

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON DEPARTMENT OF EDUCATION**

IN THE MATTER OF:THE)	FINAL ORDER
EDUCATION OF)	
)	OAH Case No. 2017-ABC-00236
STUDENT V DOUGLAS COUNTY)	Agency Case No. DP 16-115
SCHOOL DISTRICT 4)	
)	

HISTORY OF THE CASE

On September 13, 2016, Melissa Wischerath, attorney at law, filed a request for a due process hearing, on behalf of Parents and Student, with the Oregon Department of Education. In the hearing request, Ms. Wischerath alleged that the Douglas County School District No. 4 (District) failed to provide a free and appropriate education for Student as required under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 USC §§ 1400 *et seq.*

The matter was referred to the Office of Administrative Hearings (OAH) on September 14, 2016, to be set for hearing. Senior Administrative Law Judge (ALJ) Bernadette H. Bignon was appointed by the Oregon Department of Education to conduct the due process hearing and issue a Final Order in this case.

ALJ Bignon held a prehearing teleconference on September 26, 2016. Ms. Wischerath appeared on behalf of Parents and Student. Joel Hungerford, attorney at law, appeared on behalf of District. During the conference, the parties informed ALJ Bignon that they had jointly waived the resolution session in favor of mediation. Therefore no resolution session was held.

Parents' due process hearing request included a claim that the District failed to conduct a timely and accurate manifestation determination meeting pursuant to OAR 581-015-2415(3). Because that issue was subject to the expedited hearing procedures of OAR 581-015-2445, ALJ Bignon bifurcated the hearing request and scheduled a hearing on the expedited matter for October 11, 2016.

The parties jointly requested waiver of the 45-day deadline to a date certain on the remaining issues in the hearing request. The contested case hearing to address the remaining issues was set for October 28 through December 2, 2016, with the Final Order to be issued on or before February 10, 2017.

At the request of the parties, ALJ Bignon held a second prehearing teleconference on September 29, 2016 to discuss discovery and other matters related to the expedited hearing. Following the second teleconference, Parents requested to amend the September 13, 2016

hearing request to remove the expedited issue without prejudice. The District agreed to the amendment. On September 30, 2016, ALJ Bignon issued a Ruling Granting Request to Amend Hearing Request, deleting the expedited issue and canceling the expedited hearing set for October 11, 2016.

On October 14, 2016, ALJ Bignon issued the Notice of Hearing & Rights (Notice) for the contested case hearing on Parents' remaining issues raised in the September 13, 2016, hearing request. On November 15, 2016, the parties advised ALJ Bignon that they had met in mediation as scheduled but had been unable to complete mediation and/or reach resolution. Consequently the parties jointly requested to reschedule the contested case matter to January 2017.

On November 16, 2016, ALJ Bignon granted the parties' joint request to postpone, and rescheduled the hearing to January 17 through January 20, 2017, and reset relevant deadlines with the Final Order to be issued on or before March 30, 2017. On January 5, 2017, ALJ Bignon issued an Amended Notice of Hearing & Rights reflecting the rescheduled hearing dates and deadlines.

On January 6, 2016, the parties submitted their respective lists of witnesses and copies proposed exhibits. On January 11, 2017 District filed a prehearing brief. An additional prehearing teleconference was held on January 12, 2017 to discuss witness scheduling and other matters. The District agreed to provide more specification on the area of expertise in which District anticipated the witness would be expected to qualify as an expert. Parents' objected to District's alleged failure to provide documents relating to an expert's opinion. District responded that it had produced all documents in response to Parents' discovery requests. In response to Parents on-going concern regarding lack of documentation related to District's proposed expert witness, the parties were reminded of the following: any documents that either party offered at hearing that had not been produced at least five days prior to the start of hearing would be subject to exclusion from the evidence record, absent extraordinary circumstances or agreement to entry into the record by opposing counsel.

ALJ Bignon convened a hearing at District's offices on January 17 through January 20, 2017. Based on the request of the parties to complete necessary testimony, the hearing was continued to January 26 and 27, 2017. Final briefing deadlines were set with the Final Order to be issued on or before April 6, 2017. A Notice of Continued Hearing confirming the continued hearing issued on January 25, 2017.

On January 25, 2017, ALJ Bignon granted Parents' counsel's request to postpone the continued hearing due to illness. District did not oppose the request. On February 1, 2017, a Second Notice of Continued Hearing issued, setting the continued hearing for February 15 and 16, 2017.

On February 15, 2017, ALJ Bignon convened the continued hearing as scheduled. At the end of the second day of hearing, February 16, 2017, the parties had not completed taking testimony. The hearing was continued beginning at 8:00 a.m. on February 17, 2017 for completion of testimony by Mr. Burton. Upon agreement by the parties, the hearing was continued to February 22, 2017, to be convened by telephone, and the deadline for the Final

Order was set for April 28, 2017. A Third Notice of Continued Hearing issued setting the continued hearing to be convened by telephone on February 22, 2017 beginning at 9:00 a.m. On February 22, 2017, ALJ Bignon convened the telephone continued hearing as scheduled. Upon completion of the telephone hearing on February 22, 2017, the evidentiary record closed.

During the hearing before Judge Bignon, the District presented testimony from Richard Burton, David Krosner, Kristoffer Johns, Angela Hansen, Kelly Kirk, Brett Steinacher, Melanie Billiu¹, Ben Horvath, Karma Clarke-Jung, and Julia Heilman. Parents presented testimony from Father, Mother, Kimberly Sherman, Ph.D., Melanie Billiu, Amy Rodriguez, and Kimberly Conkey.

On March 22, 2017, Parents' requested an extension of the March 24, 2017 deadline for submitting final briefs based on a significant development in relevant case law: a decision by United States Supreme Court in *Endrew F. v. Douglas County School District*, 580 U.S. ___ (March 22, 2017). The District did not oppose the extension and the deadline for final briefing was rescheduled to March 30, 2017. The extension did not affect the April 28, 2017 deadline for issuance of the Final Order.

Due to unforeseen circumstances, ALJ Bignon became temporarily unavailable and was unable to issue the Final Order by the April 28, 2017 deadline. On June 15, 2017, the Office of Administrative Hearings learned that ALJ Bignon would not be available to complete her work on the case. On June 16, 2017, Presiding ALJ John Mann held a telephone status conference with the parties. Following that status conference, ALJ Mann reassigned the case to himself for purposes of reviewing the record and completing the Final Order.

ALJ Mann reviewed entire record of this proceeding, including the transcript and all exhibits and briefs submitted by the parties and took the matter under advisement. On November 21, 2017, ALJ Mann issued an Interim Order Reopening Record for Additional Evidence on Remedies (Interim Order.) In that Interim Order, ALJ Mann found that Parents had established several violations of the IDEA. However, because he determined that the record did not contain sufficient evidence upon which to fashion a remedy, ALJ Mann ordered the record reopened to allow the parties to present additional evidence and argument on the issue of appropriate remedies.

ALJ Mann held a telephone status conference with the parties on December 12, 2017. Mr. Hungerford represented the District and Ms. Wischerath represented the Parents at the status conference. The parties agreed to hold a hearing on January 22, 2018 at the District's office in Roseburg, Oregon. The parties further agreed to submit written closing briefs on or before February 14, 2018. At the request of the parties, the due date to issue the final order was extended to March 2, 2018.

