mr. Sorensen informed the team that their evaluations were in progress and not yet complete. (Ex. D224 at 1-3.)

(71) Mr. Opp described the issues with peer relations that Student was having and explained that Student was making good progress at New Options. (Ex. D224 at 1-2.) The team discussed three options including full placement at New Options, Partial placement at New

Options, or placement at PADTC. (Ex. D224 at 1.) The team agreed that the evaluations were not complete and they needed to meet again in late September when the evaluations were complete to make a final decision about eligibilities and placement. (Testimony of Mr. Parker p1333, Testimony of Student's father p733; Ex. D224 at 1.) The team informed Student's father that a medical statement was needed for Student to be determined eligible in the category of emotional disturbed and/or autistic. (Ex. D190 at 3.)

(72) At the end of the meeting, Mr. Parker believed that the team, including Student's father, had agreed they would make no changes in Student's placement at New Options until they met in the fall. (Testimony of Mr. Parker p1333.) Student's father did not inform the team that Parents were considering private schools for Student to attend in the fall. (Testimony of Student's Father p733.)

(73) On June 5, 2008, Student's father called Ms. Gartland. Student's father asked about extended year services for Student. Ms. Gartland explained the formula they used to determine services. Ms. Gartland also explained that the District might be able to be creative and gave examples. Student's father also mentioned that Student did not want to attend [] High School and was wondering if Student could attend West Salem High School. Ms. Gartland explained the process for and the difficulty with interdistrict transfers. She then stated that she had talked to Mr. Opp and Ms. Carroll about beginning Student in Ms. Carroll's reading class at [] High School at the beginning of the year because it was a great class. Ms. Gartland also said that she would be happy to meet with Student to discuss the plan for next year and asked Student's father to have Student call her. (Ex. D225.)

(74) On August 5, 2008, Parents sent a letter to Ms. Garland advising her that Ms. Mary Broadhurst, Attorney at Law, was representing Student and Parents regarding Student's educational needs. The letter also directed Ms. Gartland to release all records regarding Student to Ms. Broadhurst. (Ex. D227.)

(75) By August 5, 2008, Student's father had decided the best place for Student to get an appropriate education was Provo Canyon School. (Testimony of Student's father p685.)

(76) On August 12, 2008, Ms. Gartland sent a letter to Parents acknowledging that she had received their request to provide a copy of Student's file to Ms. Broadhurst. Ms. Garland also suggested that they schedule an IEP team meeting to review and to possibly revise Student's IEP. She suggested that they meet on August 27 or 28, 2008. (Ex. D228.)

(77) On August 13, 2008, Parents delivered to Ms. Gartland and Ms. Perry a letter explaining that they were rejecting the proposed IEP of June 4, 2008 and placement of Student at New Options. In the letter, Parents requested that the District pay for Student's education at Provo Canyon School. Parents cited their belief that there was poor coordination of feedback among the staff at New Options, that New Options was not the least restrictive educational setting, and that Student was had been denied privileges that Student had earned. Parents also described that they perceived problems with the District's processes as an attempt to delay Student's return to the school after his/her expulsion ended on April 17, 2008. Parents alleged that the District's attempted delay had a negative psychological impact on Student. Parents expressed dissatisfaction with the services provided to Student during his/her suspension and expulsion. The Parents also explained in some detail the problems and contradictions they saw in Student's April and June 2008 IEPs. The letter concluded with the parents expressing their

concerns about the behavior of some of the administrators at [] High School and their concerns about a perceived breach of confidentiality by Mr. Hurt. The Parents did not request that the District schedule an IEP meeting. (Ex. D1 at 26-37.)

(78) On August 18, 2008, Student signed a Petition Admitting Allegations that Youth was Within the Jurisdiction of the Juvenile Court. In Section 10 of the Petition, Student admitted touching Female Student 1. In Section 9 of the Petition, Student agreed that “per stipulated plea, disposition will be withheld for one year; I will enter Provo Canyon School for a minimum of one year or until I complete sex offender treatment as recommended by Dr Senn.” (Ex. D316.)

(79) On October 23, 2008, Circuit Court Judge Luukinen signed a judgment of jurisdiction. The judgment stated that if Student completed the informal disposition, the Polk County Juvenile Department agreed to dismiss the petition and if he/she does not complete the informal disposition, the Court would proceed with formal disposition of the petition. The informal disposition listed the same conditions listed in Section 9 of the Petition. (Ex. D315.)

(80) On August 20, 2008, Ms. Gartland sent Parents a notice of IEP Team Meeting scheduling a team meeting for August 27, 2008. The notice indicated that the meeting was to review exiting information about Student, to decide whether additional testing was needed, to develop or review an IEP and placement for Student, and to consider Student’s transition needs or services. The notice stated that Parents could call Susan Gartland if they could not attend the meeting or wished to discuss a different meeting time, or wished to participate through alternate means. The notice also stated that if Parents chose not to participate, the meeting might be conducted without them and asked them to provide information they wanted to be considered if they were not going to attend. The notice indicated Mr. Opp, Mr. Parker, and Ms. Carroll were attending as special education teachers, Ms. Hanes as the school psychologist, Mr. Beck as an administrator, Ms. Gartland as the special education director, Mr. Dakopolos as the District’s attorney, Ms. Anderson as the note taker, and Ms. Broadhurst as Parents’ attorney. (Ex. D229.)

(81) The meeting was delayed because Parents were unable to meet on August 27, 2008. The District was not informed of the reasons that Parents were not able to meet on the agreed upon date. (Ex. D231 at 3.)

(82) Around August 28, 2008, Mr. Sorensen, an autism specialist, spoke to Student’s father about completing the parent interview section of a form for the autism evaluation. Student’s father informed Mr. Sorensen that the only time Student could be interviewed for the evaluation was on the upcoming Saturday or Sunday. (Ex. D233.)

(83) Student attended Provo Canyon School, a private school in Provo, Utah, from September 1, 2008 through August 21, 2009. (Testimony of Student’s mother p32-33) Between September 1, 2008 and August 21, 2009, Student returned to Oregon for one occasion. Student returned for the Memorial Day weekend 2009 to visit the Oregon National Youth Guard orientation in Bend, Oregon. (Testimony of Student’s father p150.)

(84) On September 5, 2008 Ms. Gartland sent Parents a notice of IEP Team Meeting scheduling a team meeting for September 18, 2008. The notice indicated the meeting was to review exiting information about Student, decide whether additional testing was needed, develop or review an IEP and placement for Student, and consider Student’s transition needs or services. The notice stated that the Parents could call Susan Gartland if they could not attend the meeting,

wished to discuss a different meeting time, or wished to participate through alternate means. The notice also stated that if the Parents chose not to participate, the meeting might be conducted without them and asked them to provide information they wanted to be considered if they were not going to attend. The notice indicated Mr. Opp, Mr. Parker, and Ms. Carroll were attending as special education teachers, Ms. Hanes as the school psychologist, Mr. Sorensen as the autism specialist, Ms. Schmidt as the speech language specialist, Mr. Beck as an administrator, Ms. Gartland as the special education director, Mr. Dakopolos as the District's attorney, Ms. Anderson as the note taker, and Ms. Broadhurst as Parent's attorney. (Ex. D239.)

(85) On September 14, 2008, Ms. Broadhurst provided Dr. Senn's psychological evaluation, Mr. Mac Kendrick's counseling notes (Student's counselor after the October 2007 sexualized behavior incident), and Dr. Chandragiris' records to the District (Student's psychiatrist for the summer of 2008). (Ex. D242 at 1.) Dr. Senn discussed treatment resources with Mr. Robison. Provo Canyon School was part of the discussion. Dr. Senn was impressed with the packet of information and description of the school facilities. (Testimony of Dr. Senn p2300.) When he looked at sex offender treatment, Dr. Senn believed that Provo Canyon School was a program that dealt with a child's sexual battery needs, emotional needs, and educational needs. (Testimony of Dr. Senn p2302.) Dr. Senn's report recommended that Student participate in sex offender treatment but did not specifically recommend or reject the possibility of Student attending Provo Canyon School. (Testimony of Dr. Senn p2304.)

(86) The IEP team met on September 18, 2008 to discuss Student's eligibility, the IEP, and options for a placement determination. Parents, Ms. Broadhurst, Mr. Parker, Mr. Opp, Ms. Carroll, Ms. Hanes, Mr. Sorensen, Ms. Schmidt-Powell, Mr. Beck, Ms. Gartland, and Mr. Dakopolos participated in the team meeting. (Ex. D247 at 1.) During the meeting, Mr. Sorensen presented his autism evaluation and Ms. Schmidt-Powell presented her communications evaluation. The team discussed the evaluation and their observations of signs, or the lack of signs, of autistic behavior in Student. The team determined that Student did not exhibit any sensory difficulties and did not qualify as eligible under the autism spectrum. (Exs. D246; D247 at 1-2.) Ms. Hanes then presented her evaluation of Student for behavioral problems. The team discussed the evaluation and [their observations of signs of problem behavior in Student]. (Ex. D247 at 2-5.) Ms. Hanes informed the team that a medical statement is required for a finding that a student is eligible under an Emotional Disturbance eligibility determination. The team agreed to meet to work on an IEP and discuss further eligibility on September 26, 2008. Ms. Broadhurst agreed that Ms. Schmidt-Powell and Mr. Sorensen did not need to attend the IEP meeting. (Ex. D248 at 5.)

(87) On September 22, 2008, the District mailed Parents a copy of a draft IEP and a notice of IEP Team Meeting scheduling a team meeting for September 26, 2008. The notice indicated that the meeting was to review exiting information about Student, decide whether Student was eligible or continued to be eligible for special education, to develop or review an IEP and placement for Student, and to consider Student's transition needs or services. The notice stated that the Parents could call Susan Gartland if they could not attend the meeting, wished to discuss a different meeting time, or wished to participate through alternate means. The notice also stated that if Parents chose not to participate, the meeting might be conducted without them and asked them to provide information they wanted to be considered if they were not going to attend. The notice indicated Mr. Opp, Mr. Parker, and Ms. Carroll were attending as special education teachers, Ms. Hanes as the school psychologist, Mr. Beck as an administrator, Ms. Gartland as the special education director, Mr. Dakopolos as the District's attorney, Ms.

(88) The team met on September 26, 2008. Student's father, Ms. Broadhurst, Mr. Parker, Mr. Opp, Ms. Carroll, Ms. Hanes, Mr. Beck, Ms. Gartland, and Mr. Dakopolos participated in the team meeting. (Ex. D249 at 1.) The team continued to discuss what behaviors they observed and whether the behaviors were consistent with a determination that Student would be eligible as emotionally disturbed. The District team members and Student's father agreed that Student was eligible for services as Emotionally Disturbed. (Testimony of Student's father p746; Ex. D249 at 2.) All of the District team members signed the statement of eligibility for special education for Emotional Disturbance after Parents agreed to provide a medical statement. (Ex. D245 at 3.)

