

On May 5, 2011, ALJ McGorrin held a status conference to set concluding dates for the hearing. The parties agreed to continue the hearing to June 27-29, 2011, which were the next consecutive dates on which the parties and their counsel were available. The hearing concluded on June 28, 2011.

As agreed by the parties, the District presented its case first. The District presented testimony by Mary Kuhl, Student's second and fourth grade general education teacher, Kate Aly, Student's first through fourth grade special education teacher, Judy Fusek, Student's occupational therapist, Tasha Katsuda, the principal of Elementary School, and Melissa Barbour, the District's behavior consultant for special education. Student presented testimony of Karen Apgar, one of the District's psychologists, Marilyn Nersesian, the District's Educational Support Services Administrator, Emily Coburn Smith, a former District instructional assistant, Jamie Rudick, a current District instructional assistant, Jane Nordman-Reese, a District special education consultant, Student's Mother, Uncle and Grandfather, and Student. On rebuttal, the District called Karen Apgar and Larry Sullivan, Director of Educational Support Services for the District.

The record was left open to allow for the receipt of the final hearing transcript and closing arguments. Naegeli Reporting released the hearing transcript on July 12, 2011. Given mother's extended foreign travel, as well as vacations of Ms. Wiscarson and Mr. Hodukavich, the parties agreed that they would provide written closing arguments on August 31, 2011. Both parties provided closing arguments by that deadline. The deadline for issuance of the Final Order set for October 14, 2011 at the mutual request and agreement of the parties. This Final Order was issued by that date.

ISSUES

Whether the District failed to provide a Free Appropriate Public Education (FAPE), based on the following alleged violations of the Individuals with Disabilities Education Improvement Act (IDEA), its implementing federal regulations, and applicable provisions of the Oregon Revised Statutes (ORS) and Oregon Administrative Rules (ORS) by:

1. Failing to convene a properly constituted individualized education program (IEP) team during the 2007-2008 academic year.
2. Failing to convene a properly constituted IEP team during the 2008-2009 academic year.
3. Failing to evaluate Student in all areas of suspected disability during the 2008-2009 academic year.
4. Failing to evaluate Student in all areas of suspected disability during the 2009-2010 academic year.

5. Failing to provide an appropriate placement during the 2008-2009 academic year.¹

6. Failing to provide an appropriate placement during the 2009-2010 academic year.

EVIDENTIARY RULINGS

Before the due process hearing began, Ms. Hungerford objected generally to evidence that Ms. Wiscarson might present that related to events occurring after Mother filed the due process complaint on July 26, 2010. Similarly, Ms. Hungerford objected generally to evidence that Ms. Wiscarson might present that related to events occurring before July 26, 2008.

In response, Ms. Wiscarson stated that she did not intend to raise any issues not mentioned in the due process complaint. Ms. Wiscarson stated, however, that she might offer evidence of events that occurred before July 26, 2008 and after July 26, 2010 which was relevant to issues within the scope of the due process complaint.

ALJ McGorin noted that the applicable statute of limitations is the two-year statute in ORS 343.165(3) (a), which provides in relevant part:

[A] hearing * * * must be requested within two years after the date of the act or omission that gives rise to the right to request a hearing * * *.

ALJ McGorin also noted that a due process hearing is limited to issues asserted in the due process complaint, as provided by OAR 581-015-2360(2), which provides in relevant part:

Subject matter of hearing: The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the hearing request unless the other party agrees otherwise.

As a result, ALJ McGorin ruled that the actionable issues from Mother's due process complaint were those stated in the complaint that occurred between July 26, 2008 and July 26, 2010. This time period includes Student's third and fourth grade school years.

During the two-year period, three IEPs covered Student. These include an IEP prepared in February 2008, which applied to the first semester of Student's third grade year, an IEP

¹ During the due process hearing, counsel for Student and Mother raised a number of issues under the category of placement. Although some are not technically placement issues, Ms. Wiscarson included facts related to the issues in her due process complaint dated July 26, 2010. Thus, the District was on notice of the issues. Moreover, both sides had a full opportunity to present evidence regarding the issues at the due process hearing. Thus, these issues, which involve the sufficiency of Student's 2008, 2009 and 2010 IEPs, the sufficiency of a functional behavior assessment of Student and a related behavior support plan, whether the District had to provide Student a separate safety plan, whether the District effectively managed teasing of Student by other children, and Student's challenge to her/his May 2010 change in placement, were litigated during the hearing and are analyzed in this Final Order.

prepared in March 2009, which applied to the second semester of Student's third grade year and the first semester of her/his fourth grade year, and an IEP completed in January 2010, which applied to the second semester of Student's fourth grade school year.

During the two-year period, Student also had several behavior support plans. These included plans from March 2007, November 2008, January 2009, April 2009, October 2009, February 2010, March 9, 2010, and April 13, 2010.

ALJ McGorin advised the parties that she would rule on specific objections to evidence prepared or related to events outside the two-year period when the parties raised them.

Before the hearing commenced, Ms. Hungerford objected to six witnesses from a charter school attended by Student months after the due process complaint was filed. At the March 2, 2011 status conference, Ms. Wiscarson voluntarily withdrew those witnesses from her amended witness list.

Prior to the hearing, Mr. Cohn-Lee objected to Mother introducing evidence relating to the District's alleged use of physical restraints on Student. Mr. Cohn-Lee indicated that although Mother's due process complaint at page 9 references such restraints, a separate procedure exists under the OAR 581-021-0062(2)(k) for addressing complaints regarding school district's physical restraint practices. According to Mr. Cohn-Lee, Mother was pursuing that procedure, which contains an exhaustion requirement that was not yet met.

In response, Ms. Wiscarson stated that Mother was not pursuing a separate claim that the District unlawfully restrained Student under OAR 581-021-0062. Instead, Ms. Wiscarson stated that she intended to offer evidence of the District's failure to advise Mother that it was restraining Student as evidence that the District denied Student FAPE.

On March 2, 2011, ALJ McGorin held that she would accept briefs on the District's motion to exclude evidence of restraints. She gave the District three weeks or until March 23, 2011 to submit a brief. ALJ McGorin asked that Student submit any opposition brief by April 15, 2011. The District was given until April 20, 2011 to provide a reply brief. On March 23, 2011, Mr. Cohn-Lee advised that the District would not pursue a motion to exclude restraints. Instead, the District would address the issue through testimony at the hearing and in its post-hearing brief.

Based on Ms. Wiscarson's representation that she was not pursuing a separate claim for violation of the physical restraint provisions of OAR 581-021-0062, which is not alleged in her due process complaint, evidence regarding the District's alleged physical restraint of Student was allowed at the hearing to show that the District denied Student FAPE by not advising Mother that the District restrained her/him.

Ms. Hungerford objected to any purported expert testimony by Student's Uncle, who is a school psychologist for another school district. Ms. Wiscarson did not identify Uncle as an expert witness on the witness list she exchanged with the District before the hearing. In response

to the District's objection, Ms. Wiscarson stated that she only was offering Uncle as a fact witness.

At the hearing, Record documents 1 through 13 were identified and received.

Mother offered exhibits P1 through P106, P108 through P254, and P256-P273. The District objected to exhibits P1 through P67, P69-78, and P80-94 on the ground that they were irrelevant because they pertained to matters occurring before July 26, 2008. These documents included, *inter alia*, evidence of the reasons that Student was initially evaluated for special education as well as evidence of assessments of Student's disabilities after Mother filed her due process complaint.

This evidence contained relevant background information to decisions made by the District during the actionable two-year period. Accordingly, ALJ McGorin overruled the District's objection and admitted exhibits P1 through P106, P108 through P254, and P256 through P273. P274, P275, P276, P277, P279, P280, P281, P282, P283, P284, P285 were admitted without objection.

The District offered exhibits D1 through D31, D33 through D36, and D38-D39. These exhibits were admitted without objection.

FINDINGS OF FACT

(1) Mother enrolled Student for kindergarten at Elementary School in fall 2005. Student attended kindergarten (fall 2005 to summer 2006), first grade (fall 2006 to summer 2007), second grade (fall 2007 to summer 2008), third grade (fall 2008 to summer 2009) and fourth grade (fall 2009 to spring 2010) at Elementary School. (Test. of Mother; tr. at 1871-1872; Exs. P2, P79, P114, P165 and P249.)

Student's Kindergarten and First Grade Behavioral Problems

(2) During kindergarten, Student had intermittent behavioral problems. These included making threats to injure her/himself and other children. For example, on one occasion, Student ran from the school building into the street, yelling: "I will run in front of a car and get run over. I'm going to get killed." Student threatened to cut her/himself with scissors, and once stabbed her/himself with a pencil. Student kicked other children and told them that s/he would harm them. (Exs. P26, P66 and P68.)

(3) During kindergarten, Student also disobeyed District staff. At times, s/he ran away when staff approached her/him. (Exs. P26, P66 and P68.)

(4) In Student's first grade year, Student continued to have behavioral issues including running out of class and the school building, and hitting other children. As a result, the District suspended her/him. The District advised Mother that other parents had expressed concern that Student's behavior might jeopardize their children's safety. (Test. of Mother; tr. at 1887, 1894; Exs. P18 and P22.)

(5) In Student's first grade year, s/he also began sucking her/his thumb, a behavior s/he previously had given up. S/he also was exhibiting behavior problems at home. (Test. of Mother; tr. at 1896-1897.)

(6) During Student's kindergarten to fourth grade school years, Mother never thought that Student might actually hurt her/himself. Mother believed that Student's threats of harm to her/himself and others were motivated by wanting to be sent home so s/he could avoid school. (Test. of Mother; tr. at 1886.)

Student's Evaluation for Special Education Services

(7) In January 2007, midway through Student's first grade year, Mother gave written consent for Student to be evaluated for special education services. The District stated on the consent form that the reason for the evaluation was: "Student has had significant behavioral issues since school has started. Attempts to correct behavioral patterns have had limited success." Mother and the District agreed that Student would be tested for Attention Deficit Hyperactivity Disorder (ADHD). (Test. of Mother; tr. at 1889; Ex. P61 at 1.)

(8) Mother discussed with the District the possibility of doing an Autism Spectrum Disorder (ASD) evaluation of Student. Mother and the rest of Student's family decided not to pursue ASD testing because they determined that Student's needs could be met with another special education eligibility category, Other Health Impairment (OHI), under which ADHD is categorized. Mother did not ask the District to evaluate Student for ASD at that time. (Test. of Mother; tr. at 1890-1891, 2267.)²

(9) The District evaluated Student for special education services in February 2007. (Test. of Mother; tr. at 1874; Ex. D12 at 1.) Charlotte Higgins-Lee, a psychologist selected and paid for by Mother, provided a medical diagnosis of ADHD in a January 28, 2007 written report. (Test. of Aly; tr at 458; Ex. P72.) Dr. Higgin-Lee concluded in her report that "Student meets the criteria for ADHD. * * * Student should receive services for ADD/ADHD." (Ex. P72 at 4.)

(10) Ms. Higgins-Lee specifically rejected ASD in her report. Ms. Higgins-Lee stated that her testing showed: "[N]o indications of autism spectrum behaviors" by Student. (Ex. P72 at 2.) Indeed, no doctor diagnosed Student with ASD, autism, Asperger's or any other similar condition before Mother filed her due process complaint in July 2010. (Test. of Mother; tr. at 2265.)

(11) As part of Student's assessment for special education services, a District occupational therapist, Judy Fusek, administered sensory profile and visual perception tests to Student. As a result, Ms. Fusek determined that Student did not have a problem with sensory processing. Ms. Fusek concluded, however, that Student had difficulty with fine motor functioning which impacted her/his ability to write. (Ex. P76 at 2.)

² Mother testified during another portion of the due process hearing that she did in fact request in 2007 that Student be evaluated for ASD, and did not know why the testing did not occur. (Test. of Mother; tr. at 2187.) Given her earlier testimony, Mother's subsequent testimony on this point was not credible.

(12) In her report, Ms. Fusek stated that Student had difficulty with the physical act of writing. Ms. Fusek noted that although the District had evaluated Student's handwriting with a standardized test, no functional evaluation of Student's handwriting had been done. Ms. Fusek stated that she: "[W]ould like to further evaluate [Student's] handwriting and fine motor skills in a more functional environment to assess whether there is anything occupational therapy can provide to make this area of Student's school life less frustrating." (Ex. P76 at 1.)

(13) By functional environment, Ms. Fusek meant a setting where Student working was on a classroom assignment instead of writing in a testing environment. (Ex. P76 at 2; Test. of Fusek; tr. at 937; 1079-1081.) Ms. Fusek conducted functional assessments of Student's handwriting during the three-year period she worked with her/him.³

Student's Special Education Placement

(14) In February 2007, Mother consented to specialized instruction for Student with a disability of ADHD under OHI. The consent described the rationale for the placement: "Student is having significant behavioral issues that present barriers to her/his learning and need [sic] specialized instruction." The consent noted: "Student is making academic progress and learns at a fast rate when s/he is in the classroom." (Ex. P80.)

Student's 2007 IEP

(15) The District and Mother developed Student's first individualized education plan (IEP) in February 2007 during the beginning of the second semester of Student's first grade year. (Ex. P79.) Mother attended the IEP meeting as well as Student's special and general education teachers. Tasha Katsuda, Elementary School's principal, acted as District Representative. (Ex. P79 at 1.)

(16) Student's 2007 IEP described Student's present levels of academic achievement and functional performance (present levels) as follows:

Student is a creative, engaging student that his/her peers enjoy having around. S/he is observant, outgoing, articulate [sic], inquisitive, and has a good sense of humor. S/he is very intelligent, especially in math where s/he quickly displays an understanding of concepts that many of his/her peers struggle with. S/he is reading at grade level, but struggles with getting [his/her] ideas to the page in front of her/him. S/he often asks for an adult to write her/his words on the board so that s/he may copy them. Other difficulties include managing intense emotion, conflict resolution and accepting compliments. Student is well accepted by her/his peers because s/he is kind and caring, however, reading social cues is difficult for her/him. S/he enjoys adult attention and is an auditory learner.

³ As a result of the assessments, Ms. Fusek recommended a variety of assistive technologies to help Student record her/his ideas. (Test. of Fusek; tr. at 1093-1094.)

Small group instruction with high amounts of positive feedback are [sic] the best academic settings for her/him.

(Ex. P79 at 3.)

(17) The 2007 IEP set the following annual goals, criteria and evaluation procedures:

In approximately one academic year, Student will be able to take a calming break when asked or needed. (Criteria: 3 of 4 given opportunities; evaluation procedures: teacher observation recorded on point card.)

In approximately one academic year, Student will be able to identify a trusted adult across all school settings. (Criteria: 4 of 4 opportunities; evaluation procedures: teacher observation recorded on point card.)

In approximately one academic year, Student will be able to keep her/his body to her/himself. (Criteria: 85% of the school day; evaluation procedures: daily point card.)

In approximately one academic year, Student will be able to transition from one task to another appropriately. (Criteria: 85% of the school day; evaluation procedures: daily point card.)

(Ex. P79 at 4.)

(18) Student's 2007 IEP provided for specially designed instruction from February 2007 to February 2008 as follows: Behavior (30 minutes per day in special class); Occupational Therapy (5 hours per year in special or regular class) and Behavior Support Plan (daily in all settings). (Ex. P79 at 1.)

Overview of Student's First And Second Grade Years

(19) During Student's first and second grade years, s/he spent the majority of her/his time in a general education classroom. Student received 30 minutes of behavioral specialized education in a special education classroom from her/his special education teacher, Ms. Aly.⁴ (Ex. P79.) Additionally, s/he sometimes voluntarily elected to take breaks in the special education classroom. (Test. of Aly; tr. at 413.)

⁴ Ms. Aly served as Student's special education teacher during Student's entire time at Elementary School. (Test. of Aly; tr. at 397-399.) By Student's first grade, Ms. Aly had been teaching several years. She has an undergraduate degree in special education with a focus on students with emotional and behavior disorders. Ms. Aly has participated in District training on functional behavior assessment, building function-based behavior support plans, as well as on crisis prevention and intervention trainings. Prior to teaching Student, Ms. Aly had experience working with ADHD and ASD students. (Test. of Aly; tr. at 397-399.)

(20) Student had ongoing behavioral problems during his/her first and second grade years. During her/his second grade year, Student sometimes became angry and ran from adults after being corrected in front of other children. Generally, s/he ran from the special education classroom to his/her general education classroom. Toward the end of second grade, the running behavior stopped. (Test. of Kuhl; tr. at 132-133.)

(21) Overall, Student did well academically during first and second grades. By the end of her/his first grade, s/he was meeting or exceeding all of the general education academic goals. (Exs. P86 and P87; Test. of Mother; tr. at 1907.)

(22) During second grade, the District recommended Student for testing for the Talented and Gifted Program (TAG). Mother declined. (Test. of Kuhl; tr. at 167.) By the end of second grade, Student once again met or exceeded all academic categories. (Ex. P95.) S/he was spending on a routine day approximately 85% of her/his time in the regular education classroom. Student spent the balance of her/his time in the special education classroom, in occupational therapy or physical education or in music study. (Test. of Kuhl; tr. at 111-112.)

Student's 2008 IEP

(23) On January 30, 2008, midway through Student's second grade, the District invited Mother to participate in an IEP team meeting to discuss preparing a 2008 IEP. (Ex. D3 at 1.) Mother, Ms. Aly, Ms. Kuhl, Student's general education teacher, and Judy Fusek, a District occupational therapist, attended the meeting, which was held on February 1, 2008.

(24) Although no name appeared on the IEP for District Representative, Ms. Aly served in that capacity at the IEP meeting.⁵ Ms. Aly had the authority to commit the District to the services or placements proposed for Student. (Test. of Kuhl; tr. at 98.)⁶

(25) The District allows special education teachers to serve as the District representative at IEP meetings.⁷ If special education teachers have any questions about district resources, they consult with district administrators. (Test. of Sullivan; tr. at 2712-2713.)

(26) Mother was an active participant in the IEP meeting. She asked questions, which the District answered. Mother responded to the District's questions. Mother provided information about her concerns about Student's progress in school as well as goals she wanted Student to obtain. Mother advised the District that having Student in the general education setting as much as possible was very important to her. Mother did not object to the District's proposed services for Student or suggest that they would be inadequate to help Student reach her/his goals.

⁵ Ms. Aly did not sign her name under District Representative because she was unaware that she could sign in two places. (Test. of Aly; tr. at 424.)

⁶ Ms. Aly did not advise Mother that she was acting as the District's representative. (Test. of Kuhl; tr. at 176.)

⁷ Ms. Aly was employed by the Lane Education Service District ("ESD"), which provides teachers to the Eugene School District's behavior program. ESD teachers in the Eugene School District function as District staff. (Test. of Sullivan; tr. at 2820, 2838.)

(27) No placement options were discussed at the meeting about which Ms. Aly was not knowledgeable. (Test. of Aly; tr. at 424.) At that meeting, the District and Mother agreed on a 2008 IEP. (Test. of Kuhl; tr. at 91 and 97; Ex. D3.) There was no dispute about the content of the IEP, including placement. Mother also did not ask that any additional assessments of Student be done. (Test. of Aly; tr. at 870; Test. of Kuhl; tr. at 110-112.)

(28) The 2008 IEP set the following annual goals, criteria and evaluation procedures:

Student will be able to work cooperatively in groups or with a partner. (Criteria: 3 of 4 given opportunities; evaluation procedures: teacher observation recorded on point card.)

Student will be able to respond appropriately to change. (Criteria: 3 of 4 opportunities; evaluation procedures: teacher observation recorded on point card.)

Student will be able to keep his body to himself. (Criteria: 95% of the school day; evaluation procedures: daily point card.)

Student will be able to organize his thoughts into two paragraphs, each with a topic sentence, supporting details and a conclusion. (Criteria: 80% accuracy; evaluation procedures: writing samples.)

Student will be able to type 15 words per minute (Criteria: 90% accuracy; evaluation procedures: timed assessment.)

(Ex. D3 at 5-8.)

(29) Student's 2008 IEP described Student's present levels as follows:

Student is a creative, engaging student that his/her peers enjoy having around. S/he is observant, outgoing, articulate [sic], inquisitive, and has a good sense of humor. S/he is very intelligent, especially in math where s/he quickly displays an understanding of concepts that many of his/her peers struggle with. S/he is reading at grade level, but struggles with getting his/her ideas to the page in front of him/her. His/her effort in writing has improved tremendously but his/her organizational skills are not yet at grade level. In the classroom, it is challenging for him/her to raise his/her hand before answering teacher questions, and sit appropriately. Responding to change, such as when there are guest teachers, is also problematic. Cooperative learning remains a difficult task for Student. However, compared to last year, Student has gone above and beyond in following the school rules, staying safe, transitioning from activity to activity, and seeking adult help to solve problems.

(Ex. P92 at 3.)

(30) The 2008 IEP does not contain present levels statement for any of the five goals. With regard to working cooperatively with a partner, Ms. Aly did not know to what degree

Student could work cooperatively as of February 2008. Mother had no way of knowing if the three of four opportunities criteria for the working cooperatively goal was appropriate. The same is true of the goals of responding appropriately to change and keeping Student's body to her/himself. (Test. of Aly; tr. 514-515; Ex. P92 at 3.)

(31) Prior to the 2008 IEP, Student did not have writing goals. The two writing/typing goals were added as a result of Ms. Kuhl's observations in Student's midyear report card that Student was struggling with writing. (Test. of Kuhl; tr. at 99.) Mother agreed that the IEP should include a writing goal. (Test. of Mother; tr. at 1911.)

(32) Initially, Ms. Aly suggested that Student be given a goal of writing one paragraph. (Test. of Kuhl; tr. at 104.) Based on Ms. Kuhl's experience teaching elementary students, writing two paragraphs was a reasonable second grade goal. (Test. of Kuhl; tr. at 101.) Ms. Fusek also agreed that the goal was reasonable. (Test. of Fusek; tr. at 919-920.) However, the IEP did not describe the number of paragraphs Student could write or the words per minute s/he could type when the goal was developed. And, no one provided that information to Mother at the IEP meeting. (Ex. P92 at 4; Test. of Aly; tr. at 519.)