¹ Sometime after the events at issue in this case, Ms. Billiu changed her last name to Adams. At various times in the transcript, Ms. Billiu is referred to as Ms. Adams, Ms. Billiu, or Ms. Billiu-Adams. To avoid confusion, she will be referred to as Ms. Billiu in this order; the name that she used when she was Student's teacher.

The hearing was held as scheduled on January 22, 2018 at the District's offices in Roseburg. Mr. Hungerford represented the District and Ms. Wischerath represented the Parents. Ms. Wischerath was accompanied by her legal assistant, Mary Beth Williams. Parents were also present for the hearing. Richard Burton, the District's Director of Student Services and Director of Special Education, was present as the District's representative. Parents presented testimony from Kimberly Sherman, Ph.D. and from Mother. The District presented testimony from Mr. Burton, Angela Keeran, Kelly Kirk, Brett Steinacher, and Eudora Fraczek. The hearing record closed on February 14, 2018 after the parties filed their closing briefs.

On February 22, 2018, Ms. Wischerath filed a Motion to Take Judicial Notice of Ms. Kato's TSPC License. In the motion, Ms. Wischerath asked ALJ Mann to take notice of the status of the teaching license of Akiko Kato, Student's classroom teacher at his/her current private school. ALJ Mann held a telephone conference to discuss the motion on February 23, 2018. Ms. Wischerath and Mr. Hungerford participated in the conference. Following a brief discussion, ALJ Mann informed the parties that he intended to take notice of Ms. Kato's license, pursuant to ORS 183.450, if he determined that such finding was necessary to resolve the issue of the appropriate remedy. ALJ Mann allowed the District to file a rebuttal or objection to the noticed information no later than February 27, 2018. The District filed a Response to Judicial Notice on February 27, 2018 and ALJ Mann took the case under advisement.

ISSUES²

Whether Student was denied a free appropriate public education (FAPE) for the 2014-2015 and 2015-2016 school years as a result of District's alleged actions or failures to act. Parents alleged that the District:

1. Failed to evaluate Student in all areas related to suspected disability in violation of 34 CFR § 300.304 (4), (including assessment under the criteria of emotional disturbance) and failed to assess Student with tools that would assist in determining the content of Student's Individualized Education Plan (IEP), including information related to enabling the Student to be involved in, and progress in, the general education curriculum, in violation of 34 CFR § 300.304 (b) (1) (ii), thereby resulting in the denial of a FAPE to Student for the 2014-2015 and 2015-2016 School Years; and
2. Failed to place Student in the least restrictive environment by failing to provide supplementary aids and services in the regular classroom to ensure removal only under the requirements in violation of 34 CFR § 300.114 (a) (2) (ii), specifically alleged as follows:

² In the Notice of Hearing, ALJ Bignon reorganized and renumbered the issues as set forth by the parents for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J. W. v. Fresno Unified School Dist.*, 626 F3d 431, 442-443 (9th Cir. 2010)). The issues as stated in this Final Order are consistent with the issues in the Parent's Hearing Request and as articulated by ALJ Bignon in the Notice of Hearing.

- Placing Student in a special class, or classes, without consideration of placement in regular classes with the use of supplementary aids and services, and
 - Placing Student one period per day in an Odysseyware³ class without providing Student specially designed instruction (SDI) in reading, writing, basic math, behavioral or speech communication, during that period; and
 - Providing Student with less than a full school day (including requiring Student to attend a class during the regular school day that was not part of the regular curriculum, an Odysseyware class) resulting in a change of placement and a shortened school day that had not been addressed in the Student's then-current IEP; and
 - Failing to issue a prior written notice (PWN) when required for the resulting change in placement in violation of 34 CFR 300.503.
3. Failed to provide appropriate and adequate transitional services to Student during the 2015-2016 school year, in violation of 34 CFR §§ 300.320 (b) (1) and (2), and 300.321 (b) (3), by failing to comply with the requirements for transition assessments and appropriate services, specifically alleged as follows:
- Failing to adequately assess and identify Student's transition needs; and
 - Failing to adequately develop and implement transitional services; and
 - Failing to identify goals appropriate for transition; and
 - Failing to conduct an IEP team meeting that included a representative of a public agency likely to be responsible for providing or paying for transition services as required under the rule.
4. Failed to develop an IEP that was reasonably calculated to enable Student to receive educational benefits during the 2014-2015 and 2015-2016 school years in violation of 34 CFR §300.320 because District is alleged to have:
- Failed to provide a complete and accurate description of Student's present levels of academic achievement and functional performance; and
 - Failed to develop appropriate goals in the areas of reading, written language, social skills, and behavioral skills;
 - Failed to define the SDI needed to achieve those goals; and

³ Odysseyware is an online instructional program that provides instruction in a number of subjects including English language arts, history, math, and science.

- Failed to implement goals sufficient to address Student's needs in behavioral and social skills.
5. Failed to issue a PWN when Student was removed from all general education classes under the then-current May 30, 2014 IEP, resulting in a change of placement which was not reflected in Student's IEP until the IEP team met in December 2014; the alleged procedural failure is alleged to have resulted in a substantive denial of FAPE when Student did not receive SDI following removal from the general education classes, in violation of 34 CFR §300.503.
 6. Failed to develop or implement a behavioral support plan as required when the behavior of Student, a student with a disability, impeded Student's learning or the learning of others in violation of 34 CFR §300.324. Further, District's alleged failure to comply with the rules' requirements for assessment and implementation of an appropriate behavior support plan is alleged to have led directly to Student's conduct of October 15, 2015, subsequent change in placement, and a denial of FAPE.
 7. Failed to adequately assess Student for assistive technology (AT) needs, failed to provide AT based on an adequate assessment needs and failed to provide related SDI related to appropriate AT, in violation of 34 CFR §§300.5, 300.6, 300.36, 300.34, 300.38, 300.114 (k) (2) (ii) and 300.324, resulting in a denial of FAPE.
 8. Failed to provide Parents with sufficient and timely access to Student's educational records, in violation of 34 CFR §600.613, to allow Parents the ability to make fully informed decisions regarding the education and placement of Student and resulting in a denial of FAPE in violation of 34 CFR §§300.9 (a) and 300.503 (a) (1).
 9. If any or all of the above alleged violations occurred, what remedies are appropriate?

EVIDENTIARY RULINGS

The following Exhibits were admitted into the record during the hearing before Judge Bignon without objection:

- Exhibits D1 through D26 offered by the District.
- Exhibits S1, S2 through S6, S12, S13, S17 through S20, S22 through S26, S30 through S32, S34 through S38, S41, S42, S44, S47, S49, S50, S59, S68, S71, S72, S74 through S78, S81 through S84, S86, S90, S92, S93, S95 through S97, S99 through S104, S107 through S110, S113, S116, S117, S120 through S123, S125, S130, S142, S153, S154, S164, S168, S172, S179, S183, S184, S185, S186, S187, S189, S190, S191, S192, S199, S200, S201, S202, S204, S205, S208, S209, S210, S220, S221 through S223, S232, S233, S236 through S240, S244 through S252, S254, S255, S258, S260, S261, S264 (for purposes of refreshing testimony only), S268 (for purposes of refreshing testimony only), S274 (for purposes of refreshing testimony only), S286, S287, S288, S291, S294, S302 through S313, S315 through S326, S328, S330, S334, S338 through S341, S343 through S353,

S355, S357, S359, and S360.