(89) The team then began to discuss and modify the draft IEP. Ms. Carroll and Mr. Opp provided information about Student's writing ability and need for assistance. The team discussed Student's lack of credits, the number of credits needed to graduate, and options available to allow Student to make up credits and to graduate on time. The District team members agreed that there had been an error on the transcript that would be corrected. (Ex. D249 at 2.) The team continued to discuss the draft IEP and make agreed-upon changes. Ms. Broadhurst expressed concerns about having a clear level of skills listed in the IEP goals and Ms. Gartland agreed the District would work to make it clear to show objective present level of performance. (Ex. D249 at 4.) The team agreed that the District would make the corrections to the IEP that had been discussed at the meeting. The team also agreed to meet again on October 6, 2008 at 10:30 a.m. (Ex. D249 at 6.)

(90) The IEP team met on October 6, 2008. Student's father, Ms. Broadhurst, Mr. Parker, Mr. Opp, Ms. Carroll, Ms. Hanes, Mr. Beck, Ms. Gartland, and Mr. Dakopolos participated in the team meeting. (Ex. D251 at 1.) Ms. Gartland clarified that Mr. Opp is a regular education teacher and would be listed as such on the IEP. (Ex. D251 at 2.) The team then discussed the PLOPs, goals, and service summary. The team members clarified how the goals had been determined, and how the goals would be met, and then discussed the service summary. (Ex. D251 at 2-3.)

(91) The District then had Mr. Brown describe the PADTC program as a placement option for Student. Mr. Brown answered team member questions about student-to-teacher ratio, current student makeup, treatment of students with sexualized behavior in the program, and the transition of students back to their schools or another program. (Ex. D251 at 3-7.) Mr. Opp described the New Options program and answered team member's questions. The team discussed the benefits and drawbacks of day treatment versus a residential program. Ms. Levicki, the admissions coordinator from Provo Canyon participated in the meeting by telephone. Ms. Levicki described the program to team members and answered questions with descriptions of the general program. (Ex. D251 at 8-9.) Student's father agreed to arrange a meeting with Student's therapist at Provo Canyon to hear about Student's specific program. The team agreed to meet again on October 10, 2008 at 9:00 a.m. (Ex. D251 at 9.)

(92) The team met on October 10, 2008. Student's father, Ms. Broadhurst, Mr. Parker, Mr. Opp, Ms. Carroll, Ms. Hanes, Mr. Beck, Ms. Gartland, and Mr. Dakopolos participated in the team meeting. Copies of a revised IEP were provided to the team. (Ex. D254 at 1.) A medical statement regarding or from was provided to the team. (Ex. D253.)

(93) Mr. Barton, Student's primary therapist, and Mr. Taylor, Provo Canyon's special education director and therapist, provided information, over the telephone, about Student's program at Provo Canyon to the team. (Ex. D254 at 1.) Mr. Taylor is a licensed marriage and family counselor in Utah and performed a psychosocial assessment on Student when Student arrived at Provo Canyon. (Testimony of Mr. Taylor p1821-1822.) Mr. Barton stated that Student was taking classes in general math, physical education, and earth science but later indicated that Student was also taking English, keyboarding, and world history. (Ex. D254.) Mr. Barton stated that Student also attended a couple of resource classes. (Ex. D254 at 2-3.) Mr. Barton stated that he believed Student benefited from a learning environment with one-to-one learning and that his program was addressing Student's learning disability in reading, writing, and math. (Ex. D254 at 9.) Mr. Taylor informed the group that Student attended 45 to 60 minute individual counseling session a week and he/she also attended group therapy on

boundaries, relating to others, communication skills and conflict options. When asked if Student was getting accommodations of extra time and help, Mr. Taylor indicated that the school would build-in resources to address those concerns. When asked how reading was going for Student, Mr. Taylor stated that Student was doing a fair amount of reading and if a student was struggling they could receive help from teachers and handouts. (Ex. D254 at 3-4.) No specific data was given on how the school measured Student's PLOP in the identified areas of learning disability or other identified areas of need at the time Student began attending the school.

(94) Mr. Barton informed the group of Student's progress in the time he/she had been at Provo Canyon. In response to a question, Mr. Barton explained Student's treatment plan to address sexualized behavior. (Ex. D254 at 1-2.) Mr. Barton described Student's lunch break and admitted that staff was unable to witness whispering until it escalated. Mr. Barton also admitted that Student had been involved in incidents during lunch time. Mr. Taylor described the typical student at Provo Canyon as having a range of disorders including conduct disorder, defiance, mood disturbance, depression, bipolar, attention deficit hyperactivity disorder, learning disorder, and substance abuse. He also explained that 70 to 80 percent of students at Provo Canyon had been on an IEP at the time they were admitted to the school. (Ex. D254 at 3-4.) Mr. Taylor told the team that students were given individual evaluations for academic abilities and were then placed at the appropriate educational level, according to their transcripts and need to catch up on credits.

(95) The team members discussed the placement options for Student. Mr. Opp clarified that the District would be able to offer Student a full day of school. The members discussed Student's sexualized behavior at New Options and the District's response. (Ex. D254 at 6-7.) The District administrator stated that the District had worked with juvenile sex offenders in the past and that it provides space in the building to meet those students' needs. (Ex. D254 at 8.) The team discussed sex offender treatment for Student and which placement offered the appropriate program. (Ex. D254 at 8.) Ms. Gartland indicated that the IDEIA mandate was to consider the least restrictive environment. Mr. Parker, Mr. Opp, Ms. Hanes, and Ms. Carroll agreed that New Options was the appropriate placement for Student (Ex. D254 at 8.) Ms. Broadhurst informed the team that Student's family was rejecting New Options because of Student's risk of being expelled for his/her behaviors and because they did not feel it met Student's needs at that time. Ms. Gartland clarified that the District would conduct any future manifestation meetings with the current eligibility information. (Ex. D254 at 9.)

(96) Student's father raised the issue regarding the incomplete records from Wisconsin. Mr. Dakopolos stated that he did not see that discussion as productive. Mr. Dakopolos stated that Student was currently identified as Emotionally Disturbed and that he believed Student was not at any greater risk to re-offend at a District school than at Provo Canyon. The meeting was then adjourned and no additional meetings were scheduled. (Ex. D254. at 9.)

(97) The October 10, 2008 IEP was signed by Ryan Opp as the regular education teacher, Mr. Beck as other, Mr. Parker as the case manager, Ms. Hanes as the individual interpreting evaluations, Ms. Gartland as the District representative, and Ms. Carroll as the special education teacher. (Ex. D252 at 1.) Box "C" of the special factor boxes above the PLOP was marked "Yes." indicating that Student's exhibited behavior impeded his/her learning or the learning of others. (Ex. D252 at 2.) The IEP contained PLOP statements that said:

[Student] is currently 16 and a sophomore. September 2008 [he/she] was

unilaterally placed by [his/her] parents at Provo Canyon School in Utah.

Strengths: [Student], according to a self-report of attitudes and perceptions reports positive perceptions of his/her ability to do well in the school environment, to get along positively with peers and adults, manage school tasks, and pay attention and complete work that is required. [He/she] reports little anxiety or depression appears to feel [he/she] has control over how things go in her/his life, believe [him/herself] to be capable of solving problems and making decisions, believes [him/herself] to be a dependable person. [He/she] indicated an interest in joining the military or being a police officer in the future.

The two teachers who had [Student] briefly at the beginning of the last year did not report many problems other than [his/her] learning issues and difficulty staying focused in the regular classroom. The high school special education teacher reported that [Student] was likeable and cooperative in class but had a serious learning disability. [He/she] is considered, for the most part, a likeable young [person] who tends to do well in classes that are well structured and allow for [his/her] achievement level.

Parents reported that [Student] shows an interest in a variety of things (fishing, hunting, sports, swimming, canoeing and cooking). [He/she] was described as very social, considers everyone [his/her] friend but has only had about three closer friends. [He/she] tends to complain of being “picked on” and does not feel accepted by others yet participated somewhat successfully on a baseball team in 8th grade and enjoys being a part of a team. [He/she] enjoys socializing with others but can talk too much and give too much information. [He/she] has reported improved in his/her ability to talk about things that bother him/her although it may take probing from others. At times [he/she] needs time to process something that has happened before being ready to share with others.

Concerns of the parents: [Student]’s parents are concerned that over the past year [Student]’s educational needs have not been met by the IEP. Their fear is that [Student] will not reach minimum standards to graduate from high school and thus will be hindered in [his/her] work and life beyond high school. At this time [he/she] is a sophomore who is deficient in credits. [He/she] expected graduation class needs 26 credits for graduation on a regular DHS diploma track. [Student] will need all 7 credits per year plus extra 2 credits through summer work or other option for credit recovery. As an IEP student [he/she] is also able to access [his/her] education until age 21. A modified diploma should be considered as an alternative. This decision must be made this year.

Current eligibilities: [Student] has been qualified for special education services under Oregon eligibility in the category of Learning Disabled since October 2006. In April 17, 2008 the District was granted permission to pursue additional assessments in the areas of Autism Spectrum Disorder and Emotional Disturbance. Both evaluations were in process when [Student] was removed from the District. Although the assessments were not fully completed the specialists felt confident that the information would be adequate to present findings to the team.

September 18, 2008 the team determined that [Student] does not qualify for special education with the eligibility of Autism Spectrum Disorder. September 26, 2008 the team determined that [Student] was found to qualify under the category of Emotional Disturbance pending the results of a Medical Statement.

Current levels of academic performance: [Student]'s last Full Scale IQ score (9/12/2008) was in the low range at FS (83). [His/her] Verbal Comprehension score was 91, Perceptual Reasoning score was 90, Working Memory score was 80 and Processing Speed score was 83. In the areas of relative weakness, Working Memory is a measure of a person's working memory abilities involving attention, concentration, mental control and reasoning. Processing Speed measures a person's ability to quickly and correctly scan, sequence, or discriminate simple visual information.

The Woodcock Johnson II – Test of Achievement assessment was provided by Provo Canyon School dated 9/11/2008. Please note that although [Student] is a sophomore, the Standard Scores are compared to a student who is a 11th grader. The Broad Reading was scored at the 3.9 grade level (SS68). This combination of subtests measures a student's ability to decode and comprehend reading. [Student] scored at the 4.2 grade level (SS72) in comprehension. This result is similar to where [he/she] was last year and levels reported by observation from [his/her] Corrective Reading teacher spring of 2008. A student at this level would benefit from a directed reading program either one on one or small group presentation.

Math scores were at 4.6 grade level (SS67). This score measures a student's ability to apply skills and the fluency with which you use math. [Student] scored higher in [his/her] ability to apply [his/her] learning in math. That score was at 5.1 grade level (SS79). Students typically at this level can use the basic math operations, addition, subtraction, multiplication and division. They will also be familiar with fractions and decimals. They struggle with putting this material together to solve day-to-day (functional) math. At [his/her] chronological age use of calculator would significantly ease the frustrations of not having strong fluency, which scored at 2.9 grade level. Fluency is the ability to use math facts quickly and correctly. Drill and practice would not be useful as an instructional technique.