(33) Ms. Fusek, attended the IEP meeting to discuss Student's difficulty with the physical act of writing. Ms. Fusek's role as an occupational therapist was to help Student access her/his education. (Test. of Fusek; tr. at 905; 917.) Ms. Fusek recommended Alpha Smart, an assistive technology, to help Student learn to type. Alpha Smart is a hand-held computer device with a keyboard and word processing software. Students can type their assignments rather than having to write them. (Test. of Fusek; tr. at 923.) In connection with the assistive technology, Ms. Fusek recommended that the 2008 IEP include a typing goal. (Test. of Kuhl; tr. at 101-102.)

(34) After the 2008 IEP was completed, Ms. Fusek helped Student get more comfortable with the physical act of writing, and worked with her/him on increasing her/his speed in writing. Ms. Fusek also helped Student with spacing of words and writing on the lines of lined paper. (Test. of Fusek; tr. at 911.)

(35) Student's 2008 IEP provided for specially designed instruction from February 2, 2008 to February 1, 2009 as follows: Behavior (15 minutes per day in special or regular class); Writing (100 minutes per week in special or regular class); Occupational Therapy (5 hours per year in special or regular class). Supplementary aids included Alpha Smart, which was to be used daily in special or regular class. School Personnel were to use a Behavior Support Plan daily across all school settings. The 2008 IEP stated that Student would be removed from participating with non-disabled students in general education classes, extracurricular activities, and non-academic activities for 30 minutes of the school day for structured behavior support and writing instructions. (Ex. D3 at 2.)

Elementary School's Behavioral Program

(36) Student's 2008 IEP referenced as a staff support a behavior support plan (BSP) for Student. (Ex. P92 at 1.)⁸ BSPs are an important component of Elementary School's program for managing student behavior, the Positive Behavioral Support Program (the PBS program). The District developed the PBS program in collaboration with the Education Department at the University of Oregon, which works nationally with schools creating PBS programs. (Test. of Katsuda; tr. at 1121, 1123-1124 and 1126.)

(37) The PBS program rewards students for on-task behavior and compliance with Elementary School's respect, responsibility and safety rules.⁹ Rewards include verbal praise as well as the ability to earn points to purchase toys. (Test. of Katsuda; tr. at 1121.)

(38) The District trains teachers on the PBS program at the beginning of each school year. That training is supplemented during the year with refresher memos, online training videos, and access to written procedures and manuals. (Test of Kuhl; tr. at 119.)

(39) After developing the PBS program, Elementary School obtained funding to extend it to help students requiring extra assistance with behavioral issues. A committee comprised of Ms. Katsuda, general and special education teachers, and a school psychologist, identifies general and special education students who need targeted and intensive behavioral supports. The team categorizes students into three subsets: one involving students who respond to the rules based on universal instruction given to all Elementary School students, a second including students who require small group instruction, and a third covering students who need written BSPs specifically tailored to problem behavior. Based on Student's episodes of misbehavior in kindergarten and first grade, the committee determined that Student required a BSP in order to access her/his education. (Test. of Katsuda; tr. at 1124, 1126.)

(40) The starting point for creating a BSP is a functional behavioral assessment (FBA), which is a process by which a BSP is prepared, monitored, and adjusted as needed. (Test. of Aly; tr. at 420-421.) Student's FBA was an ongoing observational process during Student's school years at Elementary School. (Test. of Aly; tr. at 420-421; Test. of Sullivan; tr. at 2725-2727.)¹⁰

(41) Ms. Aly began working on Student's FBA in 2007. (Exs. P84 and Ex. P85; Test. of

⁸ Student's 2009 and 2010 IEPs also each referenced a BSP as a staff support. (Exs. P114 at 8 and P165 at 7.)

⁹ Expectations regarding the rules are posted in classrooms, hallways, the cafeteria and the library. The school advised students of the rules at the beginning of each school year and reiterated them at various times during the year. (Test. of Kuhl; tr. at 114-116.)

¹⁰ In addition to BSPs, the District used safety plans for dealing with unsafe behavior. Elementary School's special education classroom had a safety plan. (Test. of Aly; tr. at 412; Ex. P277; Test. of Sullivan; tr. at 2745; Test. of Nersesian; tr. at 1444; Ex. P277.) Additionally, Elementary School had a safety plan for the entire school. (Test. of Katsuda; tr. at 1126-1129.) The school-wide safety plan had procedures the school followed when a student ran off campus. The procedures provided for the student's teacher contacting the office, and Ms. Katsuda calling the police after a specific time passage. (Test. of Katsuda; tr. at 1127.)

Mother; tr. at 1906; Test. of Aly; tr. at 406 and 492.) She started by analyzing data regarding instances of Student's misbehavior. She looked at the time of day and setting (classroom, recess or cafeteria) where the behavior occurred. She looked at what was happening at the time of the misbehavior (new lesson being taught or discipline administered.) Ms. Aly interviewed Student's Mother to ask about her observations, and consulted with Ms. Kuhl. Ms. Aly discussed with Ms. Kuhl and Mother possible solutions for averting the behavior altogether or defusing it after it started. (Test. of Katsuda; tr. at 1124, 1126, 1137 and 1141; Test. of Mother; tr. at 1906; Test. of Aly; tr. at 406, 420-421; Exs. P84 and P85.)

(42) After completing her initial research, Ms. Aly developed hypotheses for the triggers and function of Student's misbehavior. A triggering factor for Student was being asked to do non-preferred work. The desired response to these triggers was completion of the requested task with an acceptance of the accompanying disappointment. Undesirable responses included crawling under desks, not completing work, distracting or engaging other students, and running from the room. The functions of (or reasons for) the undesirable response were avoiding non-preferred work and getting attention from peers. (Ex. D4 at 1.)

(43) Another of Student's triggers was reprimands in unstructured, large group settings. The desired response was accepting the criticism. Problem behavior included running from adults, refusing to reenter schoolrooms, and using inappropriate language. The function of the problem behavior was for Student to save face before his peers and avoid embarrassment. (Ex. D4 at 1.)

(44) Based on these hypotheses of the triggers, setting and functions of Student's behaviors, Ms. Aly developed a BSP containing steps to identify and prevent the misbehavior. The BSP listed methods for reinforcing positive behavior. The methods included praising Student often and rewarding her/his completion of non-preferred tasks with a preferred activity. The BSP also contained strategies for preventing misbehavior. These strategies included avoiding power struggles and allowing Student to take breaks. (Ex. P104 at 1.)

(45) The BSP had a scale of increasingly invasive consequences or punishments for misbehavior. These interventions included requiring Student to make up incomplete work during a preferred activity time, asking her/him to write apology letters,¹¹ rescinding earned points for buying toys, escorting her/him to a safe room in Room 7 (the special education classroom), or asking Student's parents to take her/him home. (Exs. P104 at 2 and Ex. P185 at 3.)

(46) The teachers and instructional assistants recorded Student's acceptable conduct and misbehavior on point cards. Ms. Aly sent the point cards home to Mother so she would be aware

¹¹ Writing itself was a trigger for Student because s/he had difficulties with writing. However, saving face with other children also was important for her/him. Student could save face by writing an apology letter instead of apologizing in person. Student had the choice to do either. (Test. of Smith; tr. at 1563.) Moreover, apology letters were not always given to their recipients. Instead, Ms. Aly sometimes considered the writing of the letter to be enough of a consequence for Student. (Test. of Aly; tr. at 882.)

of Student's progress.¹² Additionally, Ms. Aly used the point cards as a data source when she periodically reanalyzed and revised Student's BSP. (Test. of Aly; tr. at 407.)

(47) After developing Student's initial BSP in March 2007, Ms. Aly was in regular communication with Ms. Kuhl, who provided input on how the BSP was working, and made suggestions about how Student could be more successful in the general education classroom. (Test. of Kuhl; tr. at 128.)

(48) During Student's tenure at Elementary School, Ms. Aly revised Student's BSP approximately eight times. (Exs. P84, P104, P111, P119, P145, P168, P185 and P195.) She updated the BSP after reviewing data and anecdotal information from point cards, and talking to staff and Student's family. (Test. of Aly; tr. at 406.) Mother was only occasionally involved in changes to the BSP. (Test. of Aly; tr. at 407 and 771.) Ms. Aly did not believe that she had to call an IEP meeting or otherwise notify Mother before revising Student's BSP. (Test. of Aly; tr. at 407-408.)

(49) On one occasion, Student's family mentioned that Student felt that s/he was being singled out or picked on. Ms. Aly responded to that concern by revising Student's BSP's prevention strategies to include not intervening if Student and other students were displaying misbehavior at the same time. Ms. Aly also added a strategy of correcting a group of students rather than focusing on Student. (Test. of Aly; tr. at 402-403.)

(50) The most restrictive of Student's consequence strategies in four of the eight BSPs covering Student during her/his time at Elementary School was that if s/he refused to go to Room 7's safe room while engaged in unsafe behavior, District staff would "escort" her/him to Room 7's safe room. (Ex. P285 at 3.)

(51) Student's November 2008 BSP stated: "if unable to take self to safe room, s/he will be escorted by adults trained in OIS [Oregon Intervention Systems]." (Ex. P104 at 2.) Student's March 2010 BSP states: "In the event that Student is unsafe, s/he will be removed to designated safe room by escort from staff team trained in OIS in order to interrupt dangerous or unsafe behaviors toward self and others." (Ex. P185 at 3.)

(52) From the District's communications with her, Mother had no way of knowing how Student was taken to the safe room or by how many staff members. (Test. of Rudick; tr. at 1721.) None of the BSPs define the terms "escort" or "unsafe." None of the incident reports that District staff sent to Mother explained what those terms meant. No one from Elementary School ever explained to Mother or any of Student's other relatives what those terms meant or the range of actions that were included within the definition of "escort." (Exs. P104 at 2 and P185 at 3; Test. of Mother; tr. at 1920-1921; Test. of Aly; tr. at 889.)

(53) Mother participated in the development of Student's November 7, 2008 BSP, which was the first of Student's BSPs to include the consequence method of an escort to the safe room.

¹² At the beginning of Student's fourth grade year, Elementary School's copying budget was reduced, and Ms. Aly could no longer copy the point cards for Mother. At that point, Ms. Aly started sending Mother emails which detailed Student's behavior. (Test. of Aly; tr. at 452-453.)

During the BSP's development, Mother discussed strategy with Ms. Aly. Ms. Aly never mentioned that she was including physical restraints in Student's BSP. (Test. of Mother; tr. at 1920-1923.)¹³

(54) As part of her work as a caregiver, Mother was trained in OIS, which is a guide to using physical restraints. Mother understood from her training that the use of restraints was only permissible when someone was in imminent risk of serious bodily injury such as being in the path of a speeding vehicle. (Test. of Mother; tr. at 1924-1925.)

(55) Mother was unaware until after filing the due process complaint that the District sometimes physically touched Student in order to get her/him to Room 7. (Test. of Mother; tr. at 2171-2175.) When the District first assigned Student to Room 7, Ms. Aly advised Mother that in emergency situations, Room 7 staff might have to restrain students. Mother understood that those situations included extreme circumstances such as a child running into traffic or a fire emergency. (*Id.* at 2175.)

(56) District staff does not have a consistent definition about what the term "escort" means. When Ms. Aly used the word "escort" in Student's BSPs and incident reports, she meant that Student refused to go to the safe room on her/his own, and had to be physically assisted by staff. The physical assistance was more than placing a hand on Student's shoulder. Instead, it typically involved one staff member holding Student's belt and shirt, and pulling her/him backward. (Test. of Aly; tr. at 539-540.)

(57) At other times, the physical assistance was performed by two staff members. One would grasp Student's lower arms, and the other would grasp her/his legs. Staff would then lift Student and carry her/him to the safe room. (Test. of Aly; tr. at 541 and 545-546; Test. of Student; tr. at 2642.)

(58) According to District instructional assistants Emily Coburn Smith and Jamie Rudick, who worked in Room 7, the term "escort" can mean anything from verbal direction to physical contact. (Test. of Smith; tr. at 1536 and 1600; Test. of Rudick; tr. at 1721.)

(59) According to Ms. Kuhl, the term "escort" means that one or two staff members walked next to Student. At times, staff did not touch Student. On other occasions, staff might link an arm with one of Student's or place a hand on Student's shoulder. (Test. of Kuhl; tr. at 340.)

(60) School records show that Student was "escorted" by the District as early as her/his first grade year. (Ex. P18.) During second grade, teachers escorted Student to the safe room at least twice. (Test. of Kuhl; tr. at 126.) Moreover, incident reports show that District staff "escorted" Student to the safe room at least six times from October 2008 to May 4, 2010. (Exs. P101, P102, P129, P153, P176 and P209.) These records fail to demonstrate that on any of these occasions, anyone was in grave, imminent danger of any sort. (*Id.*)

¹³ Both Ms. Aly and Dr. Sullivan acknowledge that the physical methods the District sometimes used to get Student to Room 7 constituted physical restraints under OIS. (Test. of Aly; tr. 541 and 545-546; Test. of Sullivan; tr. at 2835.)

(61) The first of Student's BSPs to include escorts to Room 7 as a consequence was Student's November 2008 BSP. (Ex. P104 at 3.) Student's January 2009 BSP also contained the escort consequence. (Ex. P111 at 3.) For some unknown reason that Ms. Aly, who drafted the BSPs, cannot explain, Student's April 2009, October 2009 and February 2010 BSPs do not have the escort consequence. Student's March 2010 and April 2010 BSPs do have the escort consequence. Ms. Aly cannot explain either why the escort consequence was removed in April 2009 or reintroduced in March 2010. (Test. of Aly; tr. at 591, 768-769.) Moreover, despite its absence from April 2009 to March 2010, District staff continued to escort Student to Room 7 during that period. (Test. of Aly; tr. at 591; Exs. P153 and P176.)

(62) According to the District's Director of Educational Support Services, restraints are a last resort. (Test. of Sullivan; tr. at 2835 and 2845.) Mr. Sullivan believes that if District staff believes that a student's behavior warrants restraint, staff must discuss restraints in the student's IEP. That did not happen here. (Id. at 2848.)

(63) After staff escorted Student to Room 7, s/he would enter the safe room, which is within the classroom. The safe room was approximately five by five feet wide with a ten foot tall ceiling. The walls and ceiling are carpeted. (Test. of Student; tr. at 2646.) The door has a window and a magnetic lock on the door. Staff locks the door by pushing a red button outside of the safe room. Once pushed, the door cannot be opened from the inside. (Test. of Rudick; tr. at 1601-1602.)¹⁴

(64) After Student calmed down, staff would open the door so s/he could exit the room. (Test. of Rudick; tr. at 1716-1718.) In Student's case, her/his BSP provided that the school would contact her/his family if Student did not de-escalate within 30 minutes. (Test. of Sullivan; tr. at 2746-2747; Exs. P185 at 3 and P195 at 3.)

(65) The safe room was not the only area of Room 7 to which the District directed misbehaving children. Students also sometimes were sent to the sensory corner in Room 7 for timeouts. The unenclosed sensory corner had a specific chair used for timeouts. (Test. of Rudick; tr. at 1700 and 1703.)

Student's Third Grade School Year

(66) During Student's third grade school year, her/his general education teacher was Mark Olson, who has since retired from the District. (Test. of Kuhl; tr. at 129.) As was true throughout Student's time at Elementary School, Ms. Aly was her/his special education teacher. (Ex. P165 at 1.)

(67) Student had a good start to third grade. At the beginning of the school year, Ms. Kuhl asked Mr. Olson if Student was thumb-sucking or eating from garbage cans, which were behaviors that Ms. Kuhl previously had observed. Mr. Olson replied that he had not observed either of these behaviors. (Test. of Kuhl; tr. at 129.)

¹⁴ The safe room was not only used for punishment. Student and other children also sometimes used the safe room to work on assignments or have some quiet time. (Test. of Aly; tr. at 796-797.)

Room 7

(68) During Student's third grade year, Ms. Aly taught specialized education to eight to fourteen children at a time in Room 7. The children had a variety of eligibilities for special education including ADHD, ASD, and emotional disturbance. Even when not receiving specialized instruction, children voluntarily came to Room 7 for breaks. At other times, teachers from general education classroom sent children to Room 7 after they misbehaved. Assisting Ms. Aly in Room 7 were two to three instructional assistants. (Test. of Aly; tr. at 401.)

(69) Room 7's sensory corner, in addition to the timeout chair, had a couch, pillows and weighted blankets. Student used the sensory corner to calm down or take breaks. S/he enjoyed spending time in the sensory corner. (Test. of Aly; tr. at 404; test. of Smith; tr. at 1542.)

Student's Handwriting/Typing Skills

(70) Beginning in third grade, Ms. Fusek changed her focus with Student from improving her/his handwriting skills to helping her/him learn to type her/his assignments. Ms. Fusek focused on typing because the work output demand increased when Student reached third grade. (Test. of Fusek; tr. at 1093-1094.)

(71) Ms. Fusek assisted Student with typing on the Alpha Smart device, which s/he could take with her/him wherever s/he went. Additionally, Student had access to a computer in the general education classroom. Although Student's IEP required only five hours per year, Ms. Fusek spent close to nine hours per year working directly with Student. (Test. of Fusek; tr. at 1093-1094, 911-912.)

Behavior Issues Surface in Third Grade

(72) Student had a spike in behaviors in October 2008. During that period, Student was taking Strattera, an ADHD medication. The District understood that side effects from the medication might be bothering her/him. (Test. of Aly; tr. at 434; 437.) Instead of helping Student, this medication caused further problems. Mother noticed that Student was not acting like her/himself. Student complained to Mother that s/he was seeing things. Student even became scared of going to the bathroom by her/himself. (Test. of Mother; tr. at 1918-1919.)¹⁵

(73) During the third grade school year, corrective feedback and non-preferred task demands triggered behavior outbursts in Student. By following Student's BSP, Ms. Aly was able to keep Student's behavior in check overall. (Test. of Aly; tr. 435.) According to Mother, Student's BSP was effective at controlling some of Student's behavior during this time period. (Test. of Mother; tr. at 1922.)

(74) Ms. Aly also used the BSP to help Student manage teasing from other children. Ms. Aly taught Student to walk away from a student who was teasing her/him or get staff assistance. When involved, staff asked the teasing student to stop and/or issued the student a reminder slip

¹⁵ After Student twice urinated into containers in Room 7, Student told Ms. Aly that s/he was afraid to go to the restroom. (Test. of Aly; tr. at 735-736.)

about teasing. Overall, Ms. Aly thought it better to teach Student strategies to cope with teasing because schools cannot eliminate all teasing. (Test. of Aly; tr. at 568 and 884.)

(75) On November 5, 2008, one of Student's toys was misplaced or lost in the general education classroom. S/he ran from the classroom out onto a public street, eventually returning unharmed to the school building. (Ex. P103.)

Soiling Accidents

(76) Student had a history of medical problems before beginning school. After s/he was born, s/he had surgeries to correct a congenital defect involving the protrusion of her/his intestines outside of her/his body. After the surgeries, Student had bowel problems which on occasion caused her/him to soil her/his pants. These accidents continued through Student's fourth grade school year. (Test. of Mother; tr. at 1933-1935; Ex. P68 at 1.)

(77) On several occasions during Student's third grade year, staff noticed an odor coming from Student that led it to believe that Student had soiled her/his pants. (Test. of Smith; tr. at 1550.) Mother advised the District that the accidents might be related to Student's medical condition from her/his birth defect. The District and Mother arranged for the District to keep a clean pair of clothing and cleaning wipes in a backpack for Student. If Student had an accident and did not have clean clothes, the District provided them. (Test. of Mother; tr. at 1930-1937.)

(78) In December 2008, Student's pediatric nurse practitioner, Peter Schnabel, prescribed an anti-depressant, Prozac, for Student. The Prozac made Student sleepy but seemed to moderate her/his emotions somewhat. (Test. of Mother; tr. at 1930-1937.)

(79) Ms. Aly met with Melissa Barbour, the District's behavior consultant, in December 2008.¹⁶ Ms. Aly and Ms. Barbour reviewed Student's current BSP and talked about contacting Student's physician to ask about potential side effects from Student's medication. (Test. of Aly; tr. 437-438; Ex. D8 at 1.)

(80) Around that time, Ms. Aly also contacted Mother. Mother advised that Student had stopping taking anti-depressants but would resume them during winter break. (Test. of Aly; tr. 437-438 and 564; Ex. D8 at 1.) Ms. Aly asked Mother for feedback about Student's education, and asked if some of her/his behaviors might be related to a chemical imbalance. Mother responded that the District was doing the best it could for Student. (Test. of Aly; tr. 438.)

(81) For whatever reason, Student's behavior stabilized for the next four months. (Ex. D8 at 1.)

¹⁶ Ms. Barbour has a bachelor's degree in social work from the University of Tampa and a master's degree in special education from the University of Oregon. She also has a special education teaching certification. (Test. of Barbour; tr. at 1246.) Ms. Barbour consults with District special education teachers on conducting functional behavior assessments, and creating and implementing behavior support plans. (*Id.* at 1247-1249.)

2009 IEP

(82) Mother, Mr. Olson and Ms. Aly met on March 13, 2009 to prepare Student's 2009 IEP. Uncle, Grandfather, and Peter Schnabel¹⁷, also participated in the meeting. (Test. of Aly; tr. at 442; Ex. P114 at 1.) Ms. Aly signed the IEP signature lines for both Special Education Teacher/Provider and District Representative. (Ex. P114 at 1.)

(83) Mother actively participated in the IEP discussion, asking questions and providing suggestions. The meeting participants decided that because Student had been self-selecting instruction in Room 7, s/he should be encouraged to spend more time in the general education classroom. (Test. of Aly; tr. at 445.)