The following Exhibits were admitted into the record at the hearing before Judge Bignon over the District's relevancy objections:

Exhibits S7 through S10, S169 through S171, S215 through S217, S229, S234, S243, S293, S356, S361, and S367

ALJ Bignon sustained the District's relevancy objection to Exhibit S331 which was not admitted into the record.

Prior to the hearing, Student submitted documents to ALJ Bignon labeled Exhibits S1 through S367. However, Student did not offer the following Exhibits into evidence at the hearing and they were therefore not admitted:

S11, S14 through S16, S21, S27, S28, S33, S39 S40, S43, S45,S46, S48, S51 through S58, S60 through S67, S69, S70, S73, S79, S80, S85, S87, S88, S89, S91, S94, S98, S105, S106, S111, S112, S114, S115, S118, S119, S124, S126 through S129, S131 through S141, S143 through S152, S155 through S163, S165 through S167, S173 through S178, S180 through S182, S188, S193 through S198, S203, S206, S207, S211through S214, S218, S219, S224 through S228, S230, S231, S235, S241, S242, S253, S256, S257, S259, S262, S263, S265 through S267, S269 through S273, S275 through S285, S289, S290, S292, S295 through S301, S314, S327, S329, S333, S335 through S337, S342, S351, S352, S354, S358, and S362 through S367.

At the January 22, 2018 hearing before Judge Mann, the following exhibits were admitted into the record without objection:

Student's Supplemental Exhibits S1 and S5; District's Supplemental Exhibits D4 and D10.

Student's Supplemental Exhibit S8 was admitted over the District's objection that the exhibit did not have a proper foundation.

Student's Supplemental Exhibit S2 was admitted over the District's objection that the exhibit was irrelevant.

Student's Supplemental Exhibits S6 and S7 were admitted over the District's objection that the exhibits were irrelevant and lacked foundation.

The District's Supplemental Exhibits D1, D2, D3, D5, D6, D8, D11, and D12 were admitted over Parent's objection that the Exhibits were not relevant.

Parents objected to the District's Supplemental Exhibits D7, D9, and D13 as irrelevant. Those objections were sustained and the exhibits were not admitted into the record.

The District objected to Student's Supplementary Exhibits S3 and S4 based on relevance and lack of foundation. I did not rule on the objections at the hearing and took the matter under advisement. Having considered the matter, and based on the disposition of this case, I hereby sustain the relevancy objections and Student's Supplementary Exhibits S3 and S4 are not admitted.

Judicial Notice On February 22, 2018, Parents filed a motion requesting that I take judicial notice of the teaching license of Student's private school teacher. Because I have concluded that Parents request for private school tuition reimbursement is not appropriate, the licensing status of the private school teacher is irrelevant to the issues in this case. I therefore decline to take notice of that fact.

FINDINGS OF FACT

(1) At the time of hearing, Student resided with Parents within District boundaries and attended District's high school on an Individual Education Plan (IEP), having been determined eligible for special education services under the IDEA under the category of autism spectrum disorder. (Ex. D6 at 13-16.) Student was initially found eligible for special education in January 2009 under the category of autism while attending school in another district. Student's eligibility team specifically found that Student was not, at that time, eligible under the category of emotional disturbance. (Ex. S75 at 2.) Student was reevaluated for eligibility in January of 2012. Student's eligibility team again found that s/he was eligible for services under the category of autism and that Student was not eligible under the category of emotional disturbance. (Ex. S76 at 2.)

(2) Student attended the sixth grade in another district during the 2011-2012 school year. Student's January 12, 2012 IEP indicated that Student received a score of 215 on his/her fifth grade OAKS⁴ reading assessment, three points below the state benchmark, and a score of 223 on his/her fifth grade math assessment, two points below the state benchmark. The IEP also noted that Student had difficulty with writing. The IEP included Student's results from the Woodcock-Johnson III test administered during Student's 5th grade year on which Student scored a grade equivalency of -3.9 in broad reading, a -3.1 in broad math, and a -1.9 in writing. (Ex. S216 at3.) The IEP also noted that Student was receiving instruction in math and writing in special education classes. (*Id.*)

(3) The January 12, 2012 IEP stated that Student sometimes became upset, would refuse to work, and, on occasion, would crawl under a desk or table. The IEP also documented that, at times, Student would rip things up or throw objects, and that Student was starting to become physically aggressive, including times when s/he became frustrated with peers. The IEP noted that Student would occasionally start picking on other students, and instigate physical assaults. (Ex. S216 at3-4.) The IEP included a written behavior plan to be utilized throughout the year at all school sites as a related supplementary aid/service. (Test. of Burton, tr. at 445-446; Ex. S216 at13.)

(4) Student's family moved into the District and Student enrolled in a District middle

⁴ OAKS stands for Oregon Assessment of Knowledge and Skills.

school at the beginning of his/her seventh grade year. With Parents' permission, the middle school IEP team reviewed and implemented Student's January 12, 2012 IEP to allow for time Student and staff to adjust and get to know each other. (Test. of Krosner, tr. at 530-532, 547-549; Ex. S216.)

(5) On December 20, 2012, (during Student's seventh grade year) Student's IEP team met for Student's annual IEP meeting. (Ex. S215.) The team developed an IEP which indicated that Student continued to require specialized instruction in math, reading and writing. (Ex. S215 at8.) During his/her two years at the middle school, Student continued to receive special education services in the category of autism spectrum disorder. (Test. of Krosner, tr. at 531-532.)

(6) Keith Krosner, the principal of the District middle school while Student attended, was a member of Student's IEP team. Mr. Krosner has a master's degree in special education and worked as a special education teacher from 1982 through 1994. (Test. of Krosner, tr. at 525-527; Ex. D 21.) Mr. Krosner believed that Student's eligibility under the category of autism spectrum disorder was accurate. He did not see anything from Student's behavior and performance at school to suggest that Student needed to be assessed in areas other than autism. (Test. of Krosner, tr. at 532.)

(7) On December 12, 2013 (during Student's eighth grade year), Student's IEP team met for Student's annual IEP meeting. The IEP notes that Student had delays in math, reading and writing and required specialized instruction to make progress toward grade level goals and benchmarks. The IEP also stated that Student would have difficulty accessing core language arts and math curriculum without support. (Ex. S217 at 2.) The IEP indicated that Student read at level 5 with 110 words correct per minute. It also indicated that s/he scored 196 on a fall reading assessment, which was below the score of 219 which was typical for a fall eighth grade student. (Ex. S 217 at6.)