Written language scores were at the 3.8 grade level (SS65). This score is misleading to some degree. It is a combination score and includes spelling and writing samples, both of which are weak at the 2.6 (SS54) and 2.3 grade levels (SS57) respectively. [His/her] writing fluency, which measure [his/her] ability to quickly write and respond in short simple sentences, was at the 6.6 grade level, (SS87) strength on this test. [Student's] scoring at these levels in combination typically knows sentences and paragraphs and [is] working on spelling rules and longer writings. Rereading and correcting writing is in process. Writing skills tend to follow behind reading skills and as reading and vocabulary improve so does writing.

Present Level of developmental and functional performance: During the

2006-2007 school year [Student] had a total of nine behavioral referrals. This included one incident of fighting, an incident of hitting, five incidence that included disruption, insubordination (2) and inappropriate behavior (2). March 2007 [Student] was expelled for a period of one year for bringing a weapon to school. Provision was made for an early return.

[Student] entered [] High School last year as a 15 year old freshman. October 4, 2007 [he/she] was found in possession of tobacco with a two day suspension. October 16, 2007 the original expulsion was reinstated due to an incident for harassment. [Student] was provided tutoring services from approximately mid-October to mid-April. During that time [he/she] was provided 5 hours per week of tutorial services on NovaNet, a computer-assisted instruction with a licensed teacher for general content. [He/she] additionally was provided three hours per week individualized instruction in the areas of math and reading.

[Student] presented some behavioral concerns during [his/her] period of expulsion including inappropriate behavior, inappropriate talk and three harassment complaints (12/13/07; 2/2/08; and 2/11/08). On April 17, 2008 [Student] returned to high school in the New Options program.

Concerns about behavioral issues due to incidents over the last year lead the IEP team to consider placement in the New Options program which is specifically designed for students needing behavioral support. [He/she] appeared to do well and make progress in the structured program with small group instruction as evidenced by increases in rewards levels and behavior progress taken daily.

According to staff, [he/she] acted at times, before [he/she] though of possible consequences and did not consider what harm the behavior might inflict on others or the consequences of those behaviors. At times, it appeared [he/she] did not “get” appropriate social interactions within the educational environment that has a high degree of social interaction. [Student] appeared to benefit from feedback and redirection with a counselor’s input. Reinforcement of on-task behavior was also important. In order to limit inappropriate behavior, close supervision of [Student] proved necessary particularly as it relates to what could be considered “free” time i.e., lunch, passing times and before and after school.

Specifically, Mr. Opp reports that during [his/her] time in New Options [Student] was able to comply with direction within 30 seconds when given a reminder. [He/she] was working on taking direction without a reminder. [He/she] had also made progress with [his/her] ability to identify [his/her] role in interactions and how to react to input. [He/she] was able to listen to staff and peer w/o interruption but was still working on the acknowledgment of that input.

When given opportunities to show [his/her] ability to understand and respect the perspective of others in social situations [Student] was successful 41% of those opportunities. The trend was upward but still an important area of need. In the area of emotions and verbal interactions and attempt to monitor tone, volume, etc. [Student] was successful 67% of the time.

Reports from educators/supervisors indicate [Student]'s social interactions fluctuate between appropriate and on target to inappropriate. At times [he/she] seems to be unaware that [his/her] actions are inappropriate. In the educational setting it appears to be important to have consistent and continuous feedback about [his/her] social interactions with both males and females.

Summarized in an evaluation report provided by Carmel Hanes: “[Student] has well-documented learning disabilities that affect [his/her] ability to learn new material. [He/she] has complained of poor treatment from peers and has also reportedly shown aggression and intrusiveness towards them at times. [Student] has a history of not taking responsibility for [his/her] own behavior and can be uncooperative at times. At other times [he/she] appears to cooperate, take responsibility and try to please others. [He/she] currently expresses thinking that is somewhat rigid and distorted, and may perceive things inaccurately or one-dimensionally. [Student] appears to have difficulty with peers in particular, and can be more appropriate with adults.

Involvement and progress in the general education curriculum: In summary, overall, [Student] has been most successful and benefited from smaller class placements. [He/she] appears to work best in small groups and one-on-one situations. According to classroom teachers [he/she] can communicate effectively in regular classes but [he/she] will need accommodations to the materials, methods, and strategies to be successful. [He/she] needs review and repetition in order to get information into long-term memory. [He/she] should have content area assessments read to [him/her].

Preferences, needs, interests, and transition: [Student] would benefit from direct teaching and intervention around social issues. [Student] also is likely to benefit from environments that allow [him/her] hands-on learning to build vocational skills. This may help [him/her] build confidence that [he/she] does not have due to [his/her] long-term difficulty learning academic material.” (Ex. D252 at 2-5.)

(98) The IEP also includes the following annual goals and short-term objectives in each of the following areas: Mathematics, Reading, Social Emotional, Written Language, Behavioral, and Sensory Motor. (Ex. D252 at 8-15.) The IEP contained the following under the categories of measurable annual goals and related short term objectives:

(1) Mathematics Measurable Annual Goal: [Student] will demonstrate an understanding of math and increase [his/her] level from 4.6 to 5.6 gl as measured by standardized testing with the use of a calculator by maintaining a C or above in current math class as measured by curriculum based measure and work sample.

Measurable Short Term Objectives:

- (a) Round numbers to the nearest 10th and nearest 100th.
- (b) Be able to calculate elapsed time.
- (c) Reduce simple fractions.
- (d) Write fractions as percents 10, 20, 25, 50, 75 and 100%.

- (e) Determine perimeter, area, and surface area, volume.
- (f) Compute net and gross pay.
- (g) Figure a simple budget. (Ex. D252 at 8.)

(2) Reading Measurable Annual Goal: [Student] will listen to and analyze words, recognize words, understand text, and learn to read grade level text fluently. [He/she] will improve [his/her] comprehension score on standardized testing from 4.2 to 5.2 minimum by maintaining a C or above in current reading class as measured by curriculum based measure, work sample, and standardized achievement test.

Measurable Short Term Objectives:

(a) [Student] will demonstrate a variety of comprehension strategies as needed- re-reading, self-correcting, summarizing, class and group discussion, generating and responding to essential questions, making predictions, and comparing information at 80% accuracy.

(b) [He/she] will read aloud fifth grade-level narrative text and informational text fluently and read accurately with effective pacing, intonation and expression; read aloud unpracticed grade-level text at a rate of 125-150 words correct per minute. (Ex. D252 at 9.)

(3) Social Emotional Measurable Annual Goal: [Student] will improve social emotional interactions with adults and peers with 90% accuracy as measured by formal observation and informal assessment. Given examples, modeling, practice and feedback [Student] will demonstrate and ability to:

Measurable Short Term Objectives:

- (a) Understand and respect the perspective of others.
- (b) Increase ability to recognize the emotions and facial expression of others.
- (c) Modify [his/her] behavior to meet the needs of conversational partners.
- (d) Monitor [his/her] own tone, volume and language content.
- (e) Increase [his/her] ability to understand various degrees of relationships with males and females. (Ex. D252 at 10.)

(4) Written Language Measurable Annual Goal: [Student] will pre-write, draft, revise and edit papers by demonstrating the knowledge of spelling, grammar, punctuation and capitalization with 80% accuracy and an improvement on standardized testing from 3.8 gl to 4.8 gl as measured by curriculum based measure and work sample.

Measurable Short Term Objectives:

- (a) [Student] will correctly use parts of speech as to the level of proper spoken communication. (Write the way you talk.)
- (b) [Student] will write a five paragraph paper with 1) clear thesis/introduction, 2) 3 supporting paragraphs with 4-5 simple sentences each, 3) a conclusion that restates the introduction.. (Ex. D252 at 11.)

(5) Behavioral Measurable Annual Goal: [Student] will follow directions the first time with 100% accuracy in 8 of 10 attempts of objective 1, with 100% accuracy in 8 of 10 attempts of objective 2, within 30 school days of completion of objective 1, as measured by daily tracking sheets.

Measurable Short Term Objectives:

(a) When given a direction, [Student] will comply within 60 seconds, including a quiet individual reminder.

(b) When given a direction, [Student] will comply within 30 seconds, including a quiet individual reminder.

(c) When given a direction, [Student] will comply within 30 seconds.

(d) When given a direction, [Student] will acknowledge the direction and comply immediately. (Ex. D252 at 12.)

(6) Behavioral Measurable Annual Goal: [Student] will accept responsibility for [his/her] behavior by identifying [his/her] role in negative interactions and identifying alternative behaviors leading up to the negative interaction with 100% accuracy in 8 of 10 attempts of objective 1, with 100% accuracy in 8 of 10 attempts of objective 2, within 30 school days of completion of objective 1, as measured by daily tracking sheets.

Measurable Short Term Objectives:

(a) When confronted about a behavior, [Student] will listen to the staff/peer without interruption.

(b) When confronted about a behavior, [Student] will listen to the staff/peer without interruption and acknowledge that [he/she] understands the experience of the staff/peer.

(c) When confronted about a behavior, [Student] will listen to the staff/peer without interruption, acknowledge that [he/she] understands the experience of the staff/peer, and re-state the staff/peer's experience of the behavior.

(d) When confronted about a behavior, [Student] will listen to the staff/peer without interruption, acknowledge that [he/she] understands the experience of the other person, and identify where or how he/she could have made the experience positive or neutral. (Ex. D252 at 13.)

(e) When confronted about a behavior, [Student] will listen to the staff/peer without interruption, acknowledge that [he/she] understands the experience of the other person, and identify where or how [he/she] could have made the experience positive or neutral, and make amends or commitments to change the behavior if a similar situation arises. (Ex. D252 at 14.)

(7) Vocational/Career Education Annual Goal: [Student] will complete two interest surveys during 1st semester and will follow up with appropriate review with both surveys complete and reviewed with instructor by completion of activities; family, agency input and teacher observation.

Measurable Short Term Objectives:

(a) Reflect and draw conclusions from individual assessment processes.

- (b) Identify personal, educational and work goals.
- (c) Relate abilities and desires to a specific job, e.g., directing others, working along, having specific responsibilities.
- (d) Identify one or more occupations/jobs that is interesting to pursue.
(Ex. D252 at 15.)

(99) The October 2008 IEP provided for specially designed instruction of “Math, reading, and written instruction of 1 class in each subject on a daily basis or as the schedule allows 1 class per rotation. This approx. 235 minutes per week per subject.” The instruction was anticipated to be completed in a special education classroom. The IEP also provided for specially designed instruction of social/behavioral instruction of 600 minutes per week in a special education classroom. (Ex. D252 at 16.)

(100) The October IEP service summary also provided for 120 minutes per week of counseling. Under supplemental aids/services; modifications and accommodations, the IEP listed adult supervision during non-direct instruction while Student was at school. The IEP also provided for technology use for writing note taking (Alpha Smart) for use in classroom as requested by Student after two week trial in regular education settings. (Ex. D252 at 16.)