(84) Mr. Schnabel mentioned that Student had been on Prozac for anxiety. (Test. of Aly; tr. at 579-581.) Uncle asked at the meeting that the District include counseling for Student to help with anxiety. Ms. Aly responded that the District did not provide counseling services. (Test. of Uncle; tr. at 2399.) That information was incorrect. The District does provide counseling to students. (Test. of Sullivan; tr. at 2836-2838.) Indeed, the District has mental health therapists that provide anxiety counseling. (*Id.* at 2759-2760.)

(85) At the 2009 IEP meeting, there was a discussion about Student having some sensitivity to sound and touch. After the meeting, Uncle sent Ms. Aly an article on autism in an April 1, 2009 email. Ms. Aly did not respond to Uncle's email. (Ex. P117 at 1; Test. of Uncle; tr. at 2410.)¹⁸

(86) At the meeting, the participants discussed strategies for Student's BSP. (Test of Aly; tr. at 579-581.) Mother told the team that as of March 2009, the 2008 IEP had worked overall to control Student's behaviors. (Test. of Mother; tr. at 1940.)

(87) The 2009 IEP set the following annual goals, criteria and evaluation procedures: Under Behavior/Social Skills, Student had three goals. First, Student will interact appropriately in large group setting by getting permission to leave the instructional area, using appropriate language and making non-threatening statements. Second, Student will focus on her/himself when other students are breaking the rules or not following directions. Third, Student will accept feedback given by school adults. (Criteria: 90% of the school day; evaluation procedures: observational data.) Student had three goals for Written Language. First, Student will organize her/his thoughts into 2 paragraphs, each with a topic sentence, supporting details and a conclusion. (Criteria: 3 of 4 writing samples; evaluation procedures: classroom performance.) Second, Student will use correct grammar, punctuation and capitalization on written assignments. (Criteria: 90% accuracy in writing samples; evaluation procedures: classroom performance.) Finally, Student will type 15 words per minute. (Criteria: 3 of 4 opportunities; evaluation procedures: typed timing assignments. (Ex. P114 at 7.)

¹⁷ Mr. Schnabel, who worked with Lane County Mental Health, assisted Student with her/his medication and mental health needs. (Test. of Aly; tr. at 442; Ex. P114 at 2.)

¹⁸ Mother did not offer into evidence the article on autism so its content is unknown.

(88) Student's 2009 IEP did not specify Student's present levels statement with regard to any of the goals. The 2009 IEP stated regarding present levels:

Strengths of Student: Student is a caring, empathetic 3rd grader who is full of wonderful and creative ideas. S/he is very intelligent, often not needing much instruction to catch on to new concepts quickly. S/he is insightful, inquisitive and highly knowledgeable about things that interest him/her – S/he is insightful, inquisitive and highly knowledgeable about things that interest him – including many scientific concepts. S/he is an auditory learner with a great memory, often recalling information presented weeks prior. Her/his comprehension and problem-solving abilities are strong, especially when s/he is calm and interested. S/he often shares the toys s/he brings to school with other students, and gives good advice to peers who are struggling to make good choices. S/he is becoming more self-aware – recognizing what things are stressful for her/him, and sometimes even vocalizing that to the adults around her/him.

How disability affects involvement and progress in general education curriculum: While receiving instruction in the general education environment, Student has displayed intense and long-lasting behavioral struggles. Examples include leaving the instructional area without permission, leaving the school building without permission, hiding in the bathroom, stomping on [an] adult's foot, and threatening to start a fire. Statements that staff have [sic] observed Student saying include: "I've got a plan that you don't know about...I'm going to kill somebody and then say you did it. I want to give myself a blood clot so I can die and not have to come to school. Fucking bitches! Whoever did that is gonna get a big punch in the face. I'll have to bring my pistol tomorrow." These incidents lasted anywhere from 48 minutes to an hour and 42 minutes. Because of the intensity and duration of this behavior, Student was given the choice to stay in the self-contained environment beginning in late October, where staff has noticed a decline both in the duration and the intensity of his behaviors. Behaviors observed in the self-contained setting include throwing a toy, breaking pencils, shoving things off desks, banging his fist on desks and ripping paper. Statements s/he has been observed to say include: "I already know the answer, I'm NOT gonna do it, and I know I'm not following directions, blah, blah, blah." These incidents have lasted anywhere from 32 minutes to an hour and 15 minutes.

The concerns of the parents for enhancing student's education: Student's family is concerned that school staff is hyper-vigilant and inadvertently targets Student for the same behaviors that other kids exhibit but don't get into trouble for. They would like to work more closely with the school to coordinate help at home on school projects. They would also like to see Student increase her/his access to the general education environment.

The academic, developmental and functional needs of the child: Student has needs in the area of writing. Handwriting is difficult for her/him, and her/his writing is often illegible. She/he needs assistance to develop paragraphs, and multi-paragraph assignments. Behaviorally, Student needs to learn to accept

feedback, and to interact appropriately in large group settings.

Results of the initial or most recent evaluation: A functional behavior assessment completed in January hypothesized the following: Given a non-preferred demand, denial of preferred activity or request to end preferred activity, Student will sometimes play with toys, crawl under desks, refuse to do work, try to engage other students and run out of the room in order to avoid the non-preferred task/gain preferred tasks. Given corrective feedback, especially in front of peers, Student will sometimes shout: "I know," use inappropriate language, make threats, run away from adults, and refuse to come to school in order to save face or avoid consequence/correction.

(Ex. P114 at 12.)

(89) Student's 2009 IEP provided for specially designed instruction from March 14, 2009 to March 13, 2010 as follows: Behavior/Social Skills (150 minutes per week in special class)¹⁹; Written Language (150 minutes per week in special or regular class);²⁰ Occupational Therapy (300 minutes per year in special or regular class). Supplementary aids included assistive technology for written assignments. Student was to use assistive technology daily or as needed in special or regular class. Staff was to use a Behavior Support Plan daily across all school settings. Staff also was to have 120 minutes of occupational therapy consultation per year. The IEP stated that Student would be removed from participating with non-disabled students in general education classes, extracurricular activities, and non-academic activities for 30 minutes of the school day for structured behavior support and 30 minutes per day for writing instructions. The IEP specified that Student had the choice to receive grade level instruction in all other academic areas for the remaining minutes of the day in either the special or general education setting.²¹ The IEP further provided:

Student needs to be removed for individualized instruction in writing and behavior/social skills in order to have the skills necessary to access grade level instruction in large group settings. S/he has access to the general education environment for the remainder of the school day when s/he chooses, and will be rewarded at school and at home for making that choice.

(Ex. P114 at 9.)

April 2009 Behavioral Spike

(90) In April 2009, Student had some episodes of refusing to do assigned tasks. During that period, s/he self-selected to spend much of her/his time in Room 7. (Test. of Aly; tr. at 585.) Ms. Aly consulted with Ms. Barbour about the problem. Ms. Aly told Ms. Barbour that

¹⁹ The team decided to double the time for behavior and social skills from 15 minutes daily to an average of 30 minutes daily so Student could work on goals in those areas. (Test. of Aly; tr. at 446.)

²⁰ Mother understood that the specially designed instruction for behavior and writing was increased because Student was still working on goals in those categories. (Test. of Mother; tr. at 1942.)

²¹ The team decided to give Student the choice so s/he could decide on a given day where s/he would be more successful. (Test. of Aly; tr. at 448.)

Student's family wanted her/him to remain in the general education classroom as much as possible. Ms. Barbour offered to conduct classroom observations of Student during the afternoon, when s/he more frequently exhibited behavioral issues. (Test. of Barbour; tr. at 1255.) The purpose of the observations was to test whether the hypotheses from Student's FBA were still valid. Ms. Barbour conducted the observations, and concluded that the hypotheses were correct. Ms. Barbour recommended that Ms. Aly continue to consistently apply Student's BSP. (Test. of Barbour; tr. at 1255.)

(91) After spring break in 2009, Student had behavior problems during unstructured time on lunch or recess breaks while in large group settings. (Test. of Aly; tr. at 451.) As a result, Ms. Aly added a trigger of unstructured time to Student's BSP. (Ex. P119 at 1.)

(92) In April 2009, Student's Uncle asked Ms. Aly again if Student could get psychological services such as counseling. In turn, Ms. Aly asked Marilyn Nersesian, who worked in the District's educational support services. (Test. of Aly; tr. at 584.) Ms. Nersesian responded that a more therapeutic placement for Student might be considered but did not respond directly to the counseling request. Ms. Aly does not recall if Uncle's request was ever discussed again. (*Id.* at 585.)

(93) In April 2009, Student sometimes refused to do her/his math and reading work or to comply with staff's requests. Student used inappropriate language such as calling other students "bitches." S/he made obscene gestures such as extending her/his middle finger. Student threw items across the room. S/he said: "I hate everyone in the classroom but me and I can demolish the school and everyone in it." At times, Student cried while in class. (Test. of Rudek; tr. at 1752-1753; Test. of Aly; tr. 439; Exs. D8 at 1 and D9 at 13-16.)

(94) Ms. Aly did not know whether Student actually would follow through on threats s/he made. (Test. of Aly; tr. at 574.) In response to Student's threats, Ms. Aly followed her/his BSP and gave Student a choice of being in the regular or special education classroom after s/he calmed down. (Test. of Aly; tr. at 576.) The threats usually occurred in the special education classroom after Student was corrected or given non-preferred tasks. Ms. Aly was able to manage the behaviors overall by following Student's BSP. (*Id.* at 578-579.)

(95) On May 11, 2009, Student threw a soccer ball at another student. Student ran from the school building onto public streets surrounding the building. S/he hid in bushes until staff approached her/him. Student then safely returned to Room 7 on her/his own. The District suspended Student for two days and rescinded some of her/his reward points. (Ex. P132 at 2; test. of Aly; tr. at 610-611.)

(96) On May 19, 2009, Ms. Katsuda met with Mother and Grandfather to discuss the May 11, 2009 incident. Ms. Katsuda expressed concern about Student's leaving the building. Mother suggested that the teachers give feedback to a group of students instead of singling out Student. Ms. Aly incorporated that suggestion into Student's BSP. Ms. Aly also implemented Mother's idea that the teachers provide Student a pass that s/he could use whenever s/he wanted to take Room 7 breaks. (Test. of Aly; tr. at 441 and 600.)

(97) Ms. Aly also discussed Student's soiling of her/his pants again with Mother. Mother advised that Student was taking fiber medication which was causing diarrhea. (Ex. P134 at 1.) To avoid embarrassing her/him before other children, Ms. Aly developed nonverbal cues to give Student when s/he had an odor that might require clean-up. (Test. of Aly; tr. at 441; 600.)

Student Did Well Academically in 2009

(98) Despite the spikes in Student's behavior in October 2008 and April 2009, s/he continued to do well academically in her/his general education subjects. Test. of Aly; tr. at 433.) Student's midway third grade report card showed that s/he exceeded the standard for all six categories of Reading Literature, except for Effort, which s/he met. Student met the standard for all graded categories under Writing except for conventions. S/he met the standards for Art. S/he exceeded the standard for one Mathematics category, and met the remaining five categories for Mathematics. Student exceeded all categories under Speaking/Listening, Science, Social Science, Social Skills and Work Habits. (Ex. D7.)

(99) At the end of Student's third grade, Mr. Olson rated Student on his/her report card as having the same marks as at midyear with the exception of lowering Student's rating to meets expectations for effort in math, lowering Student's rating to meets expectations for Work Habits, and lowering Student's Social Studies ratings for interacting appropriately with others and demonstrating self-control to not currently meeting the standard. (Ex. D7.) Therefore, the cycles in Student's behavior did not prevent her/him from, progressing in the regular academic program. (Test. of Aly; tr. at 433.)

(100) Student also made progress toward his 2008 IEP goals during third grade. On working cooperatively, the report stated: "Currently, Student has very few opportunities to work on this skill because of the intensity of her/his behaviors in a whole group setting. While practicing this skill in isolation (for short periods of time, with preferred peers and highly supervised by an adult) s/he is successful 85% of the time." On responding to change, the report found: "Student has demonstrated the ability to respond to change appropriately 75% of the time in small group settings. S/he struggles most with changes to her/his work or task demand expectations." With regard to keeping her/his body to her/himself, the report noted: "Student has met this goal, with 99% accuracy! Way to go Student!!" On writing two paragraphs, the report found: "Currently, Student is able to identify the parts of a paragraph with 100% accuracy with no prompts. S/he struggles to develop her/his ideas and put her/his thoughts into sentences without prompting, so work continues on this goal." On typing, the report states: "Student is typing about 5 words per minute with 100% accuracy. The focus continues to be on accuracy, and not speed, as he trains his finger muscles and commits the keys to memory." (Ex. D3 at 5-6.)

Student's Fourth Grade Year

(101) Ms. Kuhl was Student's fourth grade general education teacher.²² The District assigned Student to Ms. Kuhl because of their great working relationship in second grade. (Test. of Kuhl; tr. at 134.)

(102) Ms. Kuhl revisited the TAG topic with Mother in Student's fourth grade. Ms. Kuhl explained that some students are twice-exceptional, meaning that they have a special education need combined with being talented and gifted. Ms. Kuhl advised Mother that the TAG evaluation might provide important information for Student's teachers, especially those who would be teaching Student in middle school. Mother somewhat reluctantly agreed, but never returned the authorization for TAG testing. (Test. of Kuhl; tr. at 167.)

Student's Fourth Grade General Education Classroom

(103) Ms. Kuhl taught both general education and special education students in her classroom. She had children in her classroom with ADD, ADHD and autistic tendencies. Ms. Kuhl was familiar with IEPs, having taught with them during her entire career. (Test. of Kuhl; tr. at 79-80.)

(104) Noting from Student's IEP that s/he had difficulty with handwriting, Ms. Kuhl arranged for someone to write down Student's verbal answers to questions in her/his course work. Additionally, Ms. Kuhl gave Student access to a computer s/he could use to complete written assignments. A software program called Garage Band allowed Student to verbally record part of her/his assignment, listen to the recording, and then complete the rest of the assignment. That program helped prevent Student's frustration with writing stop her/him from finishing her/his assignments. (Test. of Kuhl; tr. at 84.) Ms. Kuhl loaded the program on a computer located in a quiet area of her classroom. (*Id.* at 153.) Ms. Kuhl also provided Student with a palm-pilot sized device that enabled her/him to type assignments. (*Id.* at 80 and 84.)

(105) Ms. Kuhl accommodated Student's ADHD by allowing her/him low stimulation time. When Student needed some quiet time to collect her/his thoughts, Ms. Kuhl suggested that s/he go to a reading corner to retreat from the rest of the classroom. (Test. of Kuhl; tr. at 84.) Additionally, Ms. Kuhl gave Student headphones s/he could wear to block classroom noise. (Test. of Kuhl; tr. at 85.)

Good Start to Fourth Grade

(106) During the summer between third and fourth grade, Mother noticed that Student appeared to mature in many ways. For example, s/he no longer reacted emotionally to small issues. (Test. of Mother; tr. at 1956.) As a result, Mother took Student off Prozac. (*Id.* at 2095.) When Student started back at school in the fall of 2009, Mother observed that Student's BSP was working to control her/his behavior. (*Id.* at 1958.)

²² As of the 2009/2010 school year, Ms. Kuhl had taught general education at the District for seven years and at Elementary School for three years. Ms. Kuhl has a bachelor's degree in psychology and a master's degree in education. She is licensed as a teacher by the state of Oregon. (Test. of Kuhl; tr. at 77.)

(107) Ms. Kuhl also was pleased with Student's apparent progress. Ms. Kuhl noted that previous problem behaviors such as hiding under tables, eating from garbage cans, and placing her/his hands in her/his pants were mostly extinguished. (Test. of Kuhl; tr. at 137-138.) Student had a good start to the fourth grade with few behavioral problems for the first month or so. (Test. of Kuhl; tr. at 139; Test. of Aly; tr. at 451-452.)

October Spike in Misbehaviors

(108) In October, Student displayed some behavioral problems. (Test. of Aly; tr. at 618; Exs. 147-148, 150 and 154.) While in the cafeteria, Student spit out food, took other children's food, passed gas, and told other students s/he was going to defecate on them. (Ex. 152 at 1.)

(109) On October 14, 2009, Student used inappropriate language ("poop" and "fart"), called another child ugly, yelled at other children to not follow a teacher's direction, and slammed a door in another child's face, causing the child to cry. Student ran from the cafeteria to Room 7, where s/he calmed down. A short time later, Student pushed the locking button to hold staff and another child inside the safe room. An instructional assistant had to physically move Student away from the locking button. When the assistant moved away from the door, Student again tried to lock the door. Staff inside the safe room stopped Student from locking the safe room door by opening the door and bracing it with her foot. The District contacted Grandfather, who spoke to Student on the telephone. Student briefly calmed down before throwing the telephone on the floor. Eventually, Student regained her/his composure. (Ex. P147 at 1.)

(110) Later that day, Student moved a bent arm near another student's face, stopping before making contact. The District called Grandfather, who again spoke to Student. After getting off the telephone, Student gave "the finger" to another student. When asked to write a letter of apology to the other student, Student refused in a loud, argumentative voice. Student threw a pencil 10 feet into a wall. S/he refused to move to the tiled area until staff reminded him that his family would be called again. Student ultimately calmed down. (Ex. P147 at 2.)

(111) That afternoon, Ms. Aly sent Mother an email describing the day's events.²³ Ms. Aly mentioned that other students seemed offended by Student's statements that s/he was going to "poop" or "fart" on them. Mother thought that such language was common among children, and was dismissive of the District's concern about it. (Test. of Mother; tr. at 2072-2073; Ex. P152.)

(112) Student began sucking her/his thumb again. (Test. of Kuhl; tr. at 213; Ex. P152 at 1.) Ms. Fusek attempted to help her/him stop thumb-sucking by providing her/him a piece of refrigerator tubing to chew on. (Test. of Mother; tr. at 2073.)

²³ Budget cuts in the fall of 2009 prevented Ms. Aly from copying the daily point cards for Mother. As a result, Ms. Aly sent Mother daily emails providing Student's scores on the point cards as well as anecdotal information about Student's behavior. (Test. of Aly; tr. at 452; (Ex. D18.) Generally, Mother did not respond to the emails unless they contained a specific question for her. (Test. of Aly; tr. at 452.)

(113) On October 19, 2009, while outdoors at lunch recess, Student ran away from staff and screamed after being asked to keep her/his hands to himself. Student pulled a plant from the ground and hit another student with it. Student complied with staff's direction to go to Room 7 but ran far ahead of the instructional assistant. Student stopped in the bathroom, making loud noises that disrupted other classrooms. After entering Room 7, Student blocked staff from entering the room. Student ran screaming into the safe room where s/he encountered another child, whom Student called: "sons of a bitches [sic]." The other child left the safe room and Student entered. Student began slamming the door and spitting. After staff locked the safe room's door, Student repeatedly kicked the door, slammed her/his body against the door, and hit the window. Eventually, Student deescalated. Staff agreed to her/his calm request to exit the safe room. (Ex. P148.)

(114) Ms. Aly discussed the October spike in Student's behaviors with Ms. Barbour, the behavioral consultant. Ms. Barbour did some observations of Student during lunch breaks. Ms. Barbour observed no misbehavior during those breaks. (Test. of Barbour; tr. at 1258-1259.)

(115) On October 27, 2009, Student refused to follow staff's directions. Student swung a clenched fist at staff, saying: "If you even try to come near me, you'll be sorry." Student picked up a chair and swung it in the direction of staff. On the way to the safe room, Student tried to bite, kick and punch staff. Once inside the safe room, Student kicked the wall and door, banged on the door and spit on the floor. Eventually, Student calmed down, and staff released her/him from the safe room. (Ex. P151 at 1-2.)

(116) During the previous school year, Ms. Aly, at Mother's suggestion, had added whole group correction to Student's BSP so s/he would not feel singled out. Ms. Aly did not think that step was working as well as anticipated. In October 2009, Ms. Aly added a step requiring staff to tell Student that they needed to discuss an issue. Staff gave Student the option of discussing the issue then or later. Ms. Aly thought that this strategy would advise Student that s/he needed to redirect her/his behavior without being scolded. This would spare Student the embarrassment of being corrected in front of her/his peers. (Test. of Aly; tr. at 455, 777-778.)

(117) After Ms. Aly implemented these changes to Student's BSP, her/his behavior generally settled down. As a result, from the end of October 2009 until March 2010, Student was able to be in the general education classroom approximately 85 to 90 percent of the time. S/he went to Room 7 for specialized instruction or when s/he wanted to take a break. Mother asked that Student to be in the general education classroom as much as possible. Thus, when Student appeared in Room 7 for a break, Ms. Aly set a timer for five minutes. When the time expired, Ms. Aly directed Student to return to Ms. Kuhl's classroom. (Test. of Kuhl; tr. at. at 144; 148-150.)

Student's Three-Year Eligibility Evaluation

(118) A required three-year review of Student's eligibility for specialized education was due on February 5, 2010. In January 2010, the District notified Mother of a team meeting to discuss whether or not Student needed any further assessments of his disability. (Ex. D11 at 1, Ex. D12 at 1, and Ex. P162 at 1.)

(119) The team meeting was held later that month. Mother, Grandfather, Grandmother, Ms. Kuhl, Ms. Aly, Ms. Katsuda, and the District's Special Education Consultant, Jane Nordman-Reese, decided that no additional testing was necessary. They agreed that Student was still eligible for special education. They also agreed that Student's ADHD/OHI eligibility category remained valid. (Test. of Aly; tr. at 457.)