(8) On a page labeled "Special Factors to IEP Development," the IEP team marked the "yes" box in answer to the question "Does the student exhibit behavior that impedes his/her learning or the learning of others." (Ex. S217 at 4.) In an adjacent box (labeled "Explanation") the IEP states "See Goal and PLAAF."⁵ (*Id.*)

(9) The December 12, 2013 IEP statement of Student's Present Levels of Academic Achievement and Functional Performance (PLAAF) referred to Student's prior identification for special education under the category of autism spectrum disorder (ASD) and to testing results administered in 2008. (Ex. S217 at 2.) The IEP contained no evidence of updated testing for Student's developmental and functional performance levels. (Ex. S217). Under a section labeled Strengths of Student, the IEP states:

Concerns: [Student] can become overwhelmed and frustrated in the classroom. [S/he] can refuse to work, walk out, or in intense situations throw chairs or hit staff. [S/he] has frustrations with peer and often blames them for [his/her] behaviors when [s/he] is often the aggressor. Some of this behavior comes from a

⁵ PLAAF refers to the IEP's Present Levels of Academic Achievement and Functional Performance.

desire to avoid work.

(*Id.* at 2.) The PLAAF contains no other information regarding Student’s behavior. (*Id.*)

(10) The December 12, 2013 IEP stated that Student had delays in math, reading and writing and “needs specialized instruction in order to make gains toward grade level goals and benchmarks. [Student] would have difficulty accessing the core language arts and math curriculum without supports.” (Ex. S217 at 7.)

(11) The December 12, 2013 IEP included annual goals in the categories of reading, writing, math-calculation, social/emotional/behavioral, and speech. (Ex. S 217 at 6-7.) Student’s annual goal under the category of Social/Emotional/Behavioral was to “use coping skills to appropriately manage frustrations, stay in the classroom, and participate in classwork 95% of the time [.]” (*Id.*) The IEP noted that Student was, at that time, leaving the classroom about 50 percent of the time. (*Id.* at 7.) Student’s goal under the category of speech stated “During structured language sessions, [Student] will use strategies and vocabulary to help adapt to a variety of social situations throughout [his/her] daily routine.” (*Id.*) The IEP described Student’s present level in speech as “[Student] continues to develop the social skills necessary to participate in small groups of [his/her] peers.” (*Id.*)

(12) The December 12, 2013 IEP included SDI in written language (15 minutes per day), math (50 minutes per day), social skills (15 minutes per week), communication skills (90 minutes per month), and reading (50 minutes per day.) (Ex. S217 at 8.) The December 12, 2013 IEP stated that Student would need to be removed from participating with non-disabled students for only one period per day. (Ex. S217 at 10.) The December 12, 2013 IEP did not incorporate a behavior support plan (BSP) within the IEP nor was one included as an attachment.⁶

(13) The December 12, 2013 IEP listed supplementary aids and services that included having Student sit in the quietest part of the room away from distractions, providing 15 minutes per day in a “Quiet/Safe place to self-compose when [Student] feels overwhelmed,” and a “‘Daily Card’ to encourage positive behaviors.” (Ex. S217 at 8-9.)

(14) The IEP team met again on May 30, 2014 to review and amend the December 12, 2013 IEP and to discuss placement with regard to Student’s transition to high school the following year. (Ex. D4 at 2, S222 at 1.) Amy-Jo Rodriguez, an assistant principal at the high school Student was expected to attend the following year, was present for the meeting. Ms. Rodriguez led the special education department for the high school at that time. (Test. of Rodriguez at 924-925; S222 at 1.)

(15) The middle school staff gave a summary of Student’s history at middle school and

⁶ Several of the District’s witnesses testified that the middle school used or implemented a BSP for Student and that the BSP was intended to come with Student to high school. However, the District did not demonstrate that such a BSP was either referenced or included with the December 13, 2013 IEP or the May 30, 2014 amended IEP. Records in Student’s file showed the last behavior-related document produced in middle school was the Functional Behavioral Assessment dated March 13, 2012. Furthermore, District staff who worked directly with Student did not appear to be familiar with the contents of Student’s middle school BSP.

included many positive statements about Student. (Test. of Krosner, tr. at 532, Mother, tr. at 1559; Ex. D4 at 6.) The team also focused the challenges associated with transitioning to high school, including how Student would react to dealing with a larger building with more students present. (Test. of Rodriguez, tr. at 929.)

(16) Mr. Krosner told the team he was concerned about Student's move to high school because Student's behavioral incidents had increased markedly in the last quarter of his/her eighth grade year. (Test. of Mother, tr. at 1559.) During the last quarter of Student's eighth grade year, Student began leaving his/her classrooms without permission. Student would later be found in an empty office or in Mr. Krosner's office, many times hiding under the desk. Student began using a growl at school and would growl a lot. Student forcefully moved chairs, and a few times, Student started swinging a chair, by grabbing it and sliding it across the floor. (Test. of Mother, tr. at 1560.)

(17) Although the team discussed concerns about Student's behavior, no new supports were added to the Amended IEP as a result of this discussion. (Test. of Mother, tr. at 1560-1561; Exs. S217 at 1-11, S 222 at 1-11, D 4 at 6-13.)

(18) The May 30, 2014 IEP revised the Statement of Nonparticipation Justification, increasing the time Student was out of general education classes to three periods per day. The IEP does not contain any explanation for changing the amount of time Student was out of general education during the day, but does note that "[Student] needs small group instruction in order to make gains toward grade level goals and as a safe place to decompress." (Ex. S222 at 10.) The May 30, 2014 IEP was, as expected, in place at the beginning of the 2014-2015 school year, when Student entered ninth grade. However, contrary to the IEP, when Student entered high school, s/he was enrolled in special education classes for five out of seven school periods in the day. (Test. of Rodriguez, tr. at 929-931, 939-947; Ex. S1.)

(19) As of Student's May 15, 2014 progress report using a Pass-No Pass grading system, Student was passing Literacy 6, Social Studies, and Language Arts Supports. Student was not passing Math 8 or Language Arts 8. (Ex. S293.) The Amended IEP of May 30, 2014 section C. titled "Summary of Present levels of Academic Achievement and Functional Performance," was unchanged from the December 12, 2013 IEP. The section contained identical statements for Student's strengths and for the concerns of Parents. The team did not update Student's present levels of academic achievement or performance, nor make any changes to those reported on the December 12, 2013 IEP other than some minor corrections to reported OAKS scores. (Exs. D4 at 7, S217 at 2.)

(20) At the conclusion of the May 30, 2014 IEP meeting, Parents understood that at high school Student would be enrolled in general education classes with the option of pull outs for writing, English and math. Mother understood that Student would be in a "success" room for a portion of the day and understood that this was an option for pullout. Mother did not understand that the high school Success room was a self-contained special education classroom. (Test. of Mother, tr. at 1561-1562.)

(21) During the summer prior to his/her entry into ninth grade, Student received extended school year services (ESY) at a District high school. (Ex. D4 at 13; Test. of Mother, tr.

at 1570.) After Student started attending ESY, s/he told Mother that ESY staff had told him/her to “stop acting like a baby” and called him/her “stubborn.” After learning about the comments, Mother talked to the ESY teachers about working with Student and requested s/he be allowed a quiet, private area to calm down and reorganize. Student continued to have difficulties with ESY. (S260 at 2.)

(22) On August 6, 2014, staff called Mother to have Student picked up from school. Student had a conflict with a peer, threw a book, yelled and then hid in a restroom. Student refused to attend ESY the next day. (S260 at 2-3.)