(101) In the nonparticipation justification section of the IEP, Student was expected to be out of regular education classes for 1425 minutes per week with the regular education time increasing as he/she met behavioral goals. (Ex. D252 at 17.)

(102) The IEP lists five placement options from full time in regular education classrooms to a residential placement at Provo Canyon School. (Ex. D252 at 17.) The District members of the IEP team selected placement in a self contained program at New Options. (Ex. D252 at 17.)

(103) Ms. Hanes has worked at two residential “lock up” facilities for juveniles. Based on her experience with juvenile offenders and the information she had about Student’s behavior at the time the placement decision was made, she did not believe a residential placement was the best option for Student. (Testimony of Ms. Hanes p1054.)

(104) On October 20, 2008, Ms. Gartland sent Parents a Prior Notice of Special Education Action. The Notice was a proposal to initiate Student’s identification, placement and provision of a FAPE at the New Options program based on the evaluations, assessments, and mental health records of Student. (Ex. D257.)

(105) In December 2008 Ms. Gartland completed the process for exiting Student from Dallas School District’s rolls as a special education student because Student was attending school in Utah. Ms. Gartland understood that she had to complete the exit process to comply with Oregon State regulations for an accurate count of special education students in the District. (Testimony of Ms. Gartland p295.)

(106) Provo Canyon School offers multiple levels of core and elective classes. (Ex. S23.) Provo Canyon School offers smaller class size and opportunity for extra help which they believe is geared for special education. (Testimony of Mr. Taylor p1828.) Provo Canyon School assessed Student for his/her needs and placed him/her in what it believed were appropriate settings but the school did not have an IEP for him/her. (Testimony of Mr. Taylor p1830.)

(107) On September 11, 2008, Ms. Rachel Barth at Provo Canyon administered a Woodcock-Johnson III test of Achievement to Student. Ms. Barth scored the test using the 11th grade norms. (Ex. S25.) Student was actually in the 10th grade at the time. (Testimony of Mr. Parker p1392.)

(108) At Provo Canyon School, Student's teachers made comments into a computer system about Student's behavior and class performance on a monthly or more frequent basis. (Ex. D297.) Student struggled for the first six months he/she was at Provo Canyon School. (Testimony of Mr. Taylor p1826.)

(109) Student began living with his/her mother on or about August 21, 2009 and enrolled at a Salt Lake City public high school, Highland Hills. (Testimony of Student's mother p41; Ex. 14.)

(110) Dr. Whittaker has a Ph.D. from University of Utah in clinical psychology. (Testimony of Dr. Whittaker p2115.) While in graduate school, Dr. Whittaker interned at Monarch Center and worked with children with sexual misconduct issues. (Testimony of Dr. Whittaker p2128.)

(111) Dr. Whitaker reviewed some of Student's psychological records from Wisconsin, the disciplinary records from [] middle school, [] High School records, New Options records, Dr. Senn's report, Ms. Hanes report, and mental health records from Mr. Mac Kendrick, Dr. Chandragiri, and Dr. Soto. (Testimony of Dr. Whittaker p2131-2312.) Dr. Whitaker had also reviewed the initial evaluation, treatment records, Provo Canyon School's sex offender treatment program, and Student's discharge summary from Provo Canyon School. (Testimony of Dr. Whittaker p2131-2132.) Based on his records review, Dr. Whitaker did not believe that Provo Canyon School was a good educational placement for Student and would instead likely end up harming Student because Student was a person who learned behavior by mimicking others and would be at a school with many students who exhibited poor behavior choices (Testimony of Dr. Whittaker p2165-2168.) Dr. Whitaker believed that Student needed social skills training that could be handled in a mainstream environment with a supervisory component or in a self-contained classroom such as New Options. (Testimony of Dr. Whittaker p2158-2159.)

CONCLUSIONS OF LAW

I. The allegations of Parent's complaint dealing with acts or omissions occurring on or after September 1, 2008 are not dismissed for lack of jurisdiction.

II. The District did not fail to provide a FAPE, based on the following alleged violations of Individuals with Disabilities Education Improvement Act (IDEA):

A. Regarding an alleged December 18, 2007 Individualized Education Plan (IEP), Parents did not establish that an IEP was developed on December 18, 2007. Therefore, regarding Parents' allegations related to the alleged December 18, 2007 IEP:

1. The District did not fail to provide Prior Written Notice of an IEP;
2. The District did not fail to convene an IEP meeting;

3. The District did not withhold or fail to provide specially designed instruction and related services to Student;
4. The District did not fail to conduct and adequately interpret necessary and appropriate evaluations to address Student's emotional and behavioral disabilities; and
5. The District did not fail to evaluate, determine, and implement IEP that addressed Student's emotional and behavioral disabilities;

B. Regarding a January 23, 2008 expulsion by:

1. Parents failed to establish that the District was required to conduct a manifestation determination in December 2007;
2. Parents failed to establish that the District was required to create and adopt a behavior intervention plan for Student; and
3. Parents failed to establish that the District was required to conduct a functional behavioral assessment when unilaterally changing Student's placement for more than 10 school days.

C. Regarding an April 11, 2008 IEP by:

1. Parents have established that the District failed to provide Prior Notice of Special Education Action;
2. Parents failed to establish that the District failed to create or implement a behavioral plan despite knowledge of Student's behavior;
3. Parents failed to establish that the District withheld or failed to provide specially designed instruction and related services to Student;
4. Parents has established that the District failed to include data in Present Level of Academic Achievement and Functional Performance (PLOP), assessments, progress towards Student's goals, and actual progress the Student was making;
5. Parents failed to establish that the District failed to evaluate, determine, and implement an IEP that addressed Student's emotional and behavioral disabilities; and
6. Parents have established that the District failed to create an IEP that was reasonably calculated to enable Student to receive meaningful educational benefit.

D. Regarding a June 4, 2008 IEP by:

1. Parents failed to establish that the District failed to provide Prior Notice of Special Education Action;
2. Parents failed to establish that the District failed to create or implement a behavioral plan despite knowledge of Student's behavior;
3. Parents failed to establish that the District failed to include data in PLOPs, assessments, progress towards Student's goals, and actual progress the Student was making;
4. Parents failed to establish that the District failed to evaluate, determine, and implement an IEP that addressed Student's emotional and behavioral disabilities; and
5. Parents failed to establish that the District failed to create an IEP that was reasonably calculated to enable Student to receive meaningful educational benefits.

E In connection to the October 10, 2008 IEP by:

1. Parents have established that the District failed to provide Prior Written Notice of an IEP team meeting;
2. Parents failed to establish that the District failed to timely convene an IEP meeting;
3. Parents failed to establish that the District failed to create or implement a behavioral plan despite knowledge of Student's behavior;
4. Parents failed to establish that the District failed to include Student's proper basis for eligibility for special education services;
5. Parents failed to establish that the District failed to evaluate, determine, and implement an IEP that addressed Student's emotional and behavioral disabilities; and
6. Parents failed to establish that the District failed to create an IEP that was reasonably calculated to enable Student to receive meaningful educational benefits.
7. Parents failed to establish that the District waived any rights under the October 10, 2008 IEP when it removed Student from its special education program on or about November 4, 2008

III. Regarding the District's violations of its duty to (what you found above), Parents have not established that tuition reimbursement, compensatory education, or attorney fees are appropriate remedies.

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, Parents 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).

I. Jurisdiction

Prior to the hearing, District filed a Motion to Dismiss for Lack of Jurisdiction and a Request for Bifurcated Hearing that was subsequently denied. At hearing, District reiterated its request for a ruling to dismiss one of the six issues raised in the due process hearing request alleging that one of the issues was outside the jurisdiction of this ALJ. Specifically, District alleged that Student was not a resident of the Dallas School District at the time of the events alleged to have occurred after September 1, 2008. In my prior decision denying the District's motion, I relied on 20 USC §1415(a)(1)(A)⁴, 34 CFR § 300.101, ORS 339.115, ORS 339.133(1), and OAR 581-015-2040 *et seq.*

OAR 581-015-2040 provides in part:

(1) School districts must provide special education and related services to all resident school-age children with disabilities, except as provided in OAR 581-015-2045. * * *

* * * * *

(4) For purposes of this rule, residency is determined in accordance with ORS chapter 339.

Regarding the residency of Students for school purposes, ORS 339.133 provides, in relevant parts:

(1) Except as provided in subsection (3), (4), (5) or (7) of this section, children between the ages of 4 and 18 shall be considered resident for school purposes in the school district in which their parents, their guardians or persons in parental relationship to them reside.

* * * * *

⁴ 20 USC §1415(a)(1)(A), regarding the provision of a free appropriate public education, provides:

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(8) For the purposes of this section:

(a) "Person in parental relationship" means an adult who has physical custody of a child or resides in the same household as the child, interacts with the child daily, provides the child with food, clothing, shelter and incidental necessities and provides the child with necessary care, education and discipline. "Person in parental relationship" does not mean a person with a power of attorney or other written delegation of parental responsibilities if the person does not have other evidence of a parental relationship.

* * * * *

Under the plain meaning of the above statute, it is clear that if a student has parents then I do not need to consider whether a student also has a guardian or a "person in parental relationship." Considering the record as a whole, the preponderance of the evidence supports the conclusion that while Student's Parents did not always live in the same state, they both considered themselves in joint or equal parental roles with Student while Student attended school in Dallas, Oregon and then Provo, Utah.

Student attended Provo Canyon School in Utah from September 1, 2008 through August 21, 2009. During that time, Student's father lived in Dallas, Oregon and Student's mother lived in Salt Lake City, Utah. Therefore, as District's own witness, Mr. Tarzian, testified at hearing, Student is a resident of the school district in which his/her parents reside. Because Student's parents reside in the Dallas, Oregon and the Salt Lake City, Utah school districts, Student was a resident of both districts for the purposes of Oregon school residency requirements.

II. Statute of Limitations.

OAR 581-015-2345(3) provides:

(3) Time limitation and exception:

(a) A special education due process hearing must be requested within two years after the date of the act or omission that gives rise to the right to request the hearing.

(b) This timeline does not apply to a parent if the parent was prevented from requesting the hearing due to specific misrepresentations by the school district that it had resolved the problem forming the basis of the complaint, or the school district's withholding of information from the parent that the district was required to provide under Chapter 343.

34 CFR 300.511 provides, in relevant part:

(d) Subject matter of due process hearings. The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under Sec.300.508(b), unless the other party agrees otherwise.

(e) Timeline for requesting a hearing. A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

(f) Exceptions to the timeline. The timeline described in paragraph

(e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to--

- (1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or
- (2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

In this case, Parents filed this due process complaint and hearing request on December 9, 2010. In the middle of the first paragraph of the first allegation in their complaint, Parents allege that the deficiencies in the "December 18, 2007 IEP were nearly identical to the deficiencies in the October 23, 2007 IEP. See DP 09-117 incorporated herein by reference." (emphasis added.)