(120) At the meeting, Mother did not mention additional evaluation for Student. She did not request any testing or suggest that Student should be tested for autism or ASD. Mother provided no additional medical information regarding Student. Mother did not indicate that the District's prior testing was inadequate or ask that different evaluation tools or assessments be used. Similarly, Grandfather and Grandmother did not suggest that any other testing be done. (Test. of Kuhl; tr. at 151; Test. of Aly; tr. at 456; 457-459; Test. of Nordman-Reese; tr. at 1799-1800, 1851-1852 and 1854.)²⁴

(121) The team also decided that no further evaluation was required to determine Student's educational needs. No one said that more assessment information was necessary to devise an IEP or select goals or service levels for Student. Mother said that "not much" was going on at home at that time. Everyone at the meeting agreed that Student was being well served. At that point, Student was spending 80 to 85% of her/his time in the general education classroom. (Test. of Aly; tr. at 45 and 747-748; Test. of Kuhl; tr. at 145; Test. of Nordman-Reese; tr. at 1799-1800-1852, 1855; Ex. D13.)

(122) No one discussed Student's behavioral problems from the fall of 2009. (Test. of Mother; tr. at 2080.) Mother knew that Student's behavioral issues were cyclical during her/his school years. Mother believed that as of January 2010, Student was doing well in school. (*Id.* at 2082.)

(123) After the meeting, Ms. Nordman-Reese prepared a Psycho-Educational Assessment Report regarding Student's re-eligibility. Her report, dated January 28, 2010, finding that no additional assessments were necessary. The report stated that Student was at or above fourth grade level in most subject areas except for writing, and therefore was making good progress academically. (Ex. D12; Test. of Nordman-Reese; tr. at 1799-1800; Test. of Kuhl; tr. at 148-149.) Ms. Nordman-Reese concluded that a file review showed that Student's behaviors were not primarily the result of another disability. (*Id.*)

(124) Ms. Nordman-Reese has never interacted with Student. She did not review all of Student's test results or any of Ms. Aly's written documentation regarding her/his misbehavior. She did interview Ms. Kuhl and Ms. Aly, who advised that Student was doing well. (Test. of Nordman-Reese; tr. at 1796, 1799-1801.)

(125) Student's IQ score from one of her/his 2007 assessments for specialized education was low average or in the 13 percentile. Ms. Nordman-Reese included that score in her report. (Ex. P164 at 2.)

²⁴ If Student's family or either of her/his teachers had asked for evaluation for ASD or any other disabling condition in January 2010, the District would have conducted the evaluation. (Test. of Nordman-Reese; tr. at 1864-1865.)

(126) Ms. Nordman-Reese also reviewed the 2007 neuropsychology report of Dr. Charlotte Higgins-Lee, which discussed an IQ score from that year of 123 or high average. (Exh. P72 at 1 and 3.)

(127) In her report, Ms. Nordman-Reese failed to explain the discrepancy between the two IQ scores. Her report also did not mention the fact that Ms. Kuhl had twice recommended to Mother that Student be evaluated for the TAG program on the basis of her/his intellect. (Test. of Ms. Nordman-Reese; tr. at 1814-1815 and 1818-1820; Ex. D12.)

(128) Ms. Nordman-Reese did not review information regarding Student's behavioral problems during the fall of 2009. She reviewed a District file on Student that contained school psychology reports and a doctor's statement of the medical condition initially qualifying Student for special education eligibility. Ms. Nordman-Reese also reviewed Student's current general education grades. (Test. of Nordman-Reese at tr. 1802-1803.) Ms. Nordman-Reese did not review the working files of Student's special or general education teachers. (*Id.* at 1803.)

(129) On January 29, 2010, the District completed a statement of eligibility for special education form, concluding that Student remained eligible for special education under ADHD in the category of OHI. Mother agreed with continuing Student's ADHD eligibility. (Test. of Mother; tr. at 2086; P166 at 2.)

Progress Report Regarding 2009 IEP

(130) In the beginning of 2010, Ms. Aly prepared a progress report regarding Student's 2009 IEP goals. On working cooperatively in large group settings, the report stated: "Student currently demonstrates this skill 91% of the school day. Nice job, Student! Currently, Student has asked permission to leave the room 55/60 opportunities. S/he uses appropriate language 95% of the day, and makes statements that are non-threatening 99% of the day." With regard to focusing on her/himself instead of on students not obeying rules, the report found: "Student demonstrates this skill 91% of school day. Student is demonstrating this skill 95% of the day." On accepting feedback, the report found: "Currently, Student is accepting feedback from adults 92% of the school day. Student is meeting this goal at 98% of the day." On preparing paragraphs, the report found: "Work continues on this goal. Student needs a lot of assistance to organize paragraphs. Currently, Student is performing this task with 100% accuracy on one paragraph assignments. Teaching will progress to 2 and 3 paragraph samples as the year progresses." On using correct grammar, the report found: Work continues on this goal. Student demonstrates the knowledge of grammar and punctuation independently when working on them in isolation, but this skill has not generalized to her/his writing samples. Student uses proper convention 73% of the time without prompt, and is able to make proper corrections with prompts 100% of the samples. With regard to typing, the report found: Student is currently typing about 8 words per minutes. Currently Student is typing about 10 cwpm." (Ex. P114 at 6-7.)

Student's 2010 IEP

(131) Mother, Ms. Kuhl, and Ms. Ally met in January 2010 to prepare Student's 2010 IEP. Grandfather also participated in the meeting. Ms. Ally signed the signature lines for both

Special Education Teacher/Provider and District Representative on the IEP form. (Ex. P165 at 1.) The District teachers as well as Mother and Grandfather participated in the meeting by discussing goals for Student. (Test. of Kuhl; 159.) Mother did not ask for information on placement or programs that Ms. Aly could not address. There was no dispute about the content of the IEP, including placement. (Test. of Aly; tr. at 870.) The 2010 IEP set the following annual goals, criteria and evaluation procedures:

For Written Language: Student will organize her/his thoughts into 2 paragraphs, each with a topic sentence, supporting details and a conclusion. (Criteria: 3 of 4 writing samples; evaluation procedure: classroom performance. Student continued to have a writing goal because s/he still displayed a need for improvement with that skill. (Test. of Kuhl; tr. at 152.) Student had two goals under Behavior. The first was that s/he would complete assigned tasks without engaging or disrupting other students. (Criteria: 95% if school day; evaluation procedures: classroom performance.)²⁵ The second was that Student would respond appropriately to peers who teased or treated her/him unfairly. (Criteria: 95% of school day; evaluation procedure: observational data.²⁶)

(Ex. P165 at 6.)

(132) Student's 2010 IEP failed to describe Student's present levels statement of regarding any of the four goals. The IEP stated regarding present levels statement:

Strengths of Student: Student is a caring, empathetic 4th grader who has made tremendous progress over the past year. S/he is extremely intelligent, and has shown emerging skill in learning new languages. S/he is self-monitoring her/his breaks, identifying when s/he needs them and taking appropriate steps to gain access them. Concerns of the parents: The family wants Student to take more responsibility for homework, and to spend less time in room 7's reward time (project) so that s/he can more fully participate in science, social studies and health activities. Present level of academics: Student is grade level for all academic areas except writing. S/he struggles to take all the wonderful creative ideas s/he has from her/his brain to the paper in front of her/him. S/he has had success in this area by using Garage Band – recording her/his ideas and then transcribing them afterwards. S/he also struggles to revise, often reading what s/he thinks s/he wrote rather than the actual words on the paper. The team discussed the use of assistive technology to help with these deficits.²⁷ Present level of developmental/functional performance: Currently, Student is meeting all of her/his behavioral goals. S/he struggles to complete the specific tasks that are assigned during a given period, often trying to engage and distract other students. S/he also struggles when peers tease her/him or do things that s/he perceives to be unfair or unjust. How the disability affects involvement and progress in the general education curriculum: Student needs a calm, quiet environment to escape

²⁵ Ms. Kuhl suggested this goal because of Student's habit of avoiding work by talking to and using inappropriate language with other students. (Test. of Kuhl; tr. at 155.)

²⁶ The observational data was recorded on Student's point cards by Ms. Aly, Ms. Kuhl and instructional assistants. (Test. of Kuhl; tr. at 156.)

to when s/he gets teased, or frustrated with something. S/he needs accommodations to complete written task, and benefits from having a adult in all settings that s/he can trust to communicate with to ask for help solving problems that have her/him angry or upset.

(Ex. P165 at 2-3.)

(133) Student's 2010 IEP reduced her/his specially designed instruction for behavior from 150 minutes per week to 50 minutes per week. The IEP provided that from January 30, 2010 to January 28, 2011, Student would have the following: Behavior/Social Skills (50 minutes per week in special or general class);²⁸ Written Language (150 minutes per week in special or regular class); Occupational Therapy (300 minutes per year in special or regular class). Supplementary aids included as-needed assistive technology for written assignments. Staff was to use a Behavior Support Plan 300 minutes per day in special and general class. Staff also had 120 minutes of occupational therapy consultation per year. The 2010 IEP stated that Student would be daily removed from participating with regular class for 30 minutes of writing instructions.²⁹ S/he had the choice to leave the general education setting to calm down in the special education classroom's self-contained unit. The IEP further stated:

Student needs to be removed for individualized instruction in writing in order to gain the skills necessary to access grade level instruction in large group settings. S/he also needs a quiet, calm space to manage frustrating or upsetting events that happen throughout his day.³⁰

February 2010

(134) In February 2010, Ms. Aly continued working on Student's BSP. Ms. Aly discussed the plan with Mother at that time. (Test. of Mother; tr. at 2088; Ex. P168.) Ms. Aly told Mother that she was adding a trigger of being taught a new concept that Student did not grasp immediately. (Ex. P168 at 1.) Based on a suggestion by Mother, Ms. Aly also added another new trigger, teasing by peers. (*Id.* at 2.)

(135) Ms. Aly consulted again with Melissa Barbour, the District behavior specialist. Ms. Barbour observed Student to identify new triggering events for Student's misbehavior. (Test. of Aly; tr. at 467-468; Ex. D15.) Ms. Barbour reported that Student was engaging in task avoidance and peer attention-getting behaviors, which were already addressed in her/his BSP. (Test. of Aly; tr. at 468.)

²⁷ The assistive technology included Student's handheld computer, as well as software programs Garage Band and Co-Write. Co-Write provides a pop-up list of suggested words to students writing stories. (Test. of Kuhl; tr. at 154.)

²⁸ According to Ms. Kuhl and Ms. Aly, this was reduced because Mother wanted Student to be in the general education classroom more, and because student's behaviors in January 2010 did not require as much support as the previous year. (Test. of Kuhl; tr. at 227; Test. of Aly; tr. at 464.)

²⁹ Student was to be in special education for writing but not for work on her/his behavior and social skills goals. The team thought that Student should practice skills for her/his behavioral goals in the general education setting instead of in Room 7. (Test. of Aly; tr. at 466.)

³⁰ See Ex. P165 at 8.

(136) On February 22, 2010, Student called another student a “faggot.” (Test. of Katsuda; tr. at 1133.) Because this behavior violated Elementary School’s zero tolerance language policy, Student received intensive instruction on verbal harassment from the school and Mother. (*Id.* at 1133.)

(137) Overall, Student had a good behavioral month in February. (Ex. P173 at 2.) In fact, Mother discontinued Peter Schnabel’s counseling of Student because Mother thought it unnecessary. (Test. of Mother; tr. at 1931-1932 and 2507.)

March 2010 Escalation of Behaviors

(138) In March 2002, an escalation of behaviors began that continued through Student’s last day at Elementary School on May 13, 2010. The behaviors escalated in a variety of ways. First, the behaviors were more frequent. Second, each episode of behavior lasted longer than it had before. Next, stopping the behaviors became increasingly more difficult. Finally, the nature of the behaviors became significantly more aggressive. As of March 2010, the correction procedures in Student’s BSP stopped interrupting Student’s escalation cycles. (Exs. P175-P184; Test. of Aly; tr. at 477 and 884.)

(139) Up until March 2010 of Student’s fourth grade year, s/he had been fairly compliant with Ms. Kuhl’s direction. After that point, Student stopped responding to Ms. Kuhl’s instructions. (Test. of Kuhl; tr. at 147.) Additionally, Student was more disruptive in the general education classroom, asking for more frequent breaks to go to Room 7. S/he was less and less interested in participating in the general education classroom activities than in previous years. (Test. of Kuhl; tr. at 159-160.)

(140) On March 1, 2010, Student held a chair over her/his head and charged another child. Student then pulled a rolling coat rack over an instructional assistant’s foot. The District recorded no injury to the assistant. Staff escorted Student to the safe room. (Ex. P175.)

(141) Ms. Katsuda contacted Mother about the March 1, 2010 incident. Mother advised her that Student had stopped taking certain medications in December, which might be impacting her/his behavior. (Test. of Katsuda; tr. at 1148.)

(142) On March 9, 2010, Student became frustrated while working on a writing assignment. S/he threw a pencil, and ran from the classroom. When Student neared the principal’s office, District staff blocked Student from going further by holding onto her/his sweatshirt. (Test. of Rudick; tr. at 1735; Ex. P183.) Student calmed down, and staff let go of her/him. Student walked back to Room 7 where s/he told two other students: “Don’t even look at me or you’re both dead.” Staff directed Student to the tiled area for a timeout. While walking there, Student threw a small piece of wood which hit, but did not injure, the adult following behind her/him. Student subsequently calmed down until school ended for the day. (Ex. P183.)

(143) Ms. Aly revised Student’s BSP on March 9, 2010. Ms. Aly reintroduced the consequence strategy of escort to the safe room. She also added a new reward. Good behavior would allow Student to share a You Tube video with her/his classmates. (Ex. P185 at 3.)

(144) On March 2, 2010, Student dropped another child's jacket on the ground and refused to pick it up. Once inside Room 7, Student threw items seven to eight feet in the air. The items included a box, toothbrushes, a clipboard, eating utensils, a toaster, a clock, and coffee mugs. Student then flipped over a chair and a desk. S/he went into the safe room and kicked its door. When Student exited the safe room, s/he swung the toaster by its cord around in the air. Student told an approaching child, "Don't step an inch closer or else." Student told another child: "I'm fully capable of breaking your neck," while glaring and clenching her/his fists. (Exhs. P178 and P179.)

(145) On March 5, 2010, Ms. Barbour met with Ms. Katsuda and Ms. Ally. After discussing the increasing intensity of Student's misbehaviors, Ms. Barbour's only suggestion was that Ms. Aly continue following Student's BSP plan. (Test. of Barbour; tr. at 1267.) Ms. Barbour did two additional observations on March 9, 2010 and on March 31, 2010. (Test. of Barbour; tr. at 1268; Ex. P184.) As a result, Ms. Barbour reiterated her previous conclusion that Ms. Aly was adhering to Student's BSP. (Test. of Barbour at 1272.) Although Mother was unaware of the observations, she knew that Ms. Aly and Ms. Barbour were collaborating to help Student. (Test. of Mother; tr. at 2115-2116; 2124; 2185.)

(146) On another occasion that spring, Student became frustrated with an art project and threw sections of plastic PVC piping. The piping bounced off a table near other children but did not hit them. Student then ran from the classroom. (Test. of Kuhl; tr. at 161.)

(147) On March 12, 2010, Student ran outside the school building after accidentally elbowing another student in the chest and stomach. Staff spent about seven minutes locating Student. Student resisted the initial request to return to the building, screaming and running around the playground. Eventually, Student came inside safely. Staff contacted Student's family, which took her/him home. (Test. of Aly; tr. at 476; Ex. P186 at 1.)

(148) Concerned about Student's behavior, Ms. Kuhl spoke to Ms. Aly. Ms. Kuhl suggested to Mother that the team meet in March 2010. Mother was busy with her own school work, and unable to meet with the District at that time. (Test. of Kuhl; tr. at 162; Test. of Mother; tr. at 2172-2175.)

(149) Staff surmised that a possible reason for the escalation of Student's behavior in spring 2010 was an upcoming move. Student told Ms. Kuhl and Ms. Fusek that her/his family was planning a move to Coos Bay that summer. Student appeared upset about the move because s/he understood that the family would be homeless over the summer. According to Student's family, change is upsetting for Student and affects her/his behavior. (Test. of Uncle; tr. at 2428-2429.) In spring 2010, s/he also expressed concern about seeing her/his father, who did not live with the family. (Test. of Aly; tr. at 473, 801-801; Test. of Fusek; tr. at 942.)

(150) Ms. Aly could think of no modifications to the BSP that would address Student's concerns. (Test. of Aly; tr. at 473, 801-802.) Similarly, Ms. Barbour believed that nothing could be done to dispel Student's anxiety about the move. (Test. of Barbour; tr. at 1291-1296.)³¹

³¹ Student's family did not move to Coos Bay as planned. (Ex. P257 at 1.)

(151) Ms. Aly spoke to Mr. Schnabel in mid-March 2010. Mr. Schnabel said that Student's family previously ended Lane County Medical Services because Student had been doing so well. Mr. Schnabel said that Mother had removed Student from mental health medication. (Test. of Aly; tr. at 474.)

Continuing Escalation of Behaviors in April 2010

(152) From the beginning of April 2010 to May 10, 2010, Student's followed staff's directions only 50% of the times. At best, Student was sporadically completing her/his written work in the general education classroom by April 2010. As a result, Ms. Kuhl was unable to judge whether Student was learning anything. (Test. of Aly; tr. at 896; Exs. 276 and 193 at 2.)

(153) On April 2, 2010, Student refused staff's requests. S/he told an instructional assistant: "If you do one smidgen, I'll snap you in half." (Ex. P193.) On April 6, 2010, Student threatened: "If you touch me, trust me you won't escape this building without injuries and bruises." (Ex. P192.)

(154) Ms. Kuhl advised Mother in an April 4, 2010 email that Student seemed to be "on the verge of falling apart many days." S/he had reverted to sucking her/his thumb, which s/he was doing all day. Ms. Kuhl asked Mother if anything was happening that she should be aware of, and asked for suggestions about doing things differently in class. Mother did not respond to that email. (Ex. 193 at 2.)

(155) On April 8, 2010, Student slapped, punched and karate-chopped the arm of a female child. The child used an icepack on her arm afterward but was otherwise uninjured. (Ex. P194.)³²

(156) In April 2010, Ms. Katsuda spoke to Ms. Aly and Ms. Kuhl about their increasing concern regarding the impact of Student's behavior on her/his safety and the safety of other students. (Test. of Katsuda; tr. at 1150.) They agreed that Student's behavior with teachers and other children was much more aggressively physical than in the past. (Test. of Katsuda; tr. at 1149.)

(157) As of April 2010, Student's BSP plan was not working. Student's existing inappropriate behaviors accelerated, and new misbehaviors emerged. Ms. Aly did not know what was prompting Student's behavior or what function the behavior served. (Test. of Sullivan; tr. at 2816-2817.)

April Meeting with Mother

(158) In response to the spike in Student's behaviors, Ms. Aly scheduled a meeting with Mother.³³ (Test. of Aly; tr. at 787.) At the April 12, 2010 meeting, Mother mentioned that

³² No student was ever taken to the hospital or emergency services called to Elementary School as a result of any physical contact with Student. (Test. of Katsuda; tr. at 1228.)

Student had asked to get back on Prozac. (Test. of Barbour; tr. at 1275.) Mother suggested that Student might finish her/his work if Mother gave him/her a home reward for completing assignments. As a result, Ms. Aly agreed to notify Mother when Student completed an assigned task. Ms. Aly added the home reward as a reinforcement to Student's BSP on April 13, 2010.³⁴ (Test. of Kuhl; tr. at 163-164; Test. of Mother; tr. at 2135-2136; Ex. 195 at 3.) This BSP change did not decrease Student's behavioral problems. (Test. of Aly; tr. at 478.)

(159) Mother also told the District at the April 12, 2010 meeting: "look it's April. We just need to get Student through the rest of this year. We're going to be moving at the end of this school year, and let's just get Student through it." (Test. of Kuhl; tr. at 165; 478; Test. of Mother; tr. at 2101.)

(160) During the meeting, Ms. Kuhl stated that she was still responsible for delivering the fourth grade curriculum to Student. Ms. Kuhl suggested that they consider a different delivery model involving cartooning, which greatly interested Student. After the team meeting, Ms. Kuhl spent a half hour working with her/him on a cartooning assignment. (Test. of Kuhl; tr. at 165-166.)

(161) After meeting with Student, Ms. Kuhl drafted an outline of the project. She made plans to contact a cartoonist she knew to arrange for him to meet Student. After that, Student never returned to Ms. Kuhl's classroom full time. Ms. Kuhl therefore was unable to implement the project. (Test. of Kuhl; tr. at 166.)

(162) Ms. Aly was aware during Student's fourth grade year that Student suffered from anxiety. She believed that Student's BSP provisions allowing Student breaks, as well as the BSP's corrective procedure and preventative strategies, might address anxiety. As of April 2010, however, the BSP provisions stopped being effective in addressing anxiety. (Test. of Aly; tr. at 845.)

(163) Ms. Aly consulted again with Ms. Barbour. Once again, Ms. Barbour instructed Ms. Aly to continue consistently applying the steps in Student's BSP. Ms. Barbour's only other suggestions included teaching Student words to use instead of threats when s/he became angry. Ms. Barbour also suggested that Ms. Aly have Student rank in severity issues that upset her/him, and help Student identify appropriate responses to the issues. (Test. of Barbour; tr. at 1276-1277, 1279-1280.)

(164) Ms. Aly only made two changes to Student's BSP during spring 2010. These included adding the You Tube reward and the home reward for completing assignments. The addition of these rewards did not help. Ms. Aly made no changes to the BSP that dealt with Student's physically aggressive behavior. (Test. of Aly; tr. at 790; Exs. P168 and P185.)

³³ At the April 12, 2010 meeting, staff discussed an upcoming field trip, and advised Mother that because of Student's recent behaviors, the school could not ensure safety of Student or other children on the trip. Grandfather agreed to accompany Student on the field trip. (Test. of Katsuda; tr. at 1151-1153.)

³⁴ Ms. Aly in February 2010 had added a home reward for good behavior during lunch and recess breaks. The change she made in April 2010 was to provide that when Student completed assignments, s/he also would get a home reward. (Test. of Kuhl; tr. at 164.)