(23) In August 2014, Mother prepared a document titled “Getting to know [Student]” and emailed it to a list of high school teachers that had been provided to her. Mother later personally handed a copy of that document to Melanie Billiu, Student’s special education teacher. (Test. of Mother, tr. at 1567; Ex. S251.) Mother prepared the document to help high school staff get to know Student more quickly. Mother included detailed information about Student’s likes and dislikes, his/her positive characteristics, as well as his/her stress triggers. Mother described what Parents had observed as Student’s reactions or outbursts as well as calming techniques, and tips/goals for working with Student. (Test. of Mother, tr. at 1567-1568; Ex. S251.)

(24) Student entered high school on September 2, 2014. (Ex. S 1.) Ms. Billiu was assigned as Student’s special education teacher and case manager at that time. Ms. Billiu received her teaching license as a special education teacher in August 2014, the month prior to Student entering high school. Ms. Billiu had previously worked for 10 years as an educational assistant, but had not worked as a teacher prior to Student’s ninth grade year. (Test. of Billiu, tr. at 110-111 and 139.) As an educational assistant, Ms. Billiu worked with students affected by developmental delays, autism and behavioral issues. (Test. of Ms. Billiu, tr. at 70-72.)

(25) Student was enrolled in seven class periods at the beginning of the 2014-2015 school year. Student attended two periods of general education, Freshman House and Applied Integrated Science. Student’s remaining five periods were in special education classes. (Test. of Rodriguez, tr. at 939, 947; Ex. S1.)

(26) At the time Student entered ninth grade, Mother noticed that Student displayed anxiety about attending the new school which was in a large building with many hallways and many people. Meeting new people or trying to interact with them also caused Student anxiety. Student also experienced anxiety if a routine schedule was not followed. Student refused to attend school on some occasions during his/her ninth grade year, but Mother thought his/her attendance was typical for his/her age. (Test. of Mother, tr. at 1500-1502.)

(27) During the time she taught Student, Ms. Billiu was not certified as “highly qualified” to teach in the core curriculum categories under the federal statute known as No Child Left Behind (NCLB).⁷ (Test. of Ms. Billiu, tr. at 72-73.) While in Ms. Billiu’s class, Student did not receive direct instruction in the core curriculum including math, English, reading, language

⁷ No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 115, Stat. 1425, 2002, was revised by the Every Child Succeeds Act (ESSA), Pub. L. 114-95, 129 Stat. 1802 (2015).

arts and science because Ms. Billiu was not certified to teach in those areas. Instead, the District provided instruction in those subject areas to students placed in the Success classroom through a computer program called Odysseyware. (*Id.* at 91.)

(28) Prior to using the program, the District did not review Odysseyware to determine whether its methodology was peer-reviewed, scientifically based when used with students who have reading and attention deficits. Student was not assessed regarding his/her ability to use Odysseyware, nor did the District make a specific determination that Odysseyware would be an appropriate tool to provide Student with SDI. Rather, the District used Odysseyware as part of the Success program in which student was placed. (Test. of Burton, tr. at 260-270.) Odysseyware is used by both general and special education students and is not, in itself, a form of SDI. However, it can be used flexibly as part of a SDI program. (Test. of Hansen at 659-661.)

(29) Student's Amended May 30, 2014 IEP provided for transportation services. (Ex. D4 at 13.) However, on September 2, 2014 (student's first day of high school), the bus did not arrive to take Student to school, so Mother drove him/her to school. Student became highly anxious and would not get out of the car for approximately 10 minutes. After most students were in the school, Mother got out and spoke to a teacher standing at the gate. After speaking with a teacher and another person who had worked with Student over the summer, one of Student's teachers, Mr. Shuey, approached and offered to help Student get to where s/he needed to be. (Test. of Mother; tr. at 1571-1573.)

(30) Later that day, at approximately 10:20 a.m., Ms. Billiu called Mother to report that Student was having a "blow-out." Ms. Billiu told Mother that Student had made threats, thrown items, verbally threatened to harm and kill others, and then tipped over a desk. She told Mother that she and an instructional assistant (who had worked with Student during the summer) had tried suggestions that Mother had listed the "Getting to Know [Student]" document, but that nothing had worked. Mother attempted to explain that Student was experiencing a "melt-down," and that she should "let it pass." (Test. of Mother, tr. at 1573-75; Ex. S260 at 4-5.)

(31) On September 25, 2014 the District held an evaluation planning meeting for Student's upcoming special education reevaluation. (Ex. D5.) Parents and Student met with Ms. Billiu and Shannon Belson, the school psychologist. (*Id.* at 9; test. of Mother, tr. at 1532.) As a result of the meeting, the team sought Parents' consent to evaluate in the following areas:

- Educational Evaluation of Learning and Achievement;
- Observation of Learning Environment which would include observation of Student's interactions in the classroom and other school settings;
- Functional Behavior Analysis;
- Adaptive Behavior which would include and assessment of how Student functions independently both in and out of school;
- Speech/Language Evaluation; and
- A medical statement.

(Ex. D5 at 4.) The team opted to evaluate Student using the Childhood Autism Rating Scale (CARS), Pragmatics Checklist, three Observations, and the Adaptive Behavior Assessment System – Second Edition (ABAS). (*Id.*)

(32) At the meeting, Mother signed a consent from authorizing Student to be assessed using a Pragmatics Checklist, three classroom observations (to be conducted by Ms. Belson and by a school speech language pathologist), CARS (to be completed by Parents), and ABAS (to be completed by Student's teachers.) The consent form noted that the team already had a medical statement which would be considered in the evaluation. The team scheduled Student's annual IEP meeting and his/her reevaluation meeting for December 4, 2014. (*Id.* at 4 and 8-9; test. of Mother, tr. at 1532-1533.)

(33) Mother also learned that Student had begun some self-harming behaviors at school during ninth grade. Ms. Billiu told Mother that Student had hit walls and had hit his/her self when s/he appeared to be frustrated. During the ninth grade year, the school called Mother on several occasions to pick Student up from school either at the end of, or during, the school day. (Test. of Mother, tr. at 1505-1509.)

(34) On October 14, 2014, the District removed Student from a special education math class and Applied Integrated Science (a general education class) and placed Student in the Success classroom (a special education class) for those periods. (Test. of Rodriguez, tr. at 945; Ex. S1.) For the remainder of the 2014-2015 school year, Student was enrolled in Freshman House (a general education class) Adaptive PE (a special education class), and spent the remainder of his/her day in the Success classroom. (Ex. S356.)

(35) The District did not notify Parents that it had changed Student's schedule and had removed him/her from a general education class (Applied Integrated Science) and placed in the Success classroom instead for that period. Parents discovered Student's classes and teachers had been changed during parent/teacher conferences for the year. Mother scheduled appointments with Student's math and science teachers among others. When Mother appeared for the scheduled conference with Student's math teacher, the teacher was not there. Mother then went to her scheduled appointment with Student's science teacher; however the teacher did not seem to know who Student was. (Test. of Mother, tr. at 1562-1563.)

(36) Mother then met with Ms. Billiu who told her that Ms. Gummo, Student's math teacher, had filed an "insubordination charge" on Student, and had Student removed from her class for tearing up paperwork. Ms. Gummo came to Ms. Billiu's classroom while Mother was there and confirmed what Ms. Billiu had told her. Ms. Billiu did not ask why Student had been removed from science class and Ms. Billiu did not tell her. Sometime later, Ms. Billiu sent Mother an email, notifying Mother that Student had been removed from third and fifth periods by Ms. Billiu. (Test. of Mother, tr. at 1563-64.)