In a previous case, DP 09-117 against the same school district, Parents filed a due process complaint and an amended due process complaint alleging deficiencies in the October 23, 2007 IEP. In the DP 09-117 case, ALJ House dismissed the amended complaint for insufficiency under OAR 581-015-2345(1)(B)(i) on December 4, 2009. The Parents did not allege, and the evidence did not indicate, that either of the exceptions to the limitations period was applicable. Any and all alleged acts or omissions occurring prior to December 9, 2008 are outside of the limitations period and outside of my jurisdiction. Based on their prior case DP 09-117 Parents were aware of the two year limitations period, but failed to meet it.

Therefore, any allegations of violations of the violations of the IDEIA prior to December 9, 2008 are beyond my jurisdiction because of the two year limitations period. They are dismissed.

III. December 18, 2007

At hearing, there was no testimony or evidence presented that an IEP was created or amended on December 18, 2007. Based upon the lack of evidence of the existence of a December 18, 2007 IEP, Parents have not established that Student was denied FAPE because of any possible deficiencies in the alleged December 18, 2007 IEP.

IV. Free Appropriate Public Education

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. OAR 581-015-2040; 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. Parents requested a hearing in a due process complaint where they alleged actions, or failures to take actions by the District that constituted procedural and substantive violations of IDEIA. Parents' complaints that pertain to what would be termed procedural violations of the IDEIA are addressed first.

1. Alleged procedural violations of the IDEIA.

Parents alleged that the District committed multiple procedural violations from January 23, 2008 to October 10, 2008, in violation of OAR 581-015-2040 to 581-015-2210. In order for a District to be found in violation of the IDEIA due to procedural violations, the violations must be more than *de minimis*, they 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 (9th Cir 1992). 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 parents' opportunity to participate in the formulation of the IEP. *Park v. Anaheim Union High School District*, 464 F3d 1025, 1031 (9th Cir. 2006).

A. Failure to conduct a manifestation determination.

Parents alleged that District erred in not holding or conducting a manifestation determination in December 2007 when it expelled Student.

OAR 581-015-2000(24) defines "Placement" as an educational placement, not social service placement by a state agency.

OAR 581-015-2415 provides, in relevant part:

(1) A disciplinary removal is considered a change in educational placement and the school district must follow special education due process procedures if:

(a) The removal will be for more than 10 consecutive school days (e.g. expulsion); or

(b) The child will be removed for more than 10 cumulative school days from their current educational placement in a school year, and those removals constitute a pattern under OAR 581-015-2410(2).

* * * * *

(3) Manifestation determination. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the school district must determine whether the child's behavior is a manifestation of the student's disability in accordance with OAR 581-015-2420.

* * * * *

The above rule requires a school district to conduct a manifestation determination based on each separate violation of code of student conduct when the District seeks to change the educational placement of the child. Thus, the District was required to conduct a manifestation

determination once it decided to change Student's placement from the [] High School placement to an alternative placement based on the October 15, 2007 incident.

It is possible that the District erred in some way regarding to a manifestation determination about the October 15, 2007 incident. However, based on the statute of limitations that is not an issue in the present case. The issue in this case is whether the District was required to conduct a manifestation determination with regard to the change in Student's status on January 23, 2008 from "suspended" to "expelled." Parents argued that the change in status equated a change in placement, triggering District's obligations under IDEIA regarding Student's FAPE. The record at hearing does not support a finding that the District changed Student's placement when his/her status changed from suspended to expelled on January 23, 2008. Instead the evidence shows that only Student's status changed. Student's placement was not affected by the status change. Student continued to be placed in an alternate placement where Student received tutoring as set out in the IEP in place at that time. Thus, Parents failed to show that District violated any obligation under IDEIA related to the expulsion.

B. Failure to provide proper notice.

Parents alleged that the District failed to give an adequate Prior Written Notice (PWN) with regard to IEP meetings on April 11, 2008, June 4, 2008, and October 10, 2008.

OAR 581-015-2310 provides, in relevant part:

- (1) Prior written notice must be given to the parent of a child, and to the adult student after rights have transferred, within a reasonable period of time before a school district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.
- (2) Prior written notice must be given after a decision is made and a reasonable time before that decision is implemented.

i. April 11, 2008

On March 31, 2008, the District mailed a PWN to the Parents scheduling an IEP meeting on April 11, 2008. There was no evidence presented at hearing that Student's parents did not receive the Notice. During the IEP meeting, the team members changed Student's placement to the New Options Program at Dallas High School. Student and his/her Parents were out of town and did not participate in the team meeting on April 11, 2008. Three members of the April 11, 2008 IEP team met with Student father on April 16, 2008 to discuss the April 11, 2008 IEP and Student's placement. During the April 16, 2008 meeting they discussed the team's decision to place Student at New Options program as a change that would take place once the intake into the program was completed. However, Student's father wanted Student to begin attending New Options on April 17, 2008 when Student's expulsion ended. Mr. Parker agreed to have Student begin attending New Options on April 17, 2008.

The Parents offered no evidence to establish that the PWN sent on March 31, 2008 was untimely or inaccurate. To the contrary, the PWN reflected the District's determination to hold an IEP team meeting to discuss Student's placement upon his return to school after his expulsion. In addition, the PWN informed the Parents that they could contact the District if they had a conflict with the date to have the meeting rescheduled and warned them that the meeting might

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be held without them if they did not attend. There was no evidence presented at hearing that the District failed to properly notify the Parents of the April 11, 2008 IEP team meeting.

However, the team made a change in Student's placement at the April 11, 2008 meetings and failed to send a PWN informing Parents of that change in placement. While the District's time in which to send the PWN was limited because Student's change in placement was moved forward at the request of Student's father, the District still had time to comply with the requirement. Yet, not all procedural violations establish a violation of FAPE. As mentioned above, only those procedural violations 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. *Target Range School D. Id.* at 1484. The evidence show that that the District moved up the actual placement at the Parents request and the Parents were certainly aware of the placement decision. Based on this record, the District's failure to notify Parents of a meeting that they attended is at most a *de minimis* procedural violation because it did not prejudice Student nor result in any loss of educational opportunity.

ii. June 4, 2008

On May 22, 2008, the District mailed a PWN to Parents scheduling an IEP meeting on June 4, 2008. There was no evidence presented at hearing that Student's parents did not receive the Notice. Parents failed to identify with any specificity how the PWN was deficient. During the IEP meeting, the teams decided not to change Student's IEP or placement at that time because three evaluations were being performed but were not complete. Because no decision was made the District was not required to provide a PWN after the meeting.

iii. October 10, 2008

The District did not send Parents or their attorney a PWN scheduling the IEP meeting on October 10, 2008. There was no evidence presented at hearing about the reason for the failure. The October 10, 2008 IEP meeting was scheduled at the end of the October 6, 2008 IEP meeting and presumably Student's father and his attorney agreed to the new date. The evidence establishes that Student's father and his attorney participated in the October 10, 2008 meeting. Based on this record, the District's failure to notify Parents of a meeting that they attended is at most a *de minimis* procedural violation because it did not prejudice Student nor result in any loss of educational opportunity.

The District did send Parents a PWN on October 20, 2008. The Notice was a proposal to initiate Student's identification, placement and provision of a FAPE to New Options program based on the evaluations, assessments, and mental health records of Student. The PWN was provided to the Parents within ten days of the October 10, 2008 IEP meeting and discussed a change that was never implemented. That was sufficient to meet the District's legal obligations.

C. Failing to evaluate, determine, or create a behavior plan or behavior intervention plan (BIP) in Student's IEP to address Student's emotional and behavioral disabilities.

OAR 581-015-2400 provides in part:

For the purposes of OAR 581-015-2400 through 581-015-2445, the following definitions apply:

(1) "Behavioral intervention plan" means an individualized plan, including positive interventions, designed to assist a student to decrease inappropriate behavior and increase or teach an alternative appropriate behavior.

OAR 581-015-2415 provides in part:

(1) A disciplinary removal is considered a change in educational placement and the school district must follow special education due process procedures if:

(a) The removal will be for more than 10 consecutive school days (e.g. expulsion); or

(b) The child will be removed for more than 10 cumulative school days from their current educational placement in a school year, and those removals constitute a pattern under OAR 581-015-2410(2).

* * * * *

(3) Manifestation determination. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the school district must determine whether the child's behavior is a manifestation of the student's disability in accordance with OAR 581-015-2420.

* * * * *

(5) No manifestation. If the determination under subsection (3) is that the child's behavior is not a manifestation of the child's disability:

(a) The school district may proceed with disciplinary action applicable to children without disabilities under section (1) of this rule, in the same manner and for the same duration in which the procedures would be applied to children without disabilities.

(b) If the school district takes such action applicable to all children, the school district must:

(A) On the date on which the decision is made to remove the student under subsection (5), notify the parents of that decision and provide the parents with notice of procedural safeguards under OAR 581-015-2315.

(B) Provide services to the student in an interim alternative educational setting, determined by the IEP team, in accordance with OAR 581-015-2435; and

(C) Provide, as appropriate, a functional behavioral assessment, and behavior intervention services and modifications that are designed to address the behavior violation so that it does not recur.

* * * * *

i. January 23, 2008

Parents assert that the District violated OAR 581-015-2400(1) by failing to create or implement a BIP when Student was expelled.⁵

A manifestation determination was held on October 19, 2007 when the District changed Student's placement. Whether the District should have created or implemented a BIP at that time is outside the scope of this decision as discussed in the Statute of Limitations.

⁵ Student's prior expulsion, for bringing an instrument with a knife blade to school was reinstated due to an allegation of inappropriate sexualized behavior, occurred on January 23, 2008 not December 2007 as the Parents allege.

However, their remains an issue as to whether District was required to develop a BIP at some point in time for Student based on behavior that occurred during the period covered under the Statute of Limitations. Regarding whether Student's behavior, not previously addressed by the District, triggered obligations under IDEIA, the following rules are relevant:

OAR 581-015-2105 provides in part:

(1) General: A public agency must conduct an evaluation or reevaluation process in accordance with this rule and 581-015-2110 before:

(a) Determining that a child is a child with a disability under OAR 581-015-2130 through 581-015-2180;

(b) Determining that a child continues to have a disability under OAR 581-015-2130 through 581-015-2180;

(c) Changing the child's eligibility

* * * * *

(4) Reevaluation:

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

(b) and OAR 581-015-2110(2):

(A) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(B) If the child's parents or teacher requests a reevaluation.

(b) A reevaluation for each child with a disability:

(A) May occur not more than once a year, unless the parent and public agency agree otherwise; and

(B) Must occur at least every three years, unless the parent and public agency agree that a reevaluation is unnecessary.

OAR 581-015-2110 provides, in part:

(1) Evaluation planning. Before conducting any evaluation or reevaluation, the public agency must conduct evaluation planning in accordance with OAR 581-015-2115.

(2) Notice and consent.

(a) Before conducting any evaluation or reevaluation, the public agency must provide notice to the parent in accordance with OAR 581-015-2310 that describes any evaluation procedures the agency proposes to conduct as a result of the evaluation planning process.

(b) Before conducting any evaluation or reevaluation, the public agency must obtain informed written consent for evaluation in accordance with OAR 581-015-2090 and 581-015-2095.