Misbehavior Through the End of April

(165) On April 14, 2010, Student became frustrated because s/he missed part of recess while working with the District's occupational therapist. Student threw chairs into desks, pounded her/his desk, and broke a pencil. S/he refused to follow staff directions, and kicked a chair toward a group of other children. After entering the safe room, Student slammed the door, broke a clipboard, and repeatedly threw a pencil toward the ceiling. Later that day, Student threw parts for an art project into the air, and ran from the classroom. Staff initially could not locate Student, but found her/him later in a restroom. Student locked her/himself into a stall, kicked the walls, and broke a toilet paper dispenser. (Ex. P197; Test. of Aly; tr. at 799; Test. of Smith; tr. at 1570.)

(166) Ms. Smith and Ms. Rudek, instructional assistants from Room 7, waited until Student came out of the restroom. Each of the assistants took one of Student's arms, kicked his/her legs out from underneath her/him, and carried her/him to the safe room in Room 7. (Ex. P197 at 2; Test. of Mother; tr. at 2140.)

(167) Back in Room 7, Student held a chair over her/his head. When staff asked her/him to put the chair down, Student responded: "What are you going to do?" Student then began pushing the rolling coat rack. One of the coat rack's wheels went over the foot of Ms. Smith, an instructional assistant. Ms. Smith developed a bruise but did not go to a doctor or a hospital for medical treatment. (Ex. P197 at 2; Test. of Aly; tr. at 799; Test. of Smith; tr. at 1570.)

(168) After being directed to the safe room, Student began kicking and hitting the door. From the safe room, Student screamed at other children in the classroom. Student told another student: "Fuck you, you little brat." Staff heard Student say: "find out their address and murder them. They deserve to die." (Ex. P197 at 2.)

(169) As a result of the April 14, 2010 incidents, Ms. Aly did not make any changes to Student's BSP. Her reason was that she had just made changes to the BSP, even if they did not work. (Test. of Aly; tr. at 793; 810.)

(170) Even though Student's aggression was increasing, Ms. Aly did not know what else to do to help her/him. Ms. Aly's consultations with Ms. Barbour had not helped. Ms. Aly knew of no one else at the District she could go to for help. (Test. of Aly; tr. at 805-806.)

(171) In April, Ms. Kuhl, Ms. Aly and Ms. Katsuda discussed the topic of field trips with Mother. After hearing staff's concern about safety, Mother agreed that Grandfather would accompany Student on field trip. The District does not have funds for additional staffing for field trips. (Test. of Katsuda; tr. at 1229.)

(172) On April 26, 2010, Student screamed and shouted at other children, calling them "drunk hookers," and telling another children: "You're horny, you are a fucking bitch...fuck you, you bastard." Student said to another child: "you will die today." (Ex. P201.)

(173) On April 27, 2010, Student threw a jump rope at another child. The rope twisted around the child's body. Student pulled on one end of the rope. Student then put one of her/his hands on the child's neck and another on his shoulder. Student began pushing the child backward, who told Student to calm down. Student released the child, who was unhurt. Ms. Aly deducted some of Student's reward points and asked her/him to write an apology letter to the other child. Ms. Katsuda also decided at that point that Student would not be able to participate in two upcoming social school events, Panther Pat Recess and Field/Slide Day on June 16 and 17, 2010. (Exs. P202 and P203; Test. of Aly; tr. at 807-808; Test. of Mother; tr. at 2152-2153.)

(174) On April 29, 2010, Student lunged at another child, and then threw a pencil. (Test. of Rudick at tr. 1746; Ex. P206.) Student slammed books on tables, and screamed at staff and other children. Student threw pillows across the room, and told another child: "I'm going to hurt you." Student grabbed the coat rack and tried to pull its wheels over an instructional assistant's foot. Student then found a broken pencil and poked it into Ms. Rudick's leg. After entering the safe room, Student banged on the door and yelled to another child: "You're a bitch - your mother is a fat ugly bitch who gave birth to you, asshole." (Ex. P206 at 3.)

(175) As a result of the pencil poke, Ms. Rudick did not go to the hospital or see a doctor. She had a two-inch diameter bruise, which she iced. (Test. of Rudick; tr. at 1748.) Ms. Rudick filed a workers' compensation claim in connection with that injury because she left work early. (Test. of Rudick; tr. at 1780.)

(176) As a result of the April 29, 2010 incidents, the District suspended Student for that afternoon and the next day as well. (Test. of Katsuda; tr. at 1159-1161.) The District did not schedule a team meeting or ask Mother to discuss Student's escalating behavior. The District did not ask for Mother's input in changing Student's BSP or IEP. The District did not change Student's BSP or IEP. (Test. of Mother; tr. at 2159-2160; Exs. P165 and P195.)

Continued Misbehavior in May 2010

(177) On May 4, 2010, Student spit at another child during a recess. Student refused staff direction to return to Room 7, and staff escorted her/him to Room 7. Student complied with staff's direction to enter the safe room, slamming the head of an instructional assistant in the door. (Test. of Smith; tr. at 1575-1576; Exs. P213 at 2 and P209 at 1.) As a result, the District suspended Student for the afternoon. (Exs. P208 and P209.)

(178) As a result of having her head slammed in the door, Ms. Smith, the instructional assistant, had a bump and bruise, as well as a headache. She sought no medical attention other than mentioning the injury to her chiropractor on a routine visit. The chiropractor adjusted Ms. Smith's neck. (Test. of Smith; tr. at 1576.)

(179) After the incident with Ms. Smith, the District did not ask Mother to come to school to discuss Student's escalating behaviors. The District did not ask Mother to discuss making changes to Student's BSP or doing additional FBA research. (Test. of Mother; tr. at 2162.) Although Mother sometimes spoke to Ms. Aly when Mother picked up Student from

school, these conversations, which took place in the classroom with other children present, was hurried and strained. (Test. of Mother; tr. at 2163.)

(180) On May 7, 2010, Student ran from a classroom into a restroom. S/he pounded on the walls and kicked the door. S/he sprayed water from the faucet and pounded her/his fist on the tile wall. When told that was unsafe behavior, Student responded: "Who cares if I hurt myself? What if that's the point?" (Ex. P211.)

(181) After the May 7, 2010 incident, the District did not mention any plans to revise Student's BSP. The District did not suggest that staff and Mother discuss Student's escalating behaviors or that more FBA work be done. (Test. of Mother; tr. at 2164-2165.)

(182) On May 10, 2010, Student walked out of the building, ignoring staff's request that s/he remain in the classroom. Student banged on an exterior window of Ms. Kuhl's classroom, and then went to Room 7. Student ignored staff's direction to take a time out. While staff blocked the room exits, Student hit a plastic bin held by another child. The bin hit the child's leg but he was unhurt. (Ex. P212 at 1.)

(183) By then, the school day had ended. Staff escorted Student outside. Student dropped her/his books and ran behind the school. S/he began banging on the gym door, telling staff: "If you guys come one step closer I've got two rocks in my hands. So I wouldn't come any closer." Student returned to Room 7 where s/he slammed her/his fist on a table, threw her/his books on the floor and broke a pencil. Student began looking for her/his book of cards. A family member arrived and told Student that the cards book was in the car. Student walked behind a bookcase and unplugged a television and lamps. The family member took Student home. (*Id.*)

(184) Ms. Aly made no changes to Student's BSP after this incident. (Test. of Aly; tr. at 818.) The District did not ask Mother to problem-solve Student's behaviors, to talk about changing Student's BSP or discuss doing further FBA work. (Test. of Mother; tr. at 2165-2166.) According to Larry Sullivan, the District's Director of Educational Support Services, the District simply could not figure out the reason for Student's aggressive behaviors. (Test. of Sullivan; tr. at 2866.)

Student's Last Day of School

(185) On May 13, 2010, Student left Ms. Kuhl's classroom without permission and went to Room 7. Once s/he arrived there, s/he screamed and called other children derogatory names. Student voluntarily went into the safe room where s/he kicked and banged on the door, nearly hitting an adult with the door. Student cursed at staff and screamed, "Fuck you." (Ex. P226 at 1; Test. of Aly at tr. 826-828.)

(186) Later that day at recess, Student kicked another child in the behind. Student pushed children and threw things at them. The children did not appear upset so staff did not intervene. Student refused to line up with other children to reenter Room 7. Student ran inside Room 7, locking Ms. Aly outside. After Ms. Aly unlocked the door, Student ran to the hallway

and refused staff's direction that s/he return to Room 7. Student eventually complied, screaming all the way back to Room 7. Back in Room 7, Student sat at her/his desk and slammed her/his fist on the desk top. When staff tried to discuss Student's refusal to line up, s/he yelled "I'm leaving," and headed toward the door. Staff blocked the door. Student called other students "retards" and "retarded" and told a nearby student: "You might want to move unless you want to get hit." (*Id.*)

(187) Student continued screaming at other students. S/he stomped on a lamp plug and it came out of the outlet, which Student then kicked. S/he said to another student: "Go sit at your desk before I pop your head right off your shoulders." Staff directed Student to the safe room after s/he began plugging and unplugging a lamp. Student responded: "So you're concerned about my safety so you'll lock me in the safe room? You know I can break my neck on purpose." (*Id.*)

(188) Ms. Smith was bringing an upset child to the safe room. The upset child was hitting, kicking, and pinching. (Test. of Smith; tr. at 1579.) Student screamed: "I want my time in the safe room now," and began running toward the safe room door. Ms. Aly and Ms. Rudick determined that the other child required the safe room because of the state of her/his escalation, and blocked Student from entering the safe room. Student began swinging her/his limbs and kept moving toward the safe room door. When Student got within three or four feet of the door, s/he tripped. (Test. of Student; tr. at 2645; Test. of Smith; tr. at 1584; Test. of Rudick; tr. at 1774.)

(189) Ms. Aly and Ms. Rudick held Student's arms out at her/his sides while Student lay face down on the floor, which is not an OIS approved-restraint. (Test. of Smith; tr. at 1584, 1596.) Ms. Aly and Ms. Rudick determined that it was safer to maintain Student where s/he was rather than trying to stand her/him up and attempt a different restraint. (Test. of Rudick; tr. at 1774.)

(190) Ms. Aly and Ms. Rudick held Student by her/his forearms so as not to sprain or cause injury to Student's joints. Student tried to head butt and spit at Ms. Aly and Ms. Rudick. (Test. of Smith; tr. at 1581.) Student tried to push her/himself up, and Ms. Aly and Ms. Rudick shifted their weight to make it more difficult for Student to move. Ms. Rudick was afraid that Student was going to injure her. (Test. of Rudick; tr. at 1776.) Ms. Aly told Student several times that if s/he would lie still, staff would begin letting her/him go. (*Id.* at 2; Test. of Aly; tr. at 890.)

(191) Student struck out with a closed fist three times, hitting either Ms. Aly or Ms. Rudick. Student also spit at them. When Ms. Aly told another staff member to document Student's punching, Student said: "I couldn't care less if you were dead right now." A few minutes later, Student said s/he was ready to lie still. Ms. Aly and Ms. Rudick began to release pressure on Student. Mother arrived and heard Student screaming and crying as Mother approached Room 7. When Mother entered the room, Ms. Aly and Ms. Rudick were kneeling on either side of Student with part of their upper bodies pressed on Student's upper torso. Ms. Aly and Ms. Rudick then released Student. (Test. of Smith; tr. at 1585-1586; Test. of Mother; tr. at 2169-2170; Ex. P216 at 1-2.)

(192) Student ran screaming and crying to the other side of the room, and threatened to throw a game on the floor. S/he did not respond to Mother's request that s/he take a deep breath. S/he pulled a plug from an outlet. Mother hugged Student and s/he calmed down. Ms. Aly told Mother that Student was already on the floor when Ms. Aly and Ms. Rudick began holding her/him. Student screamed: "You're lying, you pushed down." (Test. of Mother; tr. at 2169-2170; Ex. P216 at 1-2.)

(193) Mother told Ms. Aly: "We need to do something, possibly half days at school and I would volunteer to be there too." (Test. of Mother; tr. at 2170; Ex. P216 at 2.)

(194) Ms. Aly wrote in notes she prepared after the May 13, 2010 incidents: "...being restrained shocked [Student] which could have been a good thing." Ms. Aly acknowledges, however, that restraining a prone student is not consistent with OIS training or similar training known as MANDT. (Ex. P222 at 2; Test. of Aly; tr. 829.)

The District Suspends Student

(195) After Mother took Student home on May 13, 2010, Ms. Nersesian, the District's Special Education Services Administrator, had a conversation with Ms. Katsuda about Student.³⁵ Ms. Katsuda relayed the day's events and said that Student previously had injured a staff member. Ms. Nersesian asked if the injury involved blood being drawn, and Ms. Katsuda responded: "Yes." When Ms. Nersesian asked if Ms. Katsuda was sure, Ms. Katsuda agreed to check with staff. Before doing so, Ms. Katsuda sent Ms. Nersesian an email saying that she supported an interim placement change for Student based on her/his misbehavior. (Ex. P217 at 1.)

(196) Later that evening, Ms. Katsuda sent Mother an email advising that Student would be suspended for five days. Ms. Katsuda requested that they meet during that period to transition Student to an interim placement of home instruction. Ms. Katsuda told Mother that the reason for the interim placement was to "ensure safety." Ms. Katsuda explained that she would advise Mother of the length of the interim placement at the transition meeting. (Ex. 219 at 1.) As of May 13, 2010, no meeting had been held with Mother to discuss changing Student's placement. (Test. of Kuhl at 355; Test. of Mother; tr. at 2178.)

(197) In response, Mother requested that Ms. Aly provide copies of Student's BSP and IEP, any FBAs done in the last six months, and copies of any data collected since the beginning of the school year. (Ex. P221.)

(198) On May 14, 2010, Ms. Aly emailed Ms. Barbour. Ms. Aly began the email by saying: "Just to keep you in the loop (and I should have done it way sooner, sorry!)" Ms. Aly advised Ms. Barbour that Student had been engaged in unsafe behaviors the last few weeks. Ms.

³⁵ Ms. Nersesian oversaw the District's special education program and staff. (Test. of Nersesian; tr. at 1433-1434; 1487-1488.)

Aly stated: "Tasha (Ms. Katsuda) spoke with Marilyn (Nersesian), who approved home instruction as an interim placement." (Ex. P227.)³⁶

(199) No manifestation determination meeting or IEP meeting or other meeting with Mother about placement had occurred when Ms. Aly sent the May 14, 2010 email. Ms. Aly is familiar with Oregon Administrative Rules requiring an IEP meeting before a student's placement is changed. She does not know why the rules were not followed in Student's case. (Test. of Aly; tr. at 841-842.)

Mother Requests Further Evaluation of Student

(200) On May 14, 2010, Mother sent the District a letter requesting further evaluation of Student. Mother stated:

This is a formal request for a psycho-educational evaluation, to look into the current emotional-behavioral status of Student. I have concerns that Student may be suffering form [sic] an emotional/behavioral disorder or an autism spectrum related disorder that may be impacting her/his ability to access education with her/his typically developing peers. Please convene an evaluation-planning meeting as soon as possible to address specific concerns.

(Ex. P228.)

(201) Prior to this letter to the District, Mother did not request any testing or evaluation of Student in the spring of 2010. Moreover, during that timeframe, Mother did not suggest any ideas for controlling Student's behavior other than the home reward for her/his BSP. (Test. of Mother; tr. at 2272.)

(202) Mother also sent Ms. Katsuda a May 14, 2010 letter in which she advised that she did not consent to the District physically managing Student's behaviors or restraining her/him. Mother stated that if the District was using or considering using those methods, Student's FBA and BSP would have to be revisited. Mother requested that a behavior support team meeting be convened to discuss Student's behavior and approaches for working with her/him. No such meeting occurred before the District removed Student from Elementary School later that month. (Ex. P229; Test. of Mother; tr. at 2191-2192.)

The District Recommends Expulsion

(203) On May 17, 2010, the District advised Mother that it was recommending Student for expulsion. Reasons for the expulsion included disrupting school, willfully disobeying staff, intimidating and physically harming staff, and damaging school property. The District invited Mother to attend a May 19, 2010 hearing to determine whether or not Student should be

³⁶ Ms. Nersesian denies that she approved a change in placement for Student before the May 24, 2010 placement meeting. (Test. of Nersesian; tr. at 1453.) That testimony was not credible given the testimony of Ms. Aly, comments made at the manifestation determination and placement meetings, and the timing of the District removal of Student from Elementary School.

expelled. The District informed Mother that a manifestation determination meeting would occur before the May 19, 2010 hearing. (Ex. P231 at 1.)

Manifestation Meeting

(204) A manifestation meeting was held on May 18, 2010 to determine whether the conduct for which the District planned to expel Student was a manifestation of her/his disability. Mother, Uncle, Grandfather, Ms. Katsuda, Ms. Aly, Ms. Kuhl, Ms. Nersesian and Ms. Nordman-Reese participated in the meeting. (Ex. D24 at 2.) The participants reviewed Student's recent episodes of misbehavior. (Test. of Nersesian; tr. at 1494; Test. of Nordman-Reese; tr. at 1857-1858; Ex. P233.) The participants then agreed that Student's misbehavior was "caused by or had a direct and substantial relationship to her/his ADHD disability." As a result, the District claimed to have abandoned its plan to discipline Student by expelling her/him. (Exs. D24 at 2 and P237.)

(205) At the manifestation meeting, Mother requested that Student be allowed to attend half or shortened school days until school ended in mid June 2010.³⁷ By then, Mother was a licensed special education teacher. Mother offered to help with Student's class. Mother stated that if the District thought that was too intrusive, she would assist with a nearby class. (Test. of Mother; tr. at 2204-2205; Test. of Uncle; tr. at 2447; Test. of Grandfather; tr. at 2690; Test. of Kuhl; tr. at 168; Ex. 234A.)

(206) In response, Ms. Nersesian said that given the seriousness of Student's behaviors, s/he would not be returning to Elementary School. Even though no meeting had been held with Mother to discuss a placement change, Ms. Nersesian stated that student would be taught at home via home instruction. (Test. of Katsuda; tr. at 1226-1227; Test. of Mother; tr. at 2202-2204; Test. of Uncle; tr. at 2446-2447.) When Mother said that she disagreed with home instruction, Ms. Nersesian responded: "Safety trumps everything." (Test. of Mother; tr. at 2203.)

(207) Mother said that she thought it was important for Student to finish out the year by saying goodbye to her/his teachers and other children. Ms. Nersesian responded that Student could not come back to Elementary School for that purpose. Ms. Nersesian stated that Student could only appear at school via computer on "Skype." (Test. of Mother; tr. at 2205-2206.)

(208) Uncle brought up the issue of restraints at the manifestation meeting. Uncle said that he thought that Student might have been restrained by the District. The District told Uncle that it had only restrained Student once – on the last day of school. (Ex. P235(a).)

Placement Meeting

(209) On May 20, 2010, Ms. Katsuda advised Mother that Student could not return to school as scheduled on May 21, 2010. Instead, the District was extending Student's suspension until a placement meeting could be held. (Ex. P238 at 1.)

³⁷ Elementary School's last date of school for the 2009-2010 academic year was June 17, 2010. (Test. of Katsuda; tr. at 1213-1214.)

(210) On May 20, 2010, Ms. Nersesian wrote to Mother about scheduling a placement meeting. In the letter, Ms. Nersesian advised Mother that the placement meeting was scheduled for May 24, 2010. Ms. Nersesian stated that the meeting should not take more than 20-30 minutes, "...[A]s we have completed the relevant, preliminary tasks." (Ex. P236.)

(211) The placement meeting was held on May 24, 2010, four school days after the manifest determination meeting. Mother, Grandfather, Ms. Kuhl, Ms. Aly, Ms. Nersesian and Ms. Nordman-Reese participated. (Ex. D25 at 2.)

(212) At the meeting, the District handed Mother a pre-prepared, typed Prior Notice of Special Education Action form. The form, dated May 24, 2010, stated that Student's placement was changed to home instruction. (Test. of Mother; tr. at 2209-2210; Ex. 239.) Ms. Nersesian told Mother that the placement change was required by unsafe behavior. (Test. of Nersesian; tr. at 1464.)³⁸ There was no discussion whatsoever of possible solutions or options other than home instruction. There was no discussion of Student's present levels or suggestions for changing Student's IEP or BSP. (*Id.* at 2213-2214; 2226-2227.)

(213) Ms. Nersesian explained that home instruction originally was designed for chronically ill students, but had been expanded to accommodate students who needed one-on-one individualized instruction. (Test. of Nersesian; tr. at 1454.) The instruction is provided in a school district office³⁹ or at children's homes. Student's home instruction was to last for an indefinite period until a different placement could be made. (*Id.*; Test. of Kuhl; tr. at 168, 173, 362.)

(214) Mother stated that she disagreed with the placement change. (Test. of Nersesian; tr. at 1461-1462.) Mother said that she thought that separating Student from her/his classmates would negatively affect her/his self-esteem. (Ex. D24 at 2.)

(215) Mother reiterated her request that Student be allowed to attend school on a half-day basis with Mother accompanying her/him. (Ex. P244.) Ms. Aly, who was Student's case manager for special education, never followed up on Mother's request. Ms. Aly does not know whether or not Ms. Nersesian ever did so. In any event, Ms. Katsuda was unwilling to allow shortened school days for Student because of a concern about safety. (Test. of Katsuda; tr. at 1213-1214, 1227 and 1240.) However, Dr. Sullivan, the District's Director of Educational Support Services, recommended to Ms. Nersesian that the team consider allowing Student to attend school half days. (Test. of Sullivan; tr. at 2780.) No one from the District ever got back to Mother about shortened school days. (Test. of Aly; tr. at 846.)