(37) Ben Horvath is an instructional assistant (IA) who worked with Student since Student began attending high school in September 2014. Mr. Horvath first worked with Student as one of the aids in the Success classroom.⁸ (Test. of Horvath, tr. at 1777-78.)

(38) The IEP implemented at the beginning of ninth grade (September 2014) did not include a behavior support plan developed by an IEP team. Sometime within the first two weeks

⁸ Mr. Horvath later became assigned to Student as a one-on-one aide midway through Student's tenth grade year. (Test. of Horvath, tr. at 1778.)

of school, Ms. Billiu gave Mr. Horvath a copy of Mother's "Getting to Know [Student]" document, as a guide to handle some of Student's behaviors. (Test. of Horvath, tr. at 1779, 1785-1786, 1789-1790.)

(39) Ms. Billiu and staff implemented some of the suggestions listed in Mother's document when Student got frustrated or needed to de-escalate behaviors. Staff found that earlier in the year, Student responded positively to using bubble gum, root beer candies, vanilla scents and placing a piece of fabric under the desk where it was available to Student. Staff also allowed or denied Student access to his/her DS (hand-held gaming system) during the lunch period as a behavioral intervention. (Test. of Horvath, tr. at 1779-1780.)

(40) The District cleared out an unused room adjacent to the Success room to use as Student's quiet room. At the beginning of Student's freshman year, Student would sometimes become frustrated and would go into the quiet room. (Test. of Horvath, tr. at 1779.) When Student chose to use the quiet room on his/her own initiative, Student was allowed to determine how long s/he stayed in the room. (*Id.*; test. of Billiu, tr. at 1718.)

(41) When staff directed Student to use the quiet room, Student was required to remain in the room until staff determined that s/he had calmed down. The time that Student was required to remain in the quiet room to calm down varied from 15 minutes to "a couple hours." Student was not allowed to come out of the room until Student could show that Student "was * * * 'safe' meaning [Student was] not going to try to attack or something, or cuss and scream or hit the walls or anything like that." (Test. of Billiu, tr. at 1718-1719.)

(42) On November 3, 2014, Ms. Billiu prepared progress reports for Student on his/her annual goals from the Amended May 30, 2014 IEP. Ms. Billiu found that Student did not meet his/her social/emotional/behavioral goals or goals in the areas of reading, writing, and math-calculation. (Test. of Ms. Billiu, tr. at 79-81; Ex. S236 at 1-5.)

(43) Ms. Billiu did not perform any transition assessments for Student prior to the December 11, 2014 IEP meeting. (Test. of Ms. Billiu, tr. at 74-75.) Ms. Billiu had been unable to prepare a transition assessment before the meeting because she did not know what assessments the District used. (*Id.* at 89.)

(44) Kristoffer Johns, a District speech language pathologist, began working with Student when Student started attending high school. (Test. of Johns, tr. at 574.) Mr. Johns was asked to complete a speech/language evaluation report for Student's evaluation. (*Id.* at 597.) Mr. Johns conducted the evaluation in October and November of 2014 and prepared a one page report summarizing his findings. The report was based, in part, on a pragmatics checklist that Mr. Johns asked Student's teachers to complete. The checklist has 17 separately listed items involved in interpersonal communications. The checklist requires a score of 0 for an item if a student's communication is "seldom" appropriate, a score of 1 if a student's communication is "sometimes" appropriate, and a score of 2 if a student's communication is "often" appropriate. A score of 34 on the checklist would indicate that a student's communication is often appropriate in each category. The average score for Student on the completed checklists was 11 which Mr. Johns interpreted to mean that Student's "social communication skills" are judged by his/her teachers to be "sometimes" to "seldom" appropriate. (Ex. D6 at 12.)

(45) Mr. Johns' report also included a paragraph describing Student's participation in speech therapy:

In speech therapy, [Student] will discuss [his/her] difficulties with moderate prompting and recently has been willing to help problem solve some potential pitfalls or triggers [s/he] has. We are using a color coded card [s/he] can use when [s/he is angry or unwilling to verbalize to respond to yes/no questions by [his/her] teaching staff.

(Ex. D6 at 12.) The report concluded that “[b]ased on the current evaluation data, [Student] exhibits pragmatic communication difficulties consistent with those found along the Autism Spectrum.” (*Id.*)

(46) Two additional reports were completed following the September 25, 2014 evaluation planning meeting; both entitled “Evaluation Report.” (Test. of Johns, tr. at 314-317; Exs. S325, 326.) One report was signed by Ms. Belson only (Ex. S325 “the Belson report”) and the other was signed by Ms. Billiu, Ms. Belson and Ms. Johns (Ex. S326). (*Id.*) The Belson report contained most of what was in the other report; however it contained additional information including findings regarding the criteria for autism spectrum disorder as applied to Student. (Ex. S325 at 1, S326 at 1.)

(47) Both evaluation reports listed two reasons for the referral: “academic difficulty despite targeted interventions” and “behavioral difficulties.” (Ex. S325 at 1 and S326 at 1.) The Belson report included two additional reasons for the referral for evaluation: “sensory processing problems (difficulty interpreting information from the five senses)” and “social challenges (difficulty getting along with peers and/or adults).” (Ex. S325 at 1.)

(48) The Belson report included the following identified specific concerns about Student:

Historical concerns: Becoming easily frustrated, shutting down and refusing to work, yelling at adults in charge, kicking and/or punching walls, desks, chairs, staff, and throwing objects. [Student] has difficulty monitoring [his/her] responses to internal emotional and external stimuli without specific environmental supports.

(Ex. S325 at 1.) The report noted that Student was being educated primarily in a self-contained classroom, with only one period per day in the general education environment with supports. (*Id.* at 2.)

(49) Ms. Belson's report included the results of the ABAS-2 assessments, from data collected by Ms. Billiu, Mr. Duffy (Student's PE teacher), and Mother. (Ex. D6 at 6-10.) The report notes that all three evaluators scored Student at the “extremely low range” for communication, social and practical skills. (*Id.* at 7.) The report concludes that Student's “adaptive abilities are directly related to [his/her] diagnosis of Autism Spectrum Disorder.” (*Id.*)

(50) On December 3, 2014, the District sent an Eligibility Meeting Notice to Parents to notify them that an IEP team meeting and eligibility review would be held on December 11, 2014. (Ex. D6 at 2). On December 4, 2014, Ms. Billiu emailed Mother requesting if she had any

suggestions for Student's school goals, including the possibility of Student pursuing a certificate of attendance rather than a diploma. Ms. Billiu also suggested that Mother consider shortening Student's school day to allow for more sleep. (Ex. S86.)

(51) The December 11, 2014 IEP meeting was held as scheduled and lasted approximately one hour. Mr. Duffy introduced himself, spoke briefly with Parents and left. Mr. Johns reviewed his report and updated the team on his current work with Student. (Exs. D6 and D7; test. of Father, tr. at 1434-1436.)

(52) The December 11, 2014 IEP team did not review Student's present levels of academic performance, progress or state and district testing results in the eligibility review. (Test. of Johns, tr. at 618-619.) The team reviewed Student's background medical and developmental history and was aware that Student had been identified as having a possible anxiety disorder in 2008. The team was also aware that Student had attended the Riverside Center, a highly contained facility for children with pretty extreme behaviors, several years earlier. (*Id.* at 620-621.)