(c) If the public agency refuses an evaluation or reevaluation requested by the parent, the public agency must provide the parent with prior written notice under OAR 581-015-2310.

(d) Parents may challenge the public agency's refusal to conduct a reevaluation under OAR 581-015-2345.

* * * * *

(5) Evaluation timelines:

(a) Initial. An initial evaluation must be completed within 60 school days from written parent consent to the date of the meeting to consider eligibility.

(b) Reevaluation. A reevaluation must be completed within 60 school days from written parent consent (or from the date the evaluation is initiated under OAR 581-015-2095(3)(c)) to the date of the meeting to consider eligibility, continuing eligibility or the student's educational needs.

* * * * *

OAR 581-015-2120 provides in part:

(1) Upon completing the administration of assessments and other evaluation materials, a team must determine whether the child is a child with a disability under OAR 581-015-2130 through 581-015-2180 and the educational needs of the child.

(a) The team must include the parent, in accordance with OAR 581-015-2190, and two or more qualified professionals, at least one of whom is knowledgeable and experienced in the evaluation and education of children with the suspected disability. This team may be the child's IEP team.

* * * * *

(2) The team must prepare an evaluation report and written statement of eligibility.

(a) The evaluation report(s) must describe and explain the results of the evaluation conducted.

(b) The written statement of eligibility must include:

(A) A list of the evaluation data considered in determining the child's eligibility;

(B) A determination of whether the child meets the minimum evaluation criteria for one of the disability categories in OAR 581-015-2130 through 581-015-2180 or 581-015-2795;

(C) A determination of whether the primary basis for the suspected disability is:

(i) A lack of appropriate instruction in reading (including the essential components of reading) or math; or

(ii) Limited English proficiency;

(D) A determination of whether the child's disability has an adverse impact on the child's educational performance;

(E) A determination of whether, as a result of the disability, the child needs special education services; and

(F) The signature of each member of the team indicating agreement or disagreement with the eligibility determination.

* * * * *

(3) The team must determine a child to be eligible under this rule if the child has a disability and needs special education and related services, even though the child is advancing from grade to grade.

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

* * * * *

OAR 581-015-2205

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(1) In developing, reviewing and revising the child's IEP, the IEP team must consider:

- (a) The strengths of the child;
- (b) The concerns of the parents for enhancing the education of their child;
- (c) The results of the initial or most recent evaluation of the child; and
- (d) The academic, developmental, and functional needs of the child.

* * * * *

(3) In developing, reviewing and revising the IEP of children described below, the IEP team must consider the following additional special factors:

- (a) For a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies to address that behavior;

ii. April 11, 2008

Under the obligations set out in the rules above, Parents alleged that the District failed to create a behavior plan despite knowledge of Student's behavior and that the District failed to evaluate and create an IEP that addressed Student's emotional and behavioral disabilities. Considering the connections between Student's behavior and any disabilities these allegations will be addressed together.

Under OAR 581-015-2105(4), the District was required to ensure that Student was reevaluated when it determined that Student's educational or related services needs warranted a reevaluation or when Student's Parents or teacher requested a reevaluation. Based on Student's mother's testimony and Mr. Parker's contemporaneous notes, I am persuaded that Student's Parents did not request a reevaluation of Student until March 3, 2008.

At hearing, Mr. Parker testified that he was not aware of a pattern of behavior that would indicate Student was emotionally disturbed until February 2008. By that time, Mr. Parker was aware that Student was accused of engaging in several incidents of sexualized behavior with peers in the tutoring setting. Mr. Parker then set up an IEP team meeting including the school psychologist on February 20, 2008. At the meeting, the team discussed the progress that Student was making while being tutored. After Student's mother disclosed that the family was waiting on the results of a psychosexual evaluation of Student, the team began discussing the different types of evaluations the school could do. The other team members believed that Student's mother would provide the psychosexual evaluation and, based on that information, determine what, if any, other evaluations needed to be performed. Therefore, the record supports a conclusion that by February 20, 2008, the District was aware that Student needed to be reevaluated for possible behavioral or emotional disabilities.

While it was established that the District failed to ask Parents for consent until March 5, 2008, the failure to ask for consent was reasonable based on the following: the District was required to conduct an evaluation planning before conducting a reevaluation and to provide notice to the Parents describing any evaluation procedures the District proposed to use. Based upon the discussion of the IEP team on February 20, 2008, it is clear that the District was following the requirements to determine what evaluation procedures it would need to use before asking Parents for consent to reevaluate Student.

On March 3, 2008, Student's mother informed the District that the Parents would not share the psychosexual evaluation and asked the District to proceed with an educational evaluation. Once the District sent the request for consent to the Parents on March 5, 2008, it was up to the Parents to respond in a timely manner. Parents did not sign the consent form until April 16, 2008. The delay in evaluation after March 5, 2008 was due to Parents' actions. Thus, they are foreclosed from complaining that the District did not evaluate Student in time to include the information in the April 2008 IEP.

OAR 581-015-2205(3)(a) requires that when developing, reviewing, and revising an IEP, the team must consider the use of positive behavioral interventions, supports and other strategies when a child's behavior impedes his/her learning or the learning of others. In this case the special factor box for behavioral concerns was not checked on the April 2008 IEP. At hearing, Mr. Parker testified that he did not believe that Student's behavior impeded his/her learning or the learning of others and instead attributed the problems Student's was having to his/her placement. Regardless of whether the special factor box should have been checked or not, the District complied with the developing and reviewing requirements of OAR 581-015-2205(3)(a).

Regarding the April 11, 2008 IEP, the next issue is then whether the IEP team developed an IEP that included positive behavioral interventions, supports and other strategies. The April IEP includes four behavior and social emotional goals. They include using age appropriate social-sexual behavior, making appropriate decisions, complying with directions, and accepting responsibility for his/her behavior. The measurement of the behavioral goals was through tracking sheets. The measurement of the social emotional goals was through formal observation, informal assessments for the social-sexual goal and through teacher observations, checklists, anecdotal records, and self evaluation for the appropriate decisions goal. By identifying what the team wanted Student to do and relying heavily on the use of observation, tracking sheets and/or checklists, the IEP correctly provided that Student's goals would concentrate on teaching replacement behavior. The IEP team appropriately avoided focusing on punishing Student for improper behavior. The IEP goals for behavior and social emotional issues provided Student with a BP that would address his/her behavior and emotional disabilities to the extent that the team understood Student's disabilities at the time.

The IEP also provides for specially designed instruction around social interaction with peers on a daily basis when a counselor was available and as the school schedule allowed in a special education classroom. The team agreed that Student would be placed in a self contained classroom that focused on improving Student's behavior through redirection, rewards, and consequences. The specially designed instruction met the Student's concerns about safety, and attempted to increase the likelihood that Student's behavior would improve.

The Parents have not established that the District failed to evaluate, determine, or create a BP in Student's IEP to address Student's emotional and behavioral disabilities.

iii. June 4, 2008

The IEP team that met on June 4, 2008 did not create a new IEP or amend an existing IEP. Due to concerns raised by Student's father and the fact that the evaluations were not completed, the team decided that the decision to create or amend Student's IEP would be taken up in the Fall of 2008. There was no evidence presented at hearing that the District failed to

meet any procedural requirements of addressing Student's emotional and behavioral needs in an IEP, since no IEP was created.

iv. October 10, 2008

Parents also alleged that the District failed to create a behavior plan despite knowing of Student's behavior and that the District failed to evaluate and create an IEP that addressed Student's emotional and behavioral disabilities. Considering the connections between Student's behavior and any disabilities these allegations will be addressed together. The allegation that the District failed to include the proper basis for Student's eligibility will be addressed in the next section

The IEP team met four times in the Fall of 2008 to discuss Student's IEP. By the time the October 10, 2008 IEP was created the behavior, autism, and communication evaluations were completed. Ms. Hanes had evaluated Student for behavioral problems, Mr. Sorensen had evaluated Student for autism, and Ms. Schmidt-Powell had evaluated Student for communication difficulties. At the September 18, 2008 IEP meeting, the team was given copies of the evaluations and Mr. Sorensen and Ms. Schmidt-Powell presented their findings to the team. The team then discussed the issue of eligibility and determined that Student was not eligible for services based upon a finding that Student fell within the autism spectrum.

On September 26, 2008, the team continued its discussion of eligibility for emotional disturbance. After extensive discussion, the team determined that Student was eligible for services as emotionally disturbed. As a result of the IEP team considering the three evaluations, engaging in discussion, and making the determinations about Student's eligibility, I am persuaded that the Parents have not established that the District failed to evaluate Student's emotional and behavioral disabilities during the meetings that created the October 10, 2008 IEP.

The issue then is whether the IEP team developed an IEP that included positive behavioral interventions, supports and other strategies. The October IEP included three behavior and social emotional goals. The goals included improving social emotional interactions, following directions, and accepting responsibility for his/her behavior. The measurement of the behavioral goals was through tracking sheets. The measurement of the social emotional goals was through formal observation and informal assessments. As discussed above, by identifying what the team wanted Student to do and relying heavily on the use of observation and tracking sheets, the IEP correctly provided that Student's goals would concentrate on teaching replacement behavior. The IEP provided Student with a BIP that would address his/her emotional disturbance.

The IEP also provided for specially designed instruction of 600 minutes per week around social/behavioral and counseling of 120 minutes per week. The team agreed that Student would be placed in a self contained classroom that focused on improving Student's behavior through redirection, rewards, and consequences. The Parents have not established that the District failed to evaluate, determine, or create a BIP in Student's IEP to address Student's emotional and behavioral disabilities.

D. Failure to include Student's proper basis for eligibility for special education services.

Parents also allege that the District failed to include the proper basis for Student's eligibility in the October 10, 2008 IEP but did not indicate what Parents believed would be the proper basis.

The Parents agreed with the rest of the team that Student was eligible for special education as emotionally disturbed and specific learning disabled and not eligible under the autism disorder spectrum. There was no evidence presented at hearing that Student's eligibility was improper. Therefore, Parents have not established that the District failed to include Student's proper basis for eligibility in the October 10, 2008 IEP.