Placement Implementation Meeting

(216) The day after the placement meeting, a placement implementation meeting was held. Richard Bell, the District's home instruction coordinator, told Mother that the District

³⁸ Ms. Kuhl also supported the change in placement because of Student's unsafe behaviors. (Test. of Kuhl; tr. at 171-172.)

³⁹ The school district office was not located at Elementary School. Thus, Student's instruction would not take place at Elementary School. (Test. of Kuhl; tr. at 168, 173.)

would provide transportation to and from one hour of daily one-on-one teaching for Student five days per week at a District office, which was the equivalent of full-time school. Alternatively, the District would offer Student two hours per day of instruction at home. Mother stated that she would not accept either form of home instruction. (Test. of Mother; tr. at 2232-2233; Ex. P240.)

Changes to Student's 2010 IEP

(217) The District made minimal changes to Student's IEP after changing her/his placement. The stated justification for removing her/him from Elementary School focuses on safety:

Student needs to be removed to an interim placement due to environmental triggers in the general and special class settings that escalate Student into demonstrating unsafe behaviors.

(Ex. P240(a) at 8.)

(218) Student's updated 2010 IEP does not specify what the environmental triggers were. As of the date of Student's placement change, neither Mother nor Ms. Nordman-Reese knew what the triggers were. (Test. of Nordman-Reese; tr. at 1842; Test. of Mother; tr. at 2236.)

(219) In Student's revised 2010 IEP, the District made no changes to the present levels or Student's goals. Specialized instruction for behavior/social skills was increased from 50 minutes per week to 45 minutes per day. Written language instruction was decreased from 150 minutes per week or 30 minutes per day to 20 minutes per day. (Ex. P240(a) at 7.)

Reevaluation Meeting

(220) On the morning of May 26, 2010, Uncle sent Mother and Ms. Nersesian an email in which he suggested a number of tests for Student, including a comprehensive FBA. (Ex. P245 at 1.)

(221) Later that day, the team met to discuss Mother's request for a comprehensive evaluation of Student. Ms. Kuhl, Ms. Aly, Ms. Katsuda, Ms. Apgar, Ms. Barbour, Ms. Nersesian, Ms. Nordman-Reese, and Ms. Apgar, a District school psychologist, were present for the meeting. Mother attended by telephone. (Ex. P246 at 1; Test. of Apgar; tr. at 1430; D28 at 1.)

(222) Mother said she thought that Student had characteristics of autism, and requested that s/he be evaluated for that condition and ASD. (Ex. D28 at 1.) After discussing qualifying areas for ASD, the District agreed. The District did not agree to do another FBA. (Test. of Mother; tr. at 2245.)

(223) Ms. Aly agreed that as of May 2010, Student should be tested for autism. From the discussion and input from Mother at the May 26, 2010 meeting, Ms. Aly thought that Student might have exhibited behaviors similar to those of children identified as having autism. (Test. of

Aly; tr. 481.) Prior to Mother's request, Ms. Fusek did not believe that Student should be tested for a disability other than ADHD. (Test. of Fusek at tr. 944.)

(224) The team agreed at the May 26, 2010 meeting that Student's medical form would be updated, that a speech/language pathologist would conduct a functional communication evaluation, and that information for a Gilliam Autism Rating Scale ("GARS") would be gathered. GARS contains a checklist of behaviors common to children with ASD. Student's score on the test would then be compared with a standardized score. (Test. of Apgar; tr. at 1426.) The tests were started in late September 2010. (*Id.*)

June 2010

(225) On June 7, 2010, Mother signed consent for Student to be reevaluated. The reason stated on the consent form was: "To determine if Student has characteristics of ASD and to determine if s/he meets the eligibility criteria for special education in this category." The form indicated that the District would begin collecting data, and complete the evaluation when Student returned to school in the fall. (Ex. P248 at 1.) The District did not agree to do an updated FBA. Test. of Mother; tr. at 2237.)

(226) On June 15, 2010, the District sent Mother a Prior Notice of Special Education Action documenting Student's placement change to home instruction. The rationale for the change was: "Student has demonstrated unsafe behaviors in her/his current placement." The Notice did not mention Mother's proposal of Student attending half school days accompanied by Mother. (Ex. P249.)

(227) On June 15, 2010, the District sent Mother a letter stating that the District remained ready to provide special education services in home instruction for Student. (Ex. P250.)

(228) Elementary School had a carnival near the end of the school year in June 2010. Neighborhood children and siblings of students were invited to join the Elementary School students. Mother and Student went to the school that day and retrieved Student's books. Ms. Katsuda later advised Mother via email that Mother and Student were trespassing on school grounds. (Test. of Mother; tr. at 2206.)

(229) Mother did not bring Student to the District office for home instruction. The District did not provide Student specially designed instruction between May 13, 2010 and October 2010. (Test. of Kuhl; tr. at 172; Test. of Aly; tr. 855-856.)⁴⁰

⁴⁰ In October 2010, beyond the two-year period covered in Mother's due process complaint, Mother allowed the District to provide two hours of daily specialized instruction to Student at home. At the same time, the District was conducting the testing that it agreed to in the May 26, 2010 reevaluation meeting. (Test. of Mother; tr. at 2251.)

Mother's Written Complaints Against the District

(230) On July 26, 2010, Mother filed her due process complaint on behalf of Student. (Record Document 1.)

(231) For a remedy, Mother asks that the District conduct another FBA. Mother also requests that an IEP meeting be convened to develop an appropriate IEP for Student. The family asks that Student be taught to write legibly. The family also requests that Student have counseling for anxiety and trauma from being restrained. The family asks that Student be taught problem-solving and self-advocacy skills, as well as how to trust adults. The family asks that Student be given training in organizational skills as a result of her/his ADHD. Finally, the family asks that District staff receive training on IEP development and implementation as well as discipline procedures. (Test. of Uncle; tr. at 2463-2483.)

(232) According to Dr. Sullivan, the District provides the sort of counseling requested by the family. This includes counseling for anxiety and trauma. The District also provides training in problem-solving, self-advocacy and organizational skills. (Test. of Sullivan; tr. at 2836-2838 and 2787-2792.)

(233) In fall 2010, Mother filed a complaint with the District alleging inappropriate use of restraints. (Ex. D40 at 1; Test. of Sullivan; tr. at 2774.) In response, the District investigated the complaint pursuant to its written procedure. (Ex. D40 at 2.) On February 15, 2011, the District wrote Mother a letter stating in relevant part:

Based on the documents that were available to him, the investigator concludes that you had been fully informed by staff of all incidents when seclusion and/or restraint were used with your daughter/son at Elementary School.

* * * * *

Staff did the best they could to provide you with timely and complete information whenever they made use of restraint and/or seclusion with your child.

Ex. D40 at 3.)

CONCLUSIONS OF LAW

1. The District had a qualified representative at the February 2008 team meeting to develop Student's IEP effective February 2008 to February 2009.
2. The District did not have a qualified representative at the March 2009 team meeting to develop Student's IEP effective March 2009 to February 2010, and thereby denied Student a FAPE.

3. The District evaluated Student in all areas of suspected disability during the 2008-2009 academic year.

4. The District evaluated Student in all areas of suspected disability during the 2009-2010 academic year.

5. The District failed to include any present levels in Student's IEP effective February 2008 to February 2009, and thereby denied Student a FAPE.

6. The District failed to include any present levels in Student's IEP effective March 2009 to February 2010, and thereby denied Student a FAPE.

7. The District failed to include any present levels in Student's IEP effective January 2010 to January 2011, and thereby denied Student a FAPE.

8. The District failed to provide Student an appropriate placement when it changed Student's placement from special class to home instruction in May 2010, and thereby denied Student a FAPE.

9. The District conducted an adequate functional behavior assessment of Student during the 2008-2009 academic year.

10. The District conducted an adequate functional behavior assessment of Student during the 2009-2010 academic year until the spring of 2010.

11. The District failed to conduct an adequate functional behavioral assessment of Student in spring of 2010, and thereby denied Student a FAPE.

12. The District provided Student an adequate behavior support plan during the 2008-2009 academic year.

13. The District provided Student an adequate behavior support plan during the 2009-2010 academic year until the spring of 2010.

14. The District failed to provide Student an adequate behavior support plan in spring 2010, and thereby denied Student a FAPE.

OPINION

Public Education Requirements under the IDEA

The IDEA provides for a FAPE for children with disabilities. The purpose of the IDEA is to ensure that all children with disabilities are provided a FAPE by giving them special education and related services designed to meet their unique needs. 20 USC §1400(d)(1). The IDEA focuses more on "open[ing] the door of public education to handicapped children * * * than * * * guarantee[ing] any particular level of education once inside. *Board of Educ. Of Hendrick Hudson School Dist. v. Rowley*, 458 U.S. 176, 203-204 (1982). Thus, an * * * "

‘appropriate’ public education does not mean the absolutely best or ‘potential maximizing’ education for the individual child.” *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987).

The IDEA emphasizes the importance of parental involvement in their children’s education. To further that critical goal, Congress created an elaborate procedural framework mandating full parental participation in significant decisions involving children’s assessment for special education, as well as the development and monitoring of their placement and educational goals. *Van Duyn v. Baker*, 481 F.3d 770, 776 (9th Cir. 2007).

The United States Supreme Court established a two-part test for evaluating parents’ claims that schools denied their children a FAPE:

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

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

Burden of Proof

The burden of proof in an administrative hearing of a FAPE challenge is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005). *Van Duyn v. Baker School Dist.*, 502 F.3d 811, 819-820 (9th Cir. 2007) (the party objecting to the IEP’s implementation had the burden of proof at the due process hearing).

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).

Mother raises a number of issues which she contends constitute a denial of a FAPE in this case. First, Mother claims that the District failed to have a qualified representative at Student’s 2008 and 2009 IEP team meetings. Second, Mother contends that the District failed to evaluate Student for all areas of suspected disability during the 2008-2009 and 2009-2010 academic years. Mother also argues that Student’s 2008, 2009 and 2010 IEPs do not comply with the IDEA’s procedural requirements. Additionally, Mother claims that the District’s change of Student’s educational placement in the spring of 2010 denied her/him a FAPE. Mother also asserts that the FBA and BSP that the District provided to Student were inadequate. Finally,

Mother argues that the District was required to develop a safety plan for Student, and to do a better job of making sure that other children did not tease her/him.

Mother had the burden of proving each of these claims by a preponderance of evidence. Each claim is addressed separately below.

District Representative

Mother's first argument is that the District failed to provide a qualified representative at the team meetings for developing Student's 2008 and 2009 IEPs. Mother contends that having an inadequate representative at the IEP meetings was a procedural violation of the IDEA that denied Student a FAPE. Because the District proved that it had a qualified representative at the 2008 and 2010 meetings, the District complied with the IEP team member requirements of the IDEA, its implementing regulations, and special education regulations of the state of Oregon, for that year. However, Mother proved that the District representative at the 2009 meeting was unqualified, and that as a result, the District denied Student FAPE.

The IDEA and its regulations require that the school district provide a representative at IEP meetings that satisfies three criteria:

- (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
- (ii) Is knowledgeable about the general education curriculum; and
- (iii) Is knowledgeable about the availability of resources of the public agency.

20 USC § 1414(d) (1) (B) (iv); 34 CFR § 300.321(a)(4).

2008 IEP Meeting

At the meeting to prepare Student's 2008 IEP, Student's special education teacher, Ms. Aly, signed the "Special Education Teacher/Provider" line of the IEP form. Student's general education teacher, Ms. Kuhl, signed the line for Student's "Regular Education Teacher." Ms. Fusek, a District occupational therapist, signed in as "Other." Mother signed the line entitled "Parent." However, no one signed the line for the signature of the District Representative. As a result, Mother argues that no District representative appeared at the meeting.

Ms. Aly testified, however, that she acted as District Representative at the 2008 IEP meeting. Dr. Sullivan, Director of Educational Support Services, testified that the District gave Ms. Aly the authority to do so. The only reason that Ms. Aly did not sign the line for District Representative was because she was unaware that she could sign the form in two places. Thus, Ms. Aly was the authorized District representative at the 2008 IEP meeting. Mother offered no authority for the proposition that an oversight in signing the IEP form constituted an IDEA violation.

Mother also claims that Ms. Aly could not represent the District because she was not employed by it. Instead, Ms. Aly was employed by the Lane Educational School District, another Oregon school entity which provides special education teachers to the District. However, Mother offered no authority for the proposition that the District's representative had to be an employee of the District as opposed to an employee of a related Oregon school district.

Most significantly, however, Mother presented no evidence that she or any other member of the other IEP team asked Ms. Aly for information about the special or general education programs that she was unable to provide. Mother also presented no evidence that Ms. Aly was unable to answer any questions about District resources. As a result, Mother failed to prove that Ms. Aly was an unqualified District representative for the 2008 IEP.⁴¹

Ms. Aly also was a qualified representative under the Oregon special education regulations, which include an additional requirement. OAR 581-015-2210(1)(e)(D)⁴² requires that the District representative also be "authorized to commit district resources and ensure that services set out in the IEP will be provided."

Mother offered no evidence that Ms. Aly was unauthorized to commit District resources. Similarly, Mother did not prove that Ms. Aly could not or did not ensure that the services in Student's 2008 IEP would be provided. Thus, Mother did not demonstrate that the District had no qualified representative at the 2008 IEP team meeting.

2009 IEP Meeting

At the 2009 IEP meeting, Ms. Aly did sign in as District Representative. Once again she acted as District Representative with the District's authority. However, at this meeting, Ms. Aly demonstrated that she was unfamiliar with the District's resources. As a result, Ms. Aly was not a qualified District representative.

During the fall and winter of 2008, Student had some toileting issues, and was on and off anti-depressant medications. When the team met to prepare Student's 2009 IEP, Uncle asked whether or not the District provided counseling to help with anxiety. Ms. Aly advised Uncle that the District did not do so. Dr. Sullivan testified, however, that the District did indeed provide counseling in 2009. In fact, the District had mental health therapists that provided anxiety counseling.

Ms. Aly's mistake about anxiety counseling rendered her an unqualified District representative for the 2009 IEP meeting. She was not knowledgeable about the District's

⁴¹ The only case cited by Mother was *Pitchford v. Salem-Keizer Sch. Dist.*, 155 F. Supp. 1213 (D. Or. 2001) does not apply here. In that case, the school district did not send a representative to attend an IEP meeting. Instead, the child's parent and teachers attended and developed the child's IEP. After the fact, the district representative signed off on the completed IEP. Thus, the district representative in *Pitchford*, unlike Ms. Aly, did not attend the IEP meeting. *Id.* at 1234.

⁴² Unlike the IDEA or its implementing regulations, OAR 581-015-2210(1)(e)(D) expressly states that the district representative also may be another member of the IEP team, as Ms. Aly was.

counseling resources. As a result, she could not participate in a meaningful discussion with Student's family about District resources.

Not every procedural violation, however, constitutes a denial of a FAPE. The Ninth Circuit has held that that a denial of a FAPE occurs only when "procedural inadequacies * * * result in the loss of educational opportunity * * * or seriously infringe on the parent[s]' opportunity to participate in the IEP formulation process." *W.G. v. Bd. Of Trustees of Target Range School D.* 960 F2d 1479, 1484 (9th Cir 1992).

Here, Uncle asked Ms. Aly about a resource for the 2009 IEP that may have helped Student access her/his education. A few months earlier, Student had told Ms. Aly that s/he was afraid to go to the bathroom by her/himself. Ms. Aly discovered that on at least two occasions, Student urinated in containers in Room 7 instead of going to the restroom. Thus, Student showed anxiety at school about commonplace events such as using a restroom. Counseling may have helped her/him focus on her/his schoolwork. As a result, the District's failure to provide a qualified representative at the 2009 IEP meeting denied Student a FAPE.⁴³

Failure to Reevaluate Student

In January 2007, the District evaluated Student for eligibility for special education services. After being found eligible for ADHD under OHI, Student became eligible for the full panoply of procedural safeguards and rights under the IDEA. Student was entitled to have all of her/his needs for special education addressed, regardless of whether they were caused by the specific disability category under which she/he became eligible. *See, e.g.,* OAR 581-015-2110(4)(c).

A claim regarding the District's initial evaluation of Student is not encompassed by Student's due process complaint herein, which covers the period from July 27, 2008 to July 27, 2010. Thus, Mother's contention that the District failed to evaluate Student during the 2008-2009 and 2009-2010 school years for ASD, fine motor skill deficiency and sensory issues actually constitutes a claim that the District failed to reevaluate Student.

The IDEA's implementing regulations require that reevaluations be done under three circumstances: the school district concludes that a reevaluation is necessary, the parent or student's teacher requests a reevaluation, or three years have passed since the last evaluation (unless the parent and the school district decide that a reevaluation is unnecessary). 34 CFR 300.303⁴⁴ provides:

⁴³ An argument can be made that because Ms. Aly demonstrated her lack of knowledge about District resources at the 2009 IEP meeting, she was unqualified to act as a District representative at the 2008 IEP meeting. Even if Ms. Aly was unqualified, however, Mother did not show that the lack of a knowledgeable representative resulted in a loss of opportunity to Student or that Mother's ability to participate in the 2008 IEP meeting was affected. Accordingly, Mother did not prove that having Ms. Aly as the District representative at the 2008 team meeting denied Student a FAPE.

⁴⁴ OAR 581-015-2105(4) mirrors the language of 34 CFR § 300.303.

(a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with § §300.304 through 300.311 –

(1) 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

(2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section –

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

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

34 CFR § 300.303.

ASD

Here, the only time that Mother requested ASD testing during the two-year period covered by her due process complaint was in May 2010. At that time, the District agreed to conduct ASD testing. Thus, the District did not fail to conduct ASD testing requested by Mother during the relevant two-year period.

The District also did not violate the IDEA by not reevaluating her/him for special education three years after her/his initial evaluation. The District initially evaluated Student in January 2007. Thus, the District had to reevaluate her/him by the end of January 2010 unless both the District and Student's family concluded that no reevaluation was necessary. At a January 2010 meeting, the District and Student's family reached that exact conclusion.

In early January 2010, the District reviewed Student's records. Later that month, Mother, Grandfather, Grandmother, Ms. Kuhl, Ms. Aly, Ms. Katsuda, and the District's Special Education Consultant, Ms. Nordman-Reese. The meeting participants agreed unanimously that Student remained eligible for specialized education under ADHD/OHI. The team also agreed unanimously that Student did not require any more testing. Thus, the District and Student's family decided in January 2010 that no reevaluation of Student was necessary at that point.

Mother contends that during Student's third and fourth grade years, however, the District should have evaluated Student for the ASD disability category before she specifically requested such testing on May 14, 2010. Mother claims that Student's behavior prior to spring of 2010 compelled additional testing.

In her closing brief, Mother identified a variety of behaviors of Student that she claims should have led the District to test Student for ASD in her/his third grade or fourth grade before the spring of 2010. These included the Student spending most of her/his time in the special

education classroom during that period, making comments of self-harm, bouts of crying, defecating in her/his pants and refusing to clean her/himself, persistent problems with fine motor skills, persistent problems with writing, and sensory issues.

However, Mother presented no lay or expert witness testimony at the due process hearing describing ASD or its symptoms. She offered no evidence that Student had ASD or might possibly have ASD. She offered no evidence that Student's behaviors were consistent with the symptoms of ASD or behavior displayed by children with ASD. Thus, Mother failed to establish any link between Student's behaviors and ASD. Mother therefore did not offer evidence that a fact finder could rely on to find that the District missed signs that should have led to ASD testing.

Mother offered evidence that she paid to have a private psychologist evaluate Student in January 2007 at the time of her/his initial evaluation for special education. That psychologist, Dr. Charlotte Higgins-Lee, concluded after testing Student that "there were no indications of autism spectrum behaviors." Moreover, Mother offered no evidence from any other medical professionals suggesting that Student exhibited signs of ASD during her/his third or fourth grade years.

Additionally, evidence presented at the hearing suggested that these behaviors might be attributed to problems other than ASD. For example, Mother herself testified that Student's toileting issues might be related to her/his congenital bowel defect and/or side effects from medication such as Strattera and Prozac.

Uncle did testify that at a March 2009 IEP meeting, there "seemed" to be a "general understanding" that Student had some behaviors that were on the autism spectrum such as sensitivity to sound. However, Uncle's vague reference to the discussion at the meeting did not establish that the District was aware that Student might have ASD. Uncle testified that after the 2009 meeting, Uncle sent Ms. Aly an email attaching a document labeled as "Autism primer.pdf." Mother did not offer into evidence the document referred to in Uncle's email. As a result, there is no way of knowing whether the contents of that document somehow suggested that Student had ASD.

A Ninth Circuit case illustrates the type of evidence used to support a contention that a school district must test for a specific disabling condition. In *N.B. v. Hellgate Elementary Sch. Dist.* (9th Cir. 2008), 541 F.3d 1202 (2008), a physician issued a written report concluding that a component of autism was complicating a child's speech. The child's parents gave the report to a school, requesting that the school test the child for autism. The school refused, and the parents filed a due process complaint alleging denial of a FAPE. The parents offered the expert opinion of the physician as proof that the child's speech problem was a symptom of autism, and that the school therefore should have tested the child for autism.

The Ninth Circuit reversed the district court's ruling that the school district fulfilled its evaluation duty. The court held that the physician's expert opinion proved that the child's speech difficulties might be caused by autism. As a result, the district was obliged to test for that disorder. (*Id.* at 1209.) See, also, *J.W. ex rel. J.E.W. v. Fresno Unified School*, 626 F.3d 431,

442 (9th Cir. 2010)(At a due process hearing, student offered the expert testimony of a specialist in the education of hearing-impaired children regarding the specific testing that the District supposedly should have performed.)