(53) The IEP team determined Student remained eligible for special education services under autism spectrum disorder. All members of the eligibility team, including Parents, indicated that they agreed with the eligibility determination. (Ex. D6 at 13-14.) The last page of the disability determination form includes a section labeled "Consideration for primary Emotional Disturbance." (*Id.* at 16, emphasis in original.) Underneath that label, a box is checked next to a statement that says "The determination is not primarily due to an Emotional Disturbance (if the child otherwise meets criteria, Emotional Disturbance may be a secondary disability.)" (*Id.*)

(54) The team also prepared Student's December 11, 2014 IEP. On a page labeled "Special Factors to IEP Development," the IEP team marked the "yes" box in answer to the question "Does the student exhibit behavior that impedes his/her learning or the learning of others." (Ex. D7 at 6.) In an adjacent box (labeled "Explanation") the IEP states "See Goal and PLAAF."⁹ (*Id.*)

(55) Under "Strengths of Student," the IEP included a statement that Student did not like loud noises and became frustrated when other students were loud in the classroom. For that reason, the IEP stated that Student had "a room that [s/he] will go into that is big and roomy * * * that helps to block out noise from other students." (Ex. D7 at 3.) The IEP also stated that Student had "on days" and "off days" for academics (*Id.*) In particular, the IEP noted that "[l]anguage arts-spelling, writing and reading" were triggers for Student and that Student became frustrated having to work in those areas. (*Id.*) The IEP notes that Student refused to write in a required journal even when staff offered to help. However, the IEP noted that Student did well in math on most days. (*Id.*) In addition, the IEP states:

Concerns: [Student] can become overwhelmed and frustrated in the classroom. [S/he] can refuse to work, that in some cases leaves the situations intense enough to throw chairs, hit staff as well [as] being physically aggressive towards [him/her

⁹ As above, PLAAF refers to the IEP's Present Levels of Academic Achievement and Functional Performance.

self]. [S/he] has frustrations with peer and often blames them for [his/her] behaviors when [s/he] is often the aggressor. [Student] also lays many of [his/her] behaviors on [his/her sibling]. Many of [his/her] behaviors come from a desire to avoid work.

(*Id.* at 3.)

(56) The IEP also includes a summary of the results of speech evaluations, concluding “Based on the current evaluation data, [Student] exhibits pragmatic communication difficulties consistent with those found along the Autism Spectrum.” (*Id.* at 4.) The IEP notes that Student was “found to be clinically significant in the behavior regulation index and the metacognition index” during testing in November of 2008. (*Id.*)

(57) The December 11, 2014 IEP states that Student has “delays in math, reading and writing” and “needs specialized instruction in order to make gains toward grade level goals and benchmarks. [S/he] would have difficulty accessing the core language arts and math curriculum without supports.” (*Id.* at 4.) The December 11, 2014 IEP states that Student needs a word processor for writing assignments and access to books on tape as AT devices and services. (*Id.* at 6)

(58) The December 11, 2014 IEP lists annual measurable goals in three categories; Social/Emotional/Behavioral, Speech, and Math-Calculation. (*Id.* at 7-8.) The IEP lists a measurable annual goal for Social/Emotional/Behavioral as “[Student] will use coping skills to appropriately manage frustrations, stay in the classroom, and participate in classwork 95% of the time as measured by observation from teachers and IA’s.” (*Id.* at 8) The December 11, 2014 does not include a description of Student’s present level in this category. (Ex. D7 at 8.) The goal does not include a description of what “coping skills” meant, or how Student’s progress would be measured. (*Id.* at; Test. of Johns, tr. at 626-627.) Ms. Billiu did not believe that a present level of performance for Student in this category was necessary because “everybody knew what [his/her] present level was.... [s/he] knew what [his/her] coping skills were.” (Test. of Billiu, tr. at 84-86.)

(59) The December 11, 2014 IEP goal for Speech stated “During structured sessions, [Student] will use strategies and vocabulary to help adapt to a variety of social situations throughout [his/her] daily routine.” (Ex. D7 at 8.) The goal did not include a description of how Student’s progress would be measured. The present level in the Speech category stated “[Student] is making progress; we are utilizing strategies at this time to supplement [his/her] need for verbalizing when verbal responding increases [his/her] emotional liability.” (*Id.*)

(60) The December 11, 2014 IEP goal for Math-Calculation stated “[Student] will work in Number Worlds and gain mathematical knowledge to move up to proper grade level by showing comprehension of the work with a score of 80% or higher by measurement of formal assessments given by the teacher.” (*Id.* at 9.) The December 11, 2014 IEP does not include a description of Student’s present level in this category. (*Id.*)

(61) The December 11, 2014 IEP included a provision for SDI for math for 50 minutes per day in a special education classroom. (Ex. D7 at 10.) The IEP does not include any goals or

supports for reading, writing, or language arts. Nor does the IEP contain any SDI or related services for Student's behavior or social goals. (Ex. D7.)

(62) The December 11, 2014 IEP indicated that Student would be provided bus transportation every day and would also receive 90 minutes of communication skills instruction each month as related services. (Ex. D7 at 10.) The IEP also indicated that Student would be provided a "Quiet/Safe place to self-compose or decompress when [Student] feels overwhelmed." (*Id.*) In addition, the IEP stated that Student would "only have periods 2-7th during the school day." (*Id.*) The IEP does not explain why Student would not attend first period. (*Id.*) However, notes from the IEP team meeting state "It was stated that it might be better to shorten [his/her] day. When [s/he] has missed first period, it seems to help [him/her.]" (*Id.* at 17.)

(63) Under a section labeled "Statement of Nonparticipation Justification" the December 11, 2014 IEP indicated that Student would be removed from the regular classroom five periods per day. The IEP explained the reason for such removal as "[Student] needs small group instruction in order to make gains toward grade level goals and as a safe place to decompress, as well as a place where [s/he] does not feel threatened by the amount of students within a classroom." (Ex. D7 at 12.)

(64) The December 11, 2014 IEP states that Student's placement would include less than 40 percent of the day in a regular class. The IEP indicates that the team considered a placement of between 40 and 79 percent of the day in a regular class, but rejected that option because it would not meet Student's needs. (Ex. D7 at 15.)

(65) The December 11, 2014 IEP includes a page with information related to transition planning.¹⁰ The page list Student's "Preferences, needs and interests" as "[Student] loves [his/her] DS, food and swimming." (Ex. D7 at 5) The section labeled "Results of age-appropriate transition assessments" is blank. (*Id.*) The IEP lists the following under a section labeled "Measurable Post-Secondary Goals:"

Training

Using a computer [Student] will learn how to navigate through maps through Google Earth.

Education:

Continue [his/her] education through HS until the age of 21.

Employment:

[Student] will look into volunteering at a pet shelter.

Independent Living Skill:

Due to [Student's] disabilities, independent living skills are not appropriate. Will reevaluate this in the next IEP.

(*Id.*) In a section labeled "Transition Services (including projected course of study) to assist in meeting post-secondary goals" the IEP states "Other: [Student] will work on controlling [his/her] behaviors." (*Id.*) There are no other courses, activities, or services listed. (*Id.*)

¹⁰ Student would turn 16 in October 2015, the calendar year in which this IEP would be in effect.