2. Alleged substantive violations of the IDEIA.

A. Failing to implement a BIP or an IEP to address Student's emotional and behavioral disabilities.

i. April 11, 2008

The April 2008 IEP provided for specially designed behavioral instruction around social interaction with the opposite sex on a daily basis when available with a counselor and as school schedule allowed at the New Options self-contained classroom. From April 17, 2008 to the end of the school year, Student attended classes at New Option every day. The staff at New Options filled out a tracking sheet on a daily basis to track Student's progress on meeting his/her behavior and social emotional goals. While there was evidence that Student engaged in some of the same sexualized peer interactions that he/she had previously engaged in there was substantial evidence that the staff at New Options implemented the behavior and social emotional goals created in the April 2008 IEP. In addition, the combination of the social emotional goals into one goal on the tracking sheet supports the finding that the staff at New Options staff was capable of implementing Student's emotional and behavioral disabilities. Contrary to Parents' claim, the evidence fails to show that the District materially failed to implement Student's IEP. *See Van Duyn v. Baker School District*, 581 F.3d. 770 (9th Cir. 2007)(holding that a material failure to implement the IDEA, and that a material failure occurs when the services a school provides fall significantly short of the services required by an IEP).

ii. June 4, 2008

The IEP team did not change the April 2008 IEP when it met on June 4, 2008. The staff at New Options continued to implement the April 2008 IEP as shown by daily completion of the tracking sheets. For the reasons discussed above, the District materially implemented Student's April 2008 IEP.

iii. October 10, 2008

Student's Parents unilaterally withdrew Student from Dallas School District and placed him/her at Provo Canyon School at the beginning of September 2008. Parents have not returned Student's to the District to attend classes. Because Student was not attending a District school, by Parents choice, Parents cannot be heard to complain that the District did not implement the October 10, 2008 IEP. District offered FAPE to Student but, due to Parents actions, Student was not made available to allow District to implement the October 10, 2008 IEP.

B. Denying Parents the opportunity to participate in developing, reviewing, and revising an IEP.

Parents alleged that they were denied the opportunity to participate in developing, reviewing, and revising the October 2007, April 2008, and June 2008 IEPs when the District failed to include data about Student's present levels of performance, to perform assessments, to address Student's escalating behavioral issues, and to provide an appropriate IEP team. Any possible deficiencies in the October 2007 IEP will not be addressed by this Order as discussed in the Statute of Limitations section above.

i. April 11, 2008 IEP

OAR 581-015-2200 provides:

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

(a) A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum.

* * * * *

Alleged deficiencies in the IEP PLOPs.

The April 2008 IEP PLOPs were required to include a statement describing how Student's disability affects his/her involvement and progress in the general education curriculum. Based on the record, the District did not include PLOP statements from which Student's present level of performance to establish a baseline could be discerned, as was required under OAR 581-015-2200(1). Mr. Parker created the PLOP for the April 2008 IEP. The April 2008 PLOP contained statements about why Student was not currently attending regular or special education classes at the high school. The PLOP also contained statements about tutoring in regular education subjects and special education services Student was receiving while expelled and Student's progress in general education subjects at NovaNet. The PLOP contained a statement of Student's most recent IQ testing from October 2006, Student's reading level, and a vague statement that Student qualifies for special education because of a learning disability in basic writing. There was no mention of Student's qualification for special education because of a learning disability in math or reading.

The April 2008 PLOP did not include any test scores, chapter completion in text books or grade equivalency as a baseline of present ability. It also did not indicate that Student had made any progress since the last IEP in any of the areas in which he/she qualified for special education. The April 2008 PLOP contained information about Student's expulsion and how that was being addressed. It lacked sufficient baseline data on Student's current achievement or functional performance against which expectations and future performance could be measured. Parents have established that the District failed to comply with OAR 581-015-2200(1)(a).

Alleged deficiencies in the lack of assessments in the IEP.

In their due process hearing request, Parents did not specify what assessments were not performed. Based upon the above discussion and the record at hearing, it is reasonable to assume that Parents were referring to the lack of assessments to show the current level of

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achievement and functional performance. The April 2008 PLOP did not include any data on Student's current achievement or functional performance. No evidence was presented at hearing that assessments were performed around April 2008 to establish Student's current levels of educational achievement or functional performance. It is not clear how the District could establish a current PLOP without some assessments. It can be inferred from the fact that Student was expelled at or during the relevant time period that it would likely be more difficult for the District to assess Student's current levels of achievement or functional performance. However, the District was aware that an IEP would likely be amended and that, in order to conform to IDEIA requirements, it might be required to assess Student. While the District provided evidence at hearing that Student's was making progress on his/her reading through tutoring and was not making progress completing assignments and learning modules through NovaNet, that information was not sufficient to establish Student's current levels of achievement or functional performance. Based on the evidence presented at hearing, I am persuaded that the Districts' failure to have current assessments at the time of the IEP meeting is also a violation of OAR 581-015-2200(1)(a).

Alleged deficiencies in failure to address behavioral issues in the IEP.

The Parents did not specify what they mean by a "lack of addressing [Student's] escalating behavior issues." (Parents Due Process Complaint.) To the extent Parents are asserting the April 2008 IEP did not address behavior issues, they are incorrect. The April 2008 IEP contains five annual goals that address Student's behavior. Since the Parents have alleged further deficiencies in the April 2008 IEP as it relates to the evaluation, determination, and implementation of behavioral/emotional disabilities for Student, I will address the behavioral issues at that time.

OAR 581-015-2190 provides in part:

(1) School districts must provide one or both parents with an opportunity to participate in meetings with respect to the identification, evaluation, IEP and educational placement of the child, and the provision of a free appropriate public education to the child.

* * * * *

(5) Conducting a meeting without a parent in attendance: A meeting may be conducted without a parent in attendance if the school district has given the parent notice under subsection (2), or, for IEP or placement meetings, in accordance with OAR 581-015-2195.

OAR 581-015-2195 provides in part:

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

(a) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(b) Scheduling the meeting at a mutually agreed on time and place.

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

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

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

(A) Detailed records of telephone calls made or attempted and the results of those calls;

(B) Copies of correspondence sent to the parents and any responses received; and

(C) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

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

(A) Communicates directly with the parent and arranges a mutually agreeable time and place, and sends written notice required under OAR 581-015-2190(2) to confirm this arrangement; or

(B) Sends written notice required under OAR 581-015-2190(2) proposing a time and place for the meeting and states in the notice that the parent may request a different time and place, and confirms that the parent received the notice.

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

(5) The school district must give the parent a copy of the IEP at no cost to the parent. If the parent does not attend the IEP meeting, the school district must ensure that a copy is provided to the parent.

OAR 581-015-2210 provides in 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:

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

(b) A member of the IEP team described in subsection (1)(c) through (1)(f) may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of curriculum or related services, if:

(A) The parent and school district consent in writing to the excusal; and

(B) The member submits, in writing to the parent and the IEP team, input into the development of the IEP before the meeting.

(4) The regular education teacher of the child must participate as a member of the IEP team, to the extent appropriate, in the development, review, and revision of the child's IEP, including assisting in the determination of:

(a) Supplementary aids and services, program modifications and supports for school personnel that will be provided for the child; and

(b) Appropriate positive behavioral interventions and supports, and other strategies for the child.

Alleged deficiencies in the membership of the IEP team.

The following required members for the IEP team were present: Ms. Stuck as the teacher providing regular education, Ms. Gartland as the District representative who was qualified to provide, or supervise the provision of, specially designed instruction, knowledgeable about the general education curriculum, knowledgeable about district resources, and authorized to commit district resources and ensure that services set out in the IEP will be provided, and Ms. Hanes as an individual who could interpret evaluations.

The Parents were not present at the April 11, 2008 IEP. Under OAR 581-015-2190(5), an IEP meeting may be conducted without a parent in attendance if the district has given the parent notice of the meeting. In this case, not only did the District provide the Parents notice of the April 11, 2008 IEP meeting on March 31, 2008 but Mr. Parker spoke to Student's father and they came to an agreement that that it was acceptable to the Parents if the IEP was held without them.⁶ Parents agreed that the District could hold the IEP meeting without them. Therefore, District met its obligations regarding Parents ability to participate in the April 11, 2008 IEP.

⁶ At hearing, Student's father testified that he did not recall being asked if the District could hold the April 11, 2008 IEP meeting without the Parents. (Testimony of Student's father p569.) Student's father also testified that he would not give Mr. Parker an okay to hold an IEP without him or his wife present. (Testimony of Student's father p572.) Based upon the contemporaneous notes and e-mails by Mr. Parker, *In the Matter of Student and Dallas School District*, Final Order, DP 09-129
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There is a further issue however of whether either Mr. Parker or Mr. Opp qualified as the special education teacher of the child and or as the special education provider. The U.S. Department of Education (DOE) has issued an interpretation of the federal regulation that is identical to the Oregon administrative rule on this issue, advising that the special education teacher or provider member of the IEP team should be the person who is or will be responsible for implementing the IEP (34 C.F.R. Part 300, Appendix A, Notice of Interpretation, Question 26). *See also R.B. v. Napa Valley Unified School District*, 496 F.3d. 932 (9th Cir, 2007) In this case, Mr. Parker as Student's special education case manager would be one of the individuals who was responsible for ensuring that Student's IEP was properly and completely implemented. In addition, Mr. Opp was the special education teacher for the New Options program where Student was being placed. The record does not support a finding that the April 11, 2008 team was improperly constituted.

The Parents established that the District failed to meet the requirements of OAR 581-015-2200 for April 11, 2008 IEP. The violations discussed above must be examined to determine if the violations resulted in a loss of the Parents' opportunity to participate in the formulation of the IEP as the due process complaint alleges or in a substantive violation of District's obligation to provide FAPE to Student. The IDEIA requires more than an opportunity for Parents and other team members to attend and speak at an IEP meeting; it requires an exchange of ideas based on assessments and information about the Student's current level of achievement and functional performance. If there is a lack of current information and data about the Student, the team cannot make an informed decision about the child's needs or goals.

Parents failure to attend the April 11, 2008 IEP team meeting was not the result of a procedural error of the District. However, the failure to have assessments and baseline data meant Parents could not meaningfully participate had they attended, nor could the members who did go to the meeting, The District's failure to have complied with OAR 581-015-2200, including its failure to have adequate PLOPs or current assessments for the April 11, 2008 IEP, were not *de minimis*. The failure to have current assessments and baseline data on Student's current achievement or functional performance go to the very core of an IEP and were a denial of FAPE. *See City of Chicago Sch. Dist. 299*, 52 IDELR 177 (II. 2009)(IEP was fundamentally flawed when student's present levels of performance were not based on objective data or evaluations, and goals and modifications were added by the District after the IEP meeting.). Parents met their obligation to show District that the April 11, 2008 IEP was deficient, resulting in a failure to provide FAPE to Student as required.

ii. June 4, 2008

Alleged deficiencies in the IEP PLOP and lack of assessments.

The IEP team that met on June 4, 2008 did not create a new IEP or amend an existing IEP, as alleged by Parents. Due to concerns raised by Student's father and the evaluations not yet being completed, the team decided that the decision to create or amend Student's IEP would be taken up in the Fall of 2008. Because an IEP was not created or amended in June 2008, the District did not violate any procedural IEP requirements for the PLOP, goals or assessments.

I find his testimony to be more persuasive on this issue than Student's father's lack of memory or statement that he would not have agreed.

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Alleged deficiencies in the membership of the IEP team.

Parents did not specify which IEP team members the District failed to have present at the June 4, 2008 IEP team meeting. The following required members for the IEP team were present: Student's father; Ms. Gartland as the District representative who was qualified to provide, or supervise the provision of, specially designed instruction, knowledgeable about the general education curriculum, knowledgeable about district resources, and authorized to commit district resources and ensure that services set out in the IEP will be provided; Mr. Parker as a special education provider, Ms. Hanes, Ms. Schmidt-Powell, and Ms. Sorensen as individuals who could interpret evaluations; and Mr. Opp as a special education teacher were all present. Because all of the required individuals were present at the June 4, 2008 IEP meeting, the Parents have not established that the team was improperly constituted.