Unlike in *J.W. and N.B.*, the factual record here does not support a finding that the District should have tested Student for ASD. Mother offered no evidence linking Student's behaviors with ASD. Thus, Mother did not show that the District should have suspected Student of having ASD. Because of her failure of proof, Mother did not demonstrate that the District denied Student FAPE by not evaluating her/him for ASD in Student's third and fourth grade years.⁴⁵

Sensory Issues and Handwriting/Fine Motor Functioning Testing

Mother also claims that the District failed to properly assess Student for sensory issues as well as handwriting/fine motor functioning during her/his third and fourth grade school years. The District offered evidence that when it conducted its initial 2007 eligibility evaluation of Student, Judy Fusek, a District occupational therapist, administered a sensory profile and a Developmental Test of Visual Perception to Student.

As a result, Ms. Fusek determined that Student did not have a problem with sensory processing. Ms. Fusek concluded, however, that Student had difficulty with fine motor functioning which impacted her/his ability to write. Ms. Fusek noted in her two-page report analyzing her findings that she: "[W]ould like to further evaluate Student's handwriting and fine motor skills in a more functional environment to assess whether there is anything occupational therapy can provide to make this area of Student's school life less frustrating."

Ms. Fusek explained in her testimony that the further "functional" evaluation she contemplated in her report was observing Student write an actual homework assignment instead of writing answers on an evaluative test. Ms. Fusek testified that she had many opportunities to make functional evaluations of Student during his second through fourth grade school years. Ms. Fusek also testified that during that period, she worked with Student on his writing (and typing) skills.

In response, Mother offered no evidence suggesting that the tests initially conducted by Ms. Fusek were flawed or incomplete. Mother also offered no evidence regarding the types of assessments that Ms. Fusek supposedly should have done during Student's third or fourth grade school years. Instead, Mother's argument is that because Student's handwriting was poor, Ms. Fusek should have done something different. As was the case with Mother's request for ASD testing, her claim for sensory or fine motor skills testing lacks supporting evidence. Simply put, Mother did not prove that Ms. Fusek's testing was inadequate or that the District should have conducted other specific tests.

⁴⁵ The District agreed in May 2010 to test Student for ASD. Mother offered exhibits P258, P260, P261-P270, which relate to testing and evaluation of Student in the fall of 2010, which is after the relevant time period in Student's due process complaint. The District did not object to these exhibits, and they were admitted. However, Mother offered no testimony or other evidence suggesting that anything in these exhibits showed that the District should have evaluated Student for ASD prior to Mother's request for ASD testing in May 2010.

Placement Issues

Under the issue of “placement,” Mother argues a number of issues. First, she claims that the IEPs covering Student during her/his third and fourth grade school years were deficient when prepared. Second, Mother contends that Student’s May 2010 change of placement to home instruction denied Student FAPE. Mother also claims that Student’s functional behavioral FBA and BSPs did not enable Student to access the general education curriculum. Finally, Mother asserts that the District was required to develop a separate safety plan for Student, and better deal with teasing of Student by other children.

IEPs

Three IEPs covered Student during her/his third and fourth grade years. These included an IEP prepared in February 2008, which applied to the first semester of Student’s third grade year, an IEP written in March 2009, which covered the second semester of Student’s third grade year and the first semester of her/his fourth grade year, and an IEP completed in January 2010, which applied to the second semester of Student’s fourth grade school year. Mother claims that each of these IEPs fail to state Student’s Present Levels of Academic Achievement and Functional Performance (present levels.)

Mother met her burden of proof regarding this issue. Student’s 2008, 2009 and 2010 IEPs do not comply with the IDEA because they do not include adequate present levels. As a result, Mother was unable to meaningfully participate in formulating these IEPs. The deficiencies in the IEPs therefore denied Student FAPE.

An IEP is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” *Sch. Committee of Burlington v. Dept. of Educ.*, 471 U.S. 359, 368 (1985). The IDEA expressly requires that an IEP describe a child’s present levels at the time the IEP is written. Additionally, the IEP must explain how the child’s disability affects her or his involvement and progress in the general education curriculum. 20 USC 1414(d)(1)(A)(i)(I)(aa); 34 CFR 300.320(a)(1)(i); OAR 581-015-2200(1)(a).

The IDEA states in relevant part:

(A) Individualized education program

(i) In General. The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes –

(I) a statement of the child’s present levels statement of academic achievement and functional performance, including --

(aa) how the child’s disability affects the child’s involvement and progress in the general curriculum.

20 USC 1414(d)(1)(A)(i)(I)(aa).

When analyzing the sufficiency of IEPs, courts do not judge them in hindsight. Rather, courts ask whether, given the information that the IEP team had when it drafted the IEP, the IEP complied with the IDEA's procedural requirements and was reasonably calculated to confer a meaningful educational benefit. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999.)

Student's 2008, 2009 and 2010 IEPs each state goals in the categories of Writing and Behavior. However, all three IEPs fail to include present levels in those areas that would enable Mother or anyone else to know Student's performance levels in either category.

Present Levels of Writing

The IEPs failed to state Student's ability to write at the time they were developed.⁴⁶ Student's 2008 IEP contain goals under the category of "Writing" for Student because s/he struggled with organizing her/his thoughts in writing as well as the physical act of writing. Student's 2008 IEP has two goals. The first was that within one academic year, Student would be able to write two paragraphs, each containing a topic sentence, supporting details, and a conclusion. The second was that Student would be able to type 15 words per minute within an academic year. (Ex. P92 at 5.)

The statement of Student's present levels in the 2008 IEP did not describe Student's substantive writing ability when the goals were set. The only summary of Student's present level of writing included: "S/he is reading at grade level, but struggles with getting her/his ideas to the page in front of her/him. Her/his effort in writing has improved tremendously, but her/his organizational skills are not yet at grade level." Thus, the present levels do not indicate whether student is able to even write one paragraph or whether s/he is ever able to include topic sentences, supporting details or conclusions in any of her paragraphs. Similarly, while stating that Student's writing has improved tremendously, the present levels do not indicate how the writing has improved or identify the remaining areas of needed improvement. (*Id.* at 3 and 5.)

With regard to the physical act of writing, the present levels are completely silent about Student's ability level. Moreover, neither goal under the category of writing focuses on physical writing. Instead, the second goal is a typing goal. The present levels do not indicate whether the District has abandoned any efforts to help Student with physical writing or give any other reason for the typing goal. And, the present levels do not say whether Student could type a single word when the 15 word per minute goal was set. (*Id.*)

Student's 2009 IEP contains three writing goals. Two of them are the same as those included in her/his 2008 IEP. Thus, the 2009 IEP again required Student to write two paragraphs with topic sentences, supporting details, and conclusions, and to type 15 words per minute. The new goal was that Student would use correct grammar, punctuation and capitalization on written assignments.

⁴⁶ (Exs. P92 at 3, P114 at 11-12 and P165 at 2-3.)

The 2009 IEP's present levels contain three sentences regarding Student's writing, none of which describe her/his writing performance as of March 2009: "Student has needs in the area of writing. Handwriting is difficult for her/him, and her/his writing is often illegible. S/he needs assistance to develop paragraphs, and multi-paragraph sentences." (Ex. P114 at 3 and 7.) Mother therefore could not discern from the present levels whether Student had mastered the two-paragraph or typing goals. Mother also could not ascertain Student's level of grammar, punctuation or capitalization.

Student's 2010 IEP contained only one writing goal, which was identical to one in Student's two previous IEPs. Once again, Student was asked to write two paragraphs containing topic sentences, supporting details and conclusions. (Ex. P165 at 6.)

The 2010 IEP present levels do not indicate whether the other two writing goals from the 2009 IEP were eliminated because Student met them or for another reason. The 2010 present levels' comments on Student's written ability include: "Student is grade level for all academic areas except writing. S/he struggles to take all the wonderful creative ideas s/he has from her/his brain to the paper in front of her/him. S/he has had success in this area by using Garage Band – recording her/his ideas and then transcribing them afterwards. S/he also struggles to revise, often reading what s/he thinks s/he wrote rather than the actual words on the paper. The team discussed the use of assistive technology to help with these deficits...S/he needs accommodations to complete written tasks..." (*Id.* at 3-4.)

With regard to the previous year's grammar, punctuation and capitalization goal, the present levels do not say if the goal was met completely, partially or not at all. Similarly, the present levels do not indicate why the current two-paragraph goal is unchanged. From reading the statement, Mother would not know if Student had made any progress whatsoever or if Student was at the same level s/he was two years earlier when the District first introduced the goal. Additionally, Mother would not know whether Student can complete writing assignments given to general education students in Student's grade.

Present Levels of Behavior

The same lack of information plagues the present levels about the behavior goals in Student's 2008, 2009 and 2009 IEPs. The 2008 IEP contains three behavior goals. Within approximately one academic year, Student was to work cooperatively in groups or with a partner, respond appropriately to change, and keep her/his body to her/himself.

Student's 2009 IEP contains three new behavior goals. The first is interacting appropriately in large group setting by obtaining permission to leave the instructional area, and by using appropriate language and non-threatening statements. The second is to focus on her/himself when others students are breaking rules or not following directions. The final one is to accept feedback by school adults.

With regard to these goals, the present levels statement says: "Responding to change, such as when there are guest teachers, is also problematic. Cooperative learning remains a difficult task for Student." At the same time, the present levels state that Student is meeting all

of her/his behavioral goals. (Ex. P92 at 3.) Additionally, the present levels provide no examples of how Student failed to work cooperatively in groups or with a partner.

The present levels are silent on Student's capability to keep "her/his body to her/himself." Assuming that Mother could understand what the goal meant, she would have no idea how Student was failing to meet it or how often or under what circumstances.

The present levels in Student's 2009 IEP are somewhat more detailed than those in her/his two previous IEPs, and provides some concrete examples of behaviors. These include hiding in the bathroom, stomping on an adult's foot, and threatening to start a fire. However, the examples are contained in one long 31-line paragraph that does not tie the litany of supposed wrongdoing by Student to her/his disability or to any of the three goals. Thus, the present levels do not analyze or organize the information in any useful way that would allow Mother to understand Student's current level of functioning.

Student's 2010 IEP contains two new goals. Student was to complete assigned tasks without engaging with or disrupting other students. Student also was to respond appropriately (in some unspecified and unknown fashion) to peers who tease or treat her/him unfairly.

Rather than describing Student's present behavioral abilities, the present levels in the 2010 IEP repeat the goals. The statement says: "Student struggles to complete the specific tasks that are assigned to her/him during a given period, often trying to engage and distract other students. S/he also struggles when peers tease her/him or do things that s/he perceives to be unfair or unjust."

Even more troubling regarding the behavior category is the District's failure to mention in any of the three IEP's present levels that Student's behavior sometimes required one or two staff members to physically compel her/him to go to Room 7's safe room. During the periods covered by the 2008, 2009 and 2010 IEPs, District staff at times had to physically maneuver Student to these areas with measures ranging from grabbing her/his shirt and belt to dragging her/him by the arms with her/his feet trailing on the floor behind her/him. The District could provide a no more descriptive picture of the extent of Student's behavioral issues or the District's response to them than by recounting these incidents in Student's IEPs.⁴⁷

The District relies on *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419 (8th Cir. 2010) for the proposition that Student's present levels were sufficiently detailed to advise Mother about Student's performance. In *Lathrop*, the Eighth Circuit rejected a challenge to present levels that were 12 pages long, elaborated extensively on how the child's disability affected his ability to access the general curriculum, and contained a lengthy discussion about his health, motor skills, sensory processing abilities, cognitive and adaptive behaviors, academic abilities, speech and social skills. The court held that the school district was not additionally required to cite numerical scores or percentile ranks. (*Id.* at 424.)

⁴⁷ Ms. Aly testified that she advised Mother at beginning-of-school year meetings that physical restraints might be used in certain situations. That testimony was not credible.

The District's present levels are a far cry from those in *Lathrop*. The District did not answer the most basic questions about how Student was performing in writing and behavioral skills compared to general education students in her/his grades or how Student's disability impacted her/his ability to attain general education goals. Unlike the school district in *Lathrop*, the District never provided more than cursory one-paragraph statements that did not describe Student's present levels in a useful way.⁴⁸

The District did provide some additional information about Student's present levels in its IEP progress reports. However, that does not excuse the District's obligation to provide a snapshot of Student's performance at the time the IEPs were being developed. Only then could Mother and the District formulate appropriate goals.

The Lack of Present Levels Denied Student a FAPE

The District's noncompliance with the requirement of providing present levels in Student's IEPs is a procedural violation of the IDEA. In this case, the violation denied Student a FAPE.

A hallmark of the IDEA is its emphasis on parental involvement in a child's IEP. As stated by the U.S. Supreme Court in *Rowley*, 458 U.S. 176:

[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

(*Id.* at 205.)

As a result, the Ninth Circuit repeatedly has held that when a procedural violation deprives parents their right to meaningfully participate in developing an IEP, the child is denied a FAPE.⁴⁹ In *Amanda J. v. Clark County Sch.*, 267 F.3d 877 (9th Cir. 2001), a school district violated an IDEA procedural requirement that it provide a parent all relevant records pertaining

⁴⁸ The deficient present levels statement also prevented the District from developing measurable annual IEP goals as required by the IDEA. 20 USC 1414(d)(1)(A)(i)(II); 34 CFR 300.320(a)(2)(i); OAR 581-015-2200(1)(b).

⁴⁹ ORS 343.167(3)(d) provides that a hearing officer at a due process hearing may find that a procedural violation denied a child a FAPE only if the procedural inadequacy impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the child's FAPE, or deprived the child of educational benefits. That standard is met here because ignorance of Student's present levels precluded Mother from suggesting IEP goals.

to a child's autism test results. The court found that the school district denied the child a FAPE because her parents could not fully participate in her IEP without knowing that the child might have autism. (*Id.* at 894.) The court observed:

By mandating parental involvement and requiring that parents have full access to their child's records, Congress sought to ensure that the interests of the individual children were protected. Not only will parents fight for what is in their child's best interests, but because they observe their children in a multitude of different situations, they have a unique perspective of their child's special needs.

267 F.3d 877 at 891.

See, also, M.L. v. Federal Way School Dist., 394 F.3d 634 (9th Cir. 2005)(procedural failure to include a required IEP team participant denied a child FAPE because the parents were denied information that the team participant could have shared); *W.G. v. Bd. Of Trustees of Target Range Sch.*, 960 F.2d 1479, 1485 (9th Cir. 1992) (school district's failure to consider recommendations of most knowledgeable persons regarding child, including his teacher and doctors, denied the child FAPE).

As in these Ninth Circuit cases, Mother could not meaningfully participate in Student's 2008, 2009 and 2010 IEP meetings. The District did not provide her the most basic information about Student's present levels of either academic or functional performance. Without that information, Mother could not suggest worthwhile future goals for Student.

Because the District also withheld from Mother the fact that District teachers resorted to physically moving Student to the safe room, Mother did not have a realistic view of the extent of Student's behavioral problems or the measures that the District took to control them. This lack of information prevented Mother from problem-solving the behavioral issues that escalated and ultimately led to the District's removal of Student from school in May 2010. As a result, the procedural defects in Student's IEPs denied her/him a FAPE.

May 2010 Removal from School

In May 2010, the District removed Student from Elementary School, offering her/him a home instruction placement pursuant to which s/he would be trained at a district office or at home. The District maintains that Student's placement was changed on an interim basis to allow the District to conduct the ASD testing requested by Mother. The District contends that after the testing was completed, it planned to determine an appropriate placement for Student. The District claims that by the spring of 2010, the general and special education classrooms of Elementary School no longer supported Student's needs.

The factual record does not support the District's position. Instead, the facts demonstrate that the District's removal of Student was a disciplinary action that did not comply with the IDEA's detailed procedural requirements for expelling a child with a disability. Moreover, even if the District's change to Student's placement was not disciplinary, the placement decision was

predetermined and did not provide Student with the least restrictive environment for her/his education.

Disciplinary Removal

During the spring of 2010, Student's behaviors escalated into a progression of aggressive acts that frustrated District staff. Neither Ms. Kuhl nor Ms. Aly could control Student with any of the measures in her/his BSP. Despite two minor revisions to the BSP, Student continued to ignore staff directions, make alarming threats to other students, and physically attack students and staff.

As a result, the District determined that the safety of students and staff was at stake. The District therefore concluded that it needed to remove Student from Elementary School for safety, which is a disciplinary reason.

Communications among District staff demonstrate that safety was the primary motivator. For example, Ms. Katsuda emailed Ms. Nersesian on May 13, 2010, the day that Ms. Katsuda last suspended Student. Ms. Katsuda provided Ms. Nersesian with documentation which, in Ms. Katsuda's words, "speaks to this student's level of safety." Ms. Katsuda says that because of that safety level, she supports an interim placement for Student. Similarly, Ms. Aly emailed Ms. Barbour the next day, stating that: "Student had been engaged in unsafe behaviors the last few weeks." Ms. Aly advises Ms. Barbour that because of those behaviors, Ms. Nersesian approved a different placement for Student.

All of the District's communications with Mother also reflect the safety concern. In its May 17, 2010 letter recommending Student's expulsion, the district states that the reasons include disrupting school, willfully disobeying staff, intimidating and physically harming staff, and damaging school property.

At the May 18, 2010 manifestation meeting, Ms. Nersesian told Mother that given the seriousness of Student's behaviors, s/he would not be returning to Elementary School. When Mother protested, Ms. Nersesian responded: "Safety trumps everything." When Mother asked if Student could return to the school to say her/his goodbyes, Ms. Nersesian said that s/he could only appear by computer.⁵⁰ At the May 20, 2010 placement meeting, Ms. Nersesian told Mother that the placement change was required by Student's unsafe behavior. Additionally, the District's written notice of the placement change as well as the revised 2010 IEP state that the reason for Student's placement change was unsafe behavior.

Absent from any of these communications is a concern that Student was not accessing her/his education in her/his placement at Elementary School. Never once does the District say that it is changing Student's placement to home instruction because that is the only placement that will enable her/him to learn. Instead, the District made it clear, over and over, that the reason for removing Student from Elementary School was a safety concern, which is based on

⁵⁰ After Mother and Student showed up for the school carnival in June 2010, Ms. Katsuda advised Mother that they were trespassing on school property.

discipline. While safety is undoubtedly a legitimate concern, a disciplinary change of placement requires that certain procedural requirements be met. The District failed to meet them here.

The IDEA contains a detailed procedure that must be followed when a school district proposes to expel or remove a student with a disability for disciplinary reasons. First, the district must make a manifestation determination to decide whether or not the student's misconduct is caused by her or his disability. The purpose of the manifestation determination is to ensure that a child is not denied a FAPE as a result of his or her disability.

If the school district determines that the misconduct was caused by the student's disability, the district must conduct a functional behavioral assessment and implement a behavior support plan. If the assessment and plan had already been created, the school district must review and modify the plan to address the particular misconduct leading to the student's proposed expulsion.

Instead of expelling the student, the school district must maintain the student's existing placement, unless one of two circumstances exists. First, the school district can change the student's placement if the school district and the parents agree to a changed placement. Second, the District can change the placement to a 45-day interim educational setting if the child (a) brings a weapon to or has a weapon at school or (b) has or uses illegal drugs or sells or solicits controlled substances at school or (c) has inflicted seriously bodily injury upon another at school. 34 CFR § 300.530.

IDEA regulations provide in relevant part:

Discipline Procedures

(e) *Manifestation determination.* (1) 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 school conduct, the LEA,⁵¹ the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the IEP, any teacher observations, and any relevant information provided by the parents to determine –

- (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

* * * * *

(f) *Determination that behavior was a manifestation.* If the LEA, the parent, and relevant members of the child's IEP Team determine that the conduct was a manifestation of the child's disability, the IEP Team must –

- (1) Either–

⁵¹ LEA stands for local education agency. 34 USC § 300.2(b)(ii).

(i) Conduct a functional behavioral assessment,⁵² unless the LEA has conducted a functional behavioral assessment before the behavior that resulted in the change of placement that occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan⁵³ already has been developed, review the behavioral intervention plan, and modify it, as necessary to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement form which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

(g) *Special circumstances.* School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child –

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or LEA;⁵⁴

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA;

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

(h) *Notification.* On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parent of that decision, and provide the parents the procedural safeguards notice described in § 300.504.

(i) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Controlled substance* means a drug or other substance identified under schedules I, II, III, IV or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(2) *Illegal drug* means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a license health-

⁵² OAR 581-015-2400(4) defines a function behavioral assessment as: “. . . an individualized assessment of the student that results in a hypothesis about the function of a student's behavior and, as appropriate, recommendations for a behavior intervention plan.”

⁵³ OAR 581-015-2400(1) defines a behavioral intervention plan as: “. . . an individualized plan, including positive interventions, designed to assist a student to decrease inappropriate behavior and increase or teach an alternative appropriate behavior.”

⁵⁴ SEA stands for state education agency. 34 USC § 300.2(b)(1)(i).

care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(3) *Serious bodily injury*⁵⁵ has the meaning given the term “serious bodily injury” under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(4) *Weapon*⁵⁶ has the meaning given the term “dangerous weapon” under paragraph (2) of the first subsection (g) of section 930 of title 18, United States code.⁵⁷

Here, the District proposed to expel Student for a disciplinary reason. The subsequent manifestation determination found that Student’s disability caused the misconduct for which the District planned to expel her/him. As a result, the District had to review and modify Student’s BSP to address the particular misconduct leading to her/his proposed expulsion. The District failed to do so.

Moreover, because Student’s disability caused her/his misconduct, the District could not change her/his placement unless Mother agreed, which she did not. Once Mother refused to consent to the new placement, the District was required to maintain Student’s Elementary School placement unless it could demonstrate a right to an interim placement limited to 45 days.

However, none of the three circumstances justifying an interim placement existed. Student did not have a weapon at school. Student did not use, possess or sell illegal drugs at school. Student did not inflict seriously bodily injury involving a substantial risk of death, extreme physical pain, disfigurement or impairment. At most, Student engaged in highly disruptive behavior, made threats and bruised two instructional assistants. This behavior does not rise to the level of egregious conduct that Congress deemed necessary to support a short-duration interim placement change, let alone the placement change of indefinite length that the

⁵⁵ 18 USC § 1365(3)(h) defines serious bodily injury as follows:

(3) the term “serious bodily injury” means bodily injury which involves –

(A) a substantial risk of death;

(B) extreme physical pain;

(C) protracted and obvious disfigurement; or

(D) protracted loss or impairment of the function of a bodily member, organ or mental faculty; and

(4) the term “bodily injury” means –

(A) a cut, abrasion bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ or mental faculty; or

(E) any other injury to the body, no matter how temporary.