C. Withholding or failing provide specially designed instruction and related services to Student.

The April 2008 IEP called for specially designed instruction of small group special instruction reading, writing and math on a daily basis within the school schedule accounting for about 40% of the day in a special education classroom. The IEP also provided for specially designed instruction of behavioral instruction around social interaction with the opposite sex on a daily basis when available with a counselor and as school schedule allowed in a special education classroom.

On a daily basis, the staff at New Options provided some instruction in Language Arts, Math, and Writing. There was no evidence presented about the amount of the time the staff spent teaching reading, writing and math to Student. The staff may have spent about 40% of the day teaching reading, writing and math to Student or they may not have. Because Parents alleged that the District failed to provide the required instruction, Parents have the burden to go forward with evidence to support the allegation. Parents have not met their burden to show the amount of time Student received specially designed instruction was less than the amount the IEP called for.

As to the specially designed instruction of behavioral instruction around social interaction with the opposite sex on a daily when available with a counselor and as school schedule allowed in a special education classroom, the tracking sheet and testimony of the staff show that the staff at New Options interacted with Student about behavior and social interaction when Ms. Nelson the counselor was there and when she was not. To the extent that it is not clear if this occurred on a daily basis, it was the Parents burden to establish a failure to provide instruction and services and Parents did not meet that burden of proof. .

D. Failing to create an IEP that was reasonably calculated to enable Student to receive meaningful educational benefit.

A school district provides a FAPE to a student if its program is designed to address the student's unique educational needs and is reasonably calculated to provide meaningful educational benefit in the least restrictive environment (LRE).

As explained by the Ninth Circuit, in order to "'make such access meaningful,'[an IEP must] confer at least 'some educational benefit' on disabled students." *Mercer Island*, 592 F.3d 938, 951 n.10.(9th Cir. 2010) (citing *Rowley*, 458 U.S. at 192, 200 (1982) The Ninth Circuit has additionally explained that a court should "look to the [IEP's] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [the student] with a meaningful benefit." *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) . The Adams Court further quoted the United States Third Circuit which stated:

Actions of the school systems cannot ... be judged exclusively in hindsight. ... [A]n individualized education program ("IEP") is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.

Id. (quoting *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993) (citations omitted)). Thus, "the court must examine the IEP prospectively, rather than retrospectively." See also *JG v. Douglas County School Dist.*, 552 F.3d 786, 801 (9th Cir. 2008) ("we consider the IEP at the time of its implementation, not in hindsight, and ask if its methods were reasonably calculated to confer an educational benefit on the child.").

Based upon the preponderance of the evidence, the April 2008 IEPs was not reasonably calculated to provide meaningful educational benefit to Student, at the time it was drafted. Due to the lack of current assessments and baseline data on Student's current achievement or functional performance, the April 2008 IEP was unable to provide teachers with a way to determine if Student was making any progress. Knowing where a student is at the start of an IEP is critical to determining if the educational program will be of any benefit to the student. The April 2008 IEP failed to meet the legal requirements for a FAPE from April 17, 2008 (the date it was implemented) until October 10, 2008 when a new IEP was completed.

The October 10, 2008 IEP was reasonably calculated to provide meaningful educational benefit to Student at the time it was drafted. It was properly drafted by teachers and education providers that knew the student, and who were familiar with his/her disabilities and unique needs. The IEP considered Student's unique needs and abilities, his/her disability, and social, emotional, and other needs. The IEP amply met the legal requirements for a FAPE from October 10, 2008 on.

The Parents failed to establish that the District waived any rights under the October 10, 2008 IEP when District removed Student from its special education program on or about November 4, 2008. The Parents cited no authority for their waiver argument. At hearing, it was clear that Ms. Gartland removed Student from the District special education rolls, on the basis that Student was not attending school in the District, because she believed she was following an accounting procedure put in place by the State.

IV Remedies

If a school district fails to provide a FAPE, parents have an equitable right to be reimbursed for their costs of a unilateral placement obtained for their child during the period the

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

A. Tuition Reimbursement

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

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

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

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

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

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

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

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

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

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

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

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

(C) The parents had not received notice of procedural safeguards under OAR 581-

- 015-2315 informing them of this notice requirement; and
- (b) May, in the discretion of a court or an administrative law judge, not be reduced or denied for failure to provide such notice if:
- (A) The parent is illiterate and cannot write in English; or
- (B) Compliance with paragraph (4) would likely result in serious emotional harm to the child.

As discussed above, the District failed to provide Student with FAPE for the period beginning April 17, 2008 until October 10, 2008, during which a part of the time, Student was enrolled by Parents at Provo Canyon School. The next inquiry, then, is whether Provo Canyon School constituted an appropriate placement for Student pursuant to OAR 581-015-2515(3). I conclude it was not.

The Provo Canyon School offered academic classes in which Student appears to have done well. However, there was no convincing evidence that the Provo Canyon School educational program was individually designed to provide educational benefit to Student. Again the lack of evidence is troubling. Two witnesses from Provo Canyon testified at hearing. However, no evidence was presented to indicate how the school designed the educational program to meet Student's needs. There was evidence that Student benefited from a learning environment with one-on-one learning and small class sizes. *See, Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523-524 (6th Cir. 2003), (the court discussed in detail how the private placement of the child did not provide the child with needed special education services.)

Even when schools do not provide FAPE as required, they are not required to pay for aspects of a private placement that are not related to the educational needs of the student. *County of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458 (9th Cir. 1996). For instance, a residential placement for medical treatment, even for treatment of the disability rendering the child eligible for special education services, is not reimbursable if the medical treatment is not primarily to aid the student to benefit from special education. If, however, the medical treatment is necessary for the child to receive meaningful educational benefit, then the parents are entitled to reimbursement. In this case, District argued that Student was required to attend Provo Canyon School as part of a juvenile court plea agreement. Based on the testimony of Mr. Robison, Student's father, and Dr. Senn, I am persuaded that Student was required to participate in sex offender treatment as part of a juvenile court plea agreement but I am not persuaded that Student had to attend Provo Canyon School as the District contends.

In *Ashland Sch. Dist. v. R.J.*, 588 F.3d. 1005, 1009 (9th Cir. 2009) the Court held: "Where, as here, the private-school placement is a residential facility, the placement is appropriate only if it is "necessary to provide special education and related services.'" (quoting 34 § C.F.R. 300.302 (1996)(since recodified at 34 § C.F.R. 300.104)(2009)) *See also Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d. 635 (9th Cir. 1990) Provo Canyon School might have provided Student with the services to meet his/her special education needs, however, I am unable to determine that on this record. In this case, the Parents have not established that Provo Canyon School or any residential facility was necessary to provide special education and related services.

B. Compensatory Education.

Parents request that the District be ordered to provide compensatory services, which is a request for an equitable remedy.⁷ *Parents of Student W. v. Puyallup School District 3*, 31 F 2d 1489 (9th Cir. 1994) (finding "compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting "appropriate relief.") Parents request two years of compensatory education but do not describe the request in any further detail. Because the requested remedy is one of equity, it requires consideration of the conduct of both parties when deciding the appropriate remedy.

In *Reid v. District of Columbia*, the court held that a compensatory education award must be reasonably calculated to provide the educational benefits that likely would have accrued from the special education services that the District should have provided in the first place. 401 F.3d. 516, 525 (D.C. Cir. 2005). As discussed above, the District failed to provide FAPE to Student from April 17, 2008 when the April 2008 IEP was implemented until October 10, 2008 when an IEP that was reasonably calculated to provide meaningful benefit was offered to Parents. The April 2008 IEP failed to provide FAPE during that time because it lacked current assessments and baseline data of Student present level of achievement in the areas in which he qualified for special education services and a teacher would be unable to determine if Student was making any progress.

Therefore, any compensatory education award would be limited to that which would provide the educational benefits that Student did not receive from April 17, 2008 through the end of the 2007/2008 school year and from the beginning of the 2008-2009 school year through October 10, 2008. In this case, the deficit in the April 2008 IEP was the lack of adequate data to establishing a baseline from which Student's progress could then be assessed. The award must focus on placing Student where he would have been but for the District's violation of the IDEA. A proper compensatory education award in this case would include requiring the District to provide the assessments and testing that will provide an accurate measure of Student's present level of academic achievement and functional performance. However, a compensatory educational award must also be an equitable remedy.

The 9th Circuit addressed factors for consideration in granting equitable remedies in the case of *W.G. v. Board of Trustees of Target Range School District*, 960 F 2d 1479 (9th Cir. 1992) (cited with approval in *Puyallup School District 3*, 31 F 2d 1489 at 1496.) In making its determination of the appropriateness of the remedy, the Court in *Target Range* looked to the conduct of both parties, when fashioning appropriate relief "designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Target Range*, 960 F 2d, at 1486.

I find that Parents knew that Student's mental health and behavior issues had caused difficulties in the school setting prior to Student attending Dallas School District schools. I am also persuaded that Parents repeatedly and deliberately hid this information from the District, thereby causing the District not to have the information necessary to truly determine the cause of Student's behavior or to be able to address them. When I balance the Parents blocking behavior with the fact that Student had been repeatedly assessed by Provo Canyon School and the Salt Lake City School District, it is clear that awarding the District to perform additional assessments and testing of Student would not be equitable.

⁷An equitable remedy is "usu[ally] a non-monetary one such as * * * a specific performance, obtained when available legal remedies * * * cannot adequately redress the injury." *Black's Law Dictionary*, 1072 (abridged 8th ed 2005).

Parents also requested, as a remedy, compensatory education in the form of additional education services for Student. Parents did not prove that, other than the lack of a baseline from which to measure Student's progress, the deficiencies in the April 11, 2008 IEP resulted in a failure to provide FAPE to Student. The record clearly revealed that Student's needs, known to District at that time, were met and that Student received some educational benefit under the IEP in question. Therefore, Parents are not entitled to compensatory education in the form of additional educational services for the period the April 11, 2008 IEP was in place.

In summary, on several allegations, Parent meet the burden of proof to show that the District violated the requirements of IDEIA as alleged in the request for a due process hearing however, an award of compensatory education, in the form of either additional assessments and testing or as additional educational services, is inappropriate.

B. Attorney Fees

Under U.S. Code Title 20, Chapter 33, Section 1415, Subsection (i)(3)(B) attorney fees can be awarded to as part of the costs to a prevailing party. The authority to award attorney fees lies with the District Court. ORS 343.175. Therefore, no determination is made on Parents' request.

ORDER

The Parents have established that the District failed to provide Student with FAPE from April 17, 2008 through October 10, 2008. The Parents are not awarded any tuition reimbursement for Provo Canyon School nor compensatory education. The Parents are not awarded attorney fees.

Jill Marie Messecar, 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 16th day of June, 2010 with copies mailed to:

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