⁵⁶ 18 USC § 930 (g)(2) defines a dangerous weapon as follows:

The term “dangerous weapon” means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.

⁵⁷ Pursuant to 34 USC § 300.532, a parent can appeal the interim placement in an expedited due process hearing.

District imposed here. As a result, the District violated the IDEA when it changed Student's placement to home instruction.

Predetermined Placement Change

Even if the District's motivation in changing Student's placement in May 2010 was to help her/him access his education, the District failed to include Mother in the decision. Instead, the facts show that the District had already made up its mind on the placement before meeting with Mother.

The day of the misbehavior leading to Student's proposed expulsion, Ms. Katsuda asked Ms. Nersesian for permission to change her/his placement. Also that day, Ms. Katsuda requested that Mother meet with the District to transition Student to home instruction. According to Ms. Aly's email to Ms. Barbour the next day, Ms. Nersesian granted Ms. Katsuda's placement request.

At the May 18, 2010 manifestation meeting, which occurred before any placement meeting, Ms. Nersesian told Mother that Student would not be returning to Elementary School. Ms. Nersesian refused to discuss Mother's proposal of Student attending half days with Mother accompanying her/him. Although the last day of school was a month away, Ms. Nersesian told Mother that Student could not appear to say goodbye friends and teachers.

The May 24, 2010 placement meeting was held four school days after the manifest determination meeting. At that meeting, the District handed Mother a pre-prepared, pre-typed, written notice of the placement change. The District refused to discuss any possible solutions or options other than home instruction.

In *W.G. v. Bd. Of Trustees Of Target Range Sch.*, 960 F.2d 1479 (9th Cir. 1992), representatives of a child's former school scheduled an IEP meeting, advising parents that staff from the child's current school had also been invited. When the parents arrived, the principle of the child's former school announced that the child's current school staff was unable to attend. The principle proceeded with the meeting and presented parents with a pre-prepared written IEP. The IEP stated that the child would be trained under a learning program used at his former school.

The parents objected, reminding the principle that the child's current special education teacher and school psychologist had recommended a different program. The principle refused to discuss any alternatives at the meeting, and asked parents to sign the IEP. According to the parents' testimony, the principle told them to "Take it or leave it." The parents refused to sign the IEP.

The district court held that the IEP was predetermined. As a result, the court found that the principle failed to allow the parents to meaningfully participate in the IEP's development, which denied the student FAPE. In upholding the district court's order, the Ninth Circuit stated:

Target Range failed to fulfill the goal of parental participation in the IEP process and failed to develop a complete and sufficiently individualized educational program according to the procedures specified by the Act. *Id.* at 1485.

See, also, Ms. S. ex rel. G v. Vashon Island Sch. Dist., 337 F.3d 1115, 1131 (9th Cir. 2003) (“A school district violated IDEA procedures if it independently develops and IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.”); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1486 (9th Cir. 1992)(when a school district enters an IEP meeting with an intractable position, parents’ subsequent decision to not cooperate may not excuse the district’s intransigence.)⁵⁸

As in these cases, the District had already made up its mind to change Student’s placement before meeting with Mother. As a result, the District denied Mother any participation in the placement change decision. The District thereby denied Student a FAPE.

Least Restrictive Environment

Even if the District did not violate the IDEA’s disciplinary change in placement regulations or predetermined the placement, Student’s May 2010 placement change still violated the IDEA. By selecting home instruction, the District failed to select a placement in the least restrictive environment.

Home instruction precluded Student from participating in either general or special education classrooms. If the District provided instruction to Student at home, s/he would have no school interaction whatsoever with other students. If the District provided instruction to Student at a District office, s/he might be taught by her/himself or at the most with one or two other students.

Moreover, Student would be going from a regular school day to limited hours of instruction. If Student chose to go to a District office, the District would give her/him five hours per week of instruction. If the Student chose to remain at home, the District would provide her/him ten hours per week of instruction.

As indicated earlier, the District refused to even consider Mother’s suggestion that Student attend school half days during the last month of school. To help avoid behavior issues, Mother offered to attend school with Student. Mother told the District that if it would be awkward for her to be in Student’s classroom, she would be glad to stay in a nearby classroom. That way, Student’s teacher easily could reach her if a problem arose. These arrangements were less restrictive than removing Student altogether from Elementary School. At a minimum, the District should have at least considered Mother’s plan.

⁵⁸ The federal regulations highlight the necessity of collaborative involvement in placement decisions. 34 CFR §300.115(A)(1) provides in relevant part: “School districts must ensure that * * * the educational placement of a child with a disability * * * is determined by a group of person, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options * * *.” *See, also, OAR 581-015-2250.*

The IDEA mandates that students with disabilities be placed in the least restrictive environment that will accommodate their needs. The IDEA itself provides in relevant part:

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the supplemental aids and services cannot be achieved satisfactorily.

20 USC § 1412(5)(A).⁵⁹

The federal regulations provides in relevant part:

Each public agency must ensure that –

(a) The placement decision –

* * * * *

(2) Is made in conformity with the LRE provisions of this subpart * * *

(b) the child’s placement –

(1) Is determined at least annually;

(2) Is based on the child’s IEP; and

(3) Is as close as possible to the child’s home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would have attended if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

* * * * *

⁵⁹ 34 CFR 300.114 and OAR 581-015-2240 echo the least restrictive environment requirement.

34 CFR §300.116.⁶⁰

The Ninth Circuit has emphasized that access to peers is an important goal of the least restrictive environment requirement, which also is known as mainstreaming. *Ms. S. ex rel. G.*, 337 F.3d at 1137 (a mainstream placement would give the child the nonacademic benefits of social relationships as well as provide behavior models); *Dept. of Educ. Of Haw. v. Katherine D.*, 727 F.2d 809, 815 (9th Cir. 1983)(a homebound program for a student with cystic fibrosis who sometimes needed to have her lungs suctioned violated the LRE requirement; a non-physician could be trained to perform the suctioning).

When it changed Student's placement to home instruction, the District failed to provide the least restrictive learning environment. The placement change therefore denied Student a FAPE.

FBA/BSP

Mother claims that the District's FBA and BSPs for Student were defective and should have been redone. Up until the spring of 2010, Student's BSPs were effective enough to enable her/him to progress in school and therefore receive an educational benefit. In the spring of 2010, that was no longer the case. At that point, the District was required to redevelop Student's BSP, and the FBA on which it was based.⁶¹ The District's failure to conduct an FBA of Student and prepare an effective BSP when her/his BSP failed and when her/his placement was changed denied Student FAPE.

Contrary to Student's argument, however, the District was not required to develop a separate safety plan for her/him because the safety plans already in place were adequate. Similarly, the District did not have to take any measures regarding other children's teasing of Student other than what was already provided in her/his BSPs.

IDEA Requirements for FBAs and BSPs

The IDEA only expressly requires FBAs and BSPs under one circumstance: after a manifestation determination reveals that the child's disability caused misconduct leading a school district to discipline a child by changing his or her placement. 34 CFR § 300.530. Thus, until the District changed Student's placement in May 2010, the IDEA did not explicitly require the District to perform an FBA of Student or prepare a BSP for her/him.⁶²

However, the federal regulations do require that as part of an IEP's development, the IEP team "consider" solutions for addressing behavior issues. 34 CFR 300.324 provides in relevant part:

⁶⁰ OAR 581-015-2250 contains nearly identical language.

⁶¹ Moreover, as previously discussed, the IDEA's regulations mandated that the District reformulate Student's BSP when it disciplined her/him by changing her/his educational placement.

⁶² Some states such as New Jersey require school districts to prepare behavior improvement plans when developing IEPs for student with behavior problems. Oregon currently has no such requirement in a non-disciplinary setting.

Consideration of special factors. The IEP Team must –

(i) In the case of 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.

20 USC 1414(3)(B)(i).⁶³

Recognizing this requirement, courts have held that IEPs must *mention* behavioral strategies. *See, e.g., Independent School Dist. No. 284 v. A.C.*, 258 F.3d 769, 777(8th Circ. 2001)(schools must address non-cognitive emotional problems that disrupt the learning process).

In addition to requiring that schools mention behavioral strategies such as FBAs and BSPs in IEPs, the IDEA also impliedly requires schools to create them under certain circumstances, which exist here. Schools must use effective behavioral supports, including FBAs and BSPs, when they are necessary for children to access their education. In that setting, behavioral supports become related services. The IDEA requires schools to provide, *inter alia*:

[R]elated services and supplementary aids and services . . . that will be provided for the child –

(aa) to advance appropriately toward the annual goals;

(bb) to be involved in and make progress in the general education curriculum . . . and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children * * *.

20 USC 1414(d)(1)(A)(1)(IV).⁶⁴

Congress defined related services extremely broadly to include: Transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free and appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with

⁶³ The federal regulations and the Oregon administrative rules impose the same requirement. 34 CFR 300.324(a)(2)(i); OAR 581-015-2205(3)(a).

⁶⁴ *See also*, 34 CFR 300.320(a)(4); OAR 581-015-2200(1)(d).

a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 USC 1401(26)⁶⁵

The comprehensive definition of related services easily encompasses behavioral support tools such as FBAs and BSPs. Both fit into the category of corrective or supportive psychological services or counseling services.

July 2008 to Spring 2010

Student had three IEPs from July 2008 to Spring 2010. In each of these IEPs, the District referenced as a school support a BSP based on a FBA that Ms. Aly conducted. As a result, the District considered behavioral interventions at the time it developed Student's IEPs as required by 20 USC 1414(3)(B)(i).

The District also satisfied the IDEA's requirement that it provide Student related services necessary to access her/his education. Until spring of 2010, Student's BSP largely kept her/his behavior controlled. Student's general curriculum grades at mid-year of third grade, the end of third grade, and mid-year of fourth grade show that Student was progressing. Mother offered no evidence to the contrary. Thus, prior to the Spring of 2010, Student's BSP, and the FBA on which it was based, allowed Student to access his/her education.

Where, as here, a child progresses despite behavioral issues, the school has provided the child a FAPE. *See, e.g., CJN v. Minneapolis Public Schools*, 323 F.3d 630, 638 (8th Cir. 2003) ("That his behavioral difficulties are severe, as CJN contends, makes his academic progress even more relevant to the educational benefits inquiry, because it demonstrates that his IEPs were not only reasonably calculated to provide educational benefit, but, at least in part, did so as well."); *K.E. v. Independent School Dist. No. 15*, No. 10-2176 (8th Cir. 2011)(deficiencies in a school's FBA and related BSP did not deny a child FAPE where she made more than a small amount of academic progress).⁶⁶

Arguably, Student may have further excelled if the District had successfully curbed all misconduct during his/her third and fourth grade years up until the spring of 2010. However, as stated by the Ninth Circuit, if the child is gaining educational benefit, then the child is receiving a FAPE:

An 'appropriate' public education does not mean the absolutely best or 'potential-maximizing' education for the individual child * * *. The states are obliged to provide a basic floor of opportunity through a program designed to provide educational benefit to the handicapped child.

Seattle School Dist., No. 1, 82 F.3d 1493, 1500 (9th Cir. 1996)(citations omitted).

⁶⁵ Related services are defined identically in 34 CFR 300.34(a) and OAR 581-015-2000(28).

⁶⁶ A copy of this unofficially cited case, which was filed on August 3, 2011, is attached hereto as Exhibit A.

Thus, during the period of July 2008 to spring 2010, Student's BSP worked adequately enough to enable her/him to progress within the general education curriculum. Accordingly, the District was not required to reformulate Student's BSP or related FBA at that time.

Spring 2010

In the spring of 2010, the frequency and extent of Student's behaviors escalated dramatically. Her/his teachers were increasingly unable to control her/his outbursts. Student refused to follow the directions of Ms. Kuhl, with whom Student previously had a good working relationship. Most of the teachers' efforts were consumed in a continuous struggle to deescalate Student's disruptive behaviors. Ms. Kuhl could not tell if Student was learning anything because s/he completed so few assignments. The Student's BSP simply no longer worked.

At that point, the IDEA's requirement that the District provide Student with related services necessary for her/him to gain educational benefit mandated that the District do something. The District had decided at the time Student qualified for special education that s/he needed a BSP to access her/his education. The District therefore was compelled to remedy the deficiencies in Student's BSP that no longer allowed her/him to succeed. The District's failure to do so denied Student a FAPE.

While not specifically addressing which section of the IDEA or its regulations require behavior management plans, the Eighth Circuit found a denial of a FAPE when a school district failed to develop one for a student with behavioral problems. *Neosho R-V School Dist. v. Clark*, 315 F.3d 1022, 1030 (8th Cir. 2003). As stated by the court: "[W]e agree that the School District failed to provide [the child] an educational benefit by not developing and implementing an appropriate behavior management plan.) (*Id.*)

Similarly, the Eastern District of California found that a school's failure to take action when a child's behavior deteriorated denied the child a FAPE. In *Covington v. Yuba City Unified School Dist.*, No. 2:07-cv-01811-MCE-GGH (E.D. Cal. 2011), a child stopped responding to the behavioral strategies and interventions that had succeeded in the past. The child became increasingly defiant and resistant to redirection. Finding that the school did not respond quickly or effectively to resolve this "run-away" behavior, the hearing officer concluded that the school denied the child FAPE. The Eastern District upheld that ruling.⁶⁷

The District cites the case of *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419 (8th Cir. 2010) for the proposition that the IDEA does not require BSPs. This case holds that the IDEA's requirement that schools "consider" behavioral supports when developing IEPs does not require that an IEP state specific goals for behavior. *Id.* at 425. The case does not address the IDEA's mandate that schools offer related services enabling children to access education. Moreover, in *Lathrop*, the child's IEPs "both described his disruptive behaviors and included a host of strategies to address them." *Id.* Furthermore, during the period at issue, the child in *Lathrop* progressed academically. *Id.* at 427.

⁶⁷ A copy of this unofficially cited Memorandum and Order, issued by the Central District on February 7, 2011, is attached hereto as Exhibit B.

As previously discussed, the IDEA's procedural requirements for disciplinary placement changes also required the District to redo Student's FBA and BSP in Spring 2010. When the District functionally expelled Student in May 2010 by changing her/his placement, the District also had to reconsider the BSP and the FBA which formed its foundation. By ignoring the IDEA's explicit procedural requirement that the District do so, the District denied Student a FAPE.

Safety Plan and Teasing

Mother also argues that because Student ran off school grounds on a few occasions, the District was required to design a safety plan especially for her/him. Mother cites no authority for that proposition. Moreover, the District had both a school-wide safety plan as well as a Room 7 safety plan during the two-year relevant period. Those plans provided for contacting a child's parents and/or the police when a child left the school campus. Any failure by the District to follow the plans was *de minimus*. Mother offered no evidence suggesting that those plans were inadequate or that Student was ever harmed when s/he left the school building. Most importantly, Mother offered no evidence indicating that without a separate safety plan, Student was prevented from accessing her/his education.

Finally, Mother contends that the District did nothing to stop other children from teasing Student. First, the District did provide behavior supports in Student's BSP to help her/him deal with teasing. Second, Mother did not prove at hearing that other children subjected her/him to severe teasing. Finally, Mother did not demonstrate that whatever teasing Student received barred her/his access to her/his education.

The Ninth Circuit held in *M.L. v. Federal Way School Dist.*, 394 F.3d 634 (9th Cir. 2005) that common-place school teasing that does not interfere with education does not deny FAPE. As stated by the court:

If a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE.

394 F.3d at 650.

REMEDY

Hearing officers have broad powers to fashion remedies which will help compensate students for school district's violations of IDEA. According to the Ninth Circuit: "Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the [IDEA.]" *Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1496-97 (9th Cir. 1994) (citations omitted.) See also, *Park ex rel. Pak v. Anaheim Union High*, 464 F.3d 1025, 1033 (9th Cir. 2006) (hearing officers have discretion in crafting appropriate remedies).

Counsel for Student and Mother requested in her closing brief the following remedies.⁶⁸

⁶⁸ Parent's Post-Hearing Brief at page 95, lines 14-25.

- Student requires a comprehensive FBA to identify the Student's triggers and the function of her/his physically aggressive behaviors.

Given the District's violation of IDEA by failing to conduct an adequate FBA during the spring of 2010, this remedy is reasonable. After the District completes the FBA, it also must develop a BSP based on the conclusions reached in the FBA. If the District plans to physically move or restrain Student, the District must confer with Parent and describe in the BSP the circumstances under which the District may physically move or restrain her/him.

- Student's IEP needs present level information with concrete data and baseline data information.

Given the District's violation of IDEA by failing to provide adequate present levels in Student's 2008, 2009 and 2010 IEPs, this remedy is reasonable with regard to providing concrete data. Counsel, however, has not defined what she means in this case by the phrase "baseline data" or proven that it is a necessary element of every statement of present levels. What the District must do is to provide a detailed snapshot of Student's academic achievement and functional performance which includes a description of how her/his disability affects Student's involvement and progress in the general curriculum.

- Student requires counseling and trauma therapy.

Given the District's physically moving and restraining of Student without Mother's knowledge or consent, trauma therapy for Student is reasonable. Because of Student's demonstrated anxiety, anxiety counseling also is reasonable. As Dr. Sullivan testified, the District has counselors who can provide such counseling to Student.

- Student needs to be taught skills by the District, including behavioral strategies, how to trust adults again, conflict resolution, self-advocacy, problem-solving strategies, how to self-soothe, how to write legibly, how to deal with authority, how to appropriately express emotions, and organizational skills.

Given the District's failure to provide an adequate FBA or related BSP, instruction in social skills such as trusting adults, conflict resolution, self-advocacy, problem-solving, self-soothing, dealing with authority, organizational skills and expressing emotions is reasonable. Given the District's failure to provide useful present levels regarding Student's ability to write, instruction in the physical act of handwriting also is reasonable.

- District staff need [sic] training regarding IEP development, the FBA process and discipline procedures for special education students.

Given the District's failure to develop adequate IEPs, to conduct an appropriate FBA, as well as its physically moving and restraining Student without Mother's knowledge or consent, training for District staff is reasonable. As the Ninth Circuit has held, one form of compensatory education is to provide training for a student's teachers. In upholding a hearing officer's order that the school train Student's special education teacher on developing IEPs, the court stated:

“The award was designed to compensate [the child] for the District’s violations by better training his teachers to meet [the child’s] particular needs. *Park*, 464 F.3d 1025 at 1034.

Additionally, given the District’s failure to comply with the IDEA’s requirements regarding placement changes, the District must return Student to the placement s/he had at Elementary School before the District placed her/him in home instruction in May 2010. After doing so, the District must convene a team meeting with Mother to determine a placement for Student that will allow her/him to access her/his education in the least restrictive environment.

ORDER

Mother has shown by a preponderance of the evidence that the District did not provide Student with a FAPE as required under IDEA. **Accordingly, it is also ordered that:**

(1) Within one week of the date of this Order, the District will meet with Mother to discuss transitioning Student back to the placement s/he had at Elementary School before the District changed her/his placement to home instruction in May 2010.

(2) Within two weeks of the date of this Order, the District must return Student to the placement s/he had at Elementary School before the District changed her/his placement to home instruction in May 2010.

(3) Within one month of the date of this Order, the District will convene an IEP team meeting to develop an IEP for Student that complies fully with the IDEA, and in particular, contains a detailed statement of the present levels of Student’s academic and functional performance as well as a summary of how Student’s disability affects her/his performance. In attendance at the IEP meeting must be a District representative who is knowledgeable about District services, in addition to all other required participants under the IDEA. As part of the IEP meeting, the team will determine an appropriate placement for Student that will allow her/him to access her/his education in the least restrictive environment.

(4) Within two months of the date of this Order, the District will conduct a comprehensive FBA of Student.

(5) Within three months of the date of this Order, the District will complete a BSP for Student. Any plan of the District to physically move or restrain Student must be discussed with Mother and documented in the BSP with a complete description of the circumstances under which such physical movement or restraint will be used by the District. The BSP must provide that within 24 hours of any physical movement or restraint of Student by the District, the District will notify Mother in writing of all details regarding the movement or restraint.

(6) Within three weeks of the date of this Order, the District will begin providing to Student:

- a. One hour per week in social skills instruction including how to trust adults, conflict resolution, self-advocacy, problem-solving strategies, self-

soothing strategies, dealing with authority, appropriately expressing emotions, and organizational skills (one hour per week during each non-vacation week of the 2011-2012 academic year).

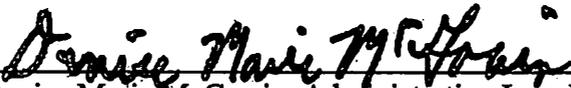
b. Thirty minutes per week in counseling dealing with anxiety, trauma or other related issues by a psychologist selected by the District (thirty minutes per week during each non-vacation week of the 2011-2012 academic year).

c. Specialized instruction designed to help Student learn to write legibly (30 minutes per week during each non-vacation week of the 2011-2012 academic year).

(7) Within three weeks of the date of this Order, the District will provide six hours of instruction on the development of IEPs to any person who will serve as Student's special education teacher during the 2011-2012 academic year.

(8) Within one month of the date of this Order, the District will provide six hours of instruction on the development of FBAs and BSPs to any person who will serve as Student's special education teacher during the 2011-2012 academic year.

(9) Within one month of the date of this Order, the District will provide six hours of instruction on appropriate disciplinary measures for sixth grade students to any person who will serve as Student's special education teacher during the 2011-2012 academic year.


Denise Marie McGorin, 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 13th day of October, 2011 with copies mailed to:

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