(66) Mother signed a Certificate of Attendance Agreement on December 29, 2014. Student signed the same agreement on January 9, 2015. The Agreement states, in part, that the IEP team understands:

A Certificate of Attendance does not meet traditional diploma requirements and [Student] will not be eligible for a traditional diploma under this plan.

* * * * *

That a Certificate of Attendance

- a. will not be regarded as meeting entrance requirements for the military.
- b. will not be accepted for entrance requirements in a four-year university.
- c. will not be accepted at a community college.

(Ex. D7 at 25.) Student's December 11, 2014 IEP states "It was discussed that [Student] would not graduate with a standard or modified diploma, but with a certificate of attendance, which is signed by mom and is placed at the end for the IEP." (Ex. S220 at 3.)

(67) On February 17, 2015, Mother emailed Ms. Billiu asking for Student's IQ. Ms. Billiu sent an email to Ms. Belson asking if she could administer an IQ test for Student. On February 25, 2015, Ms. Belson emailed Mother to inform her that she did not have a cognitive assessment for Student, but could conduct one if Mother signed a consent for evaluation. (Ex. S99.) On March 5, 2015, Mother signed a consent for Student to receive a cognitive assessment. (Ex. S42.)

(68) Assistant principal Brett Steinacher first met Student on September 16, 2015 after Student walked out of class. Student's emotions were escalated and Mr. Steinacher was attempting to calm Student down. Student and Mr. Steinacher first spent about an hour talking in Mr. Steinacher's office. Mr. Steinacher then took Student for a walk to try to get Student to de-escalate further. However, s/he became more agitated as they walked in an adjoining building. Mr. Steinacher then took Student back to his office. Student was initially very upset with Ms. Billiu, but later focused his/her anger on Mr. Steinacher when they returned to the office. (Test. of Steinacher, tr. at 1193-1196) Student told Mr. Steinacher that Student was going to "fucking kill him." (*Id.* at 1195.) Student hit Mr. Steinacher in the shoulder, and then started choking him. (*Id.*) Security staff was able to separate Student from Mr. Steinacher, but Student kept attempting to reengage. Eventually Student sat on a bench and started punching him/herself in the face, hitting his/her head against the bench and saying that s/he was a "monster." (*Id.* at 1196.) The school notified Parents who came to the school and took Student home. (*Id.* at 1196-97; Ex. S17.)

(69) Later on September 16, 2015, Mr. Steinacher, Ms. Billiu and Mr. Burton discussed the need to conduct a Functional Behavioral Assessment (FBA) and to create a new BSP for Student. (Test. of Steinacher, tr. at 1197, 1200.) Soon after, District staff met with Parents to discuss the planned FBA and BSP. (*Id.* at 1200.)

(70) The IEP team met on September 21, 2015 to amend Student's December 11, 2014

IEP. Student and Mother both attended. Ms. Billiu, Ms. Belson, Mr. Burton, and Mr. Steinacher attended for the District. The IEP team met to discuss any needed changes to Student's IEP in light of the September 16, 2015 incident. In addition, the IEP team discussed a safety plan that was expected to be finalized on October 16, 2015. (Ex. D8 at 5.)

(71) The September 21, 2015 Amended IEP notes the following:

9-21-15: Concerns about how much and fast that [Student's] behaviors are escalating. [S/he] is not wanting to take responsibility for them, stating things such as I hate this or that. [Student] has not been sleeping well at time[s], and has also been refusing to eat properly. [S/he] has been falling asleep during 5th period and not wanting to wake up until seventh, even with several prompts about not sleeping and time to work * * *. [S/he] has become extremely angry about it, even as far as throwing a chair at staff.

(Ex. D8 at 6.) Notes from the meeting indicate that Student stated that s/he was not sleeping well and that s/he had a cat in his/her room that would crawl on him/her while s/he was trying to sleep. The notes also state that Student was "not eating as much" and was "refusing to eat." (Ex. S187 at 4.) In addition, the notes list a goal of "[n]ot falling asleep – waking up hungry." (*Id.* at 5.) The notes indicate that Student stated that s/he would "try going to bed @ 9 pm" and that s/he would wake up earlier to eat breakfast at home. (*Id.*)

(72) The September 21, 2015 IEP included five pages of notes from Parents, including their concerns, tips and strategies for working with Student, Student's strengths, and proposed goals. (*Id.* at 7-11.) Parents were concerned, among other things, with what they perceived to be an escalation in Student's aggression and a regression in academics. The Parents were also concerned that school staff were communicating with Student in a way that s/he perceived as demeaning. (*Id.* at 7.)

(73) Parents' notes indicate that they asked for additional speech and language services for social pragmatic skills. The notes state that Student was not using those skills in real life situations. The notes also state that Parents wanted Student to receive "social situations training" and suggested that the District develop interventions and strategies for behaviors that were annoying, but not intentional. (*Id.* at 11.)

(74) The September 21, 2015 IEP did not include any additional goals, SDI, or services. (Ex. D6 at 11-13.) The IEP noted Mother's concerns, including a statement that Mother believed that Student's behavior would improve over the next month as s/he worked on a goal of sleeping more. The District members of the team recommended that Mother take items out of Student's room to see if that would help Student sleep. (*Id.* at 5.)

(75) October 15, 2015, Ms. Billiu observed Student start to fall asleep in class. Ms. Billiu told him/her that it was not appropriate to sleep in class and offered him/her the opportunity to take a break, go for a walk, or get some fresh air. Student responded that s/he was reading and had just closed his/her eyes briefly and declined to take a break. Ms. Billiu observed student falling asleep later in class, and again reminded Student to stay awake. Student was upset by the comment and ripped up a paper s/he was working on. Ms. Billiu told Student s/he could finish the work later and asked him/her to go to his/her quiet room, but Student did not do

so. A short time later, Ms. Billiu observed Student falling asleep again. Ms. Billiu told Student that it was no longer a choice and that s/he needed to go to his/her quiet room. Student was upset by this comment, stood up, grabbed a chair and swung it toward Ms. Billiu, striking her in the nose. Ms. Billiu was later taken to the hospital and diagnosed with a fractured nose. (Ex. S18 at 2.)

(76) The District subsequently held a manifestation determination meeting with regard to the October 15, 2015 incident. Parents attended the meeting along with their attorney, Mary Broadhurst. As a result of the meeting, the IEP team determined that the conduct was caused by or had a direct and substantial relationship to Student's disability. The review team determined that Student's conduct on October 15, 2015 involved a weapon or dangerous instrument and that it resulted in serious bodily injury. However, Parents were not sure that the chair Student used to hit Ms. Billiu was a weapon under the IDEA. The manifestation review document prepared at the meeting indicated that Parents and the District agreed that a change of placement was appropriate, however the Parents disagreed that the District had a behavioral intervention plan. The District also determined that Student would be placed in an interim alternative placement. Parents disagreed with that decision. The District and the Parents agreed, however, that it was necessary to conduct a functional behavioral assessment and to review Student's behavior plan. (Ex. D9.)

(77) At the time of the manifestation determination meeting, Student was enrolled in Adaptive PE, Math-Number Worlds, Keyboarding, and three periods in the Success room where s/he was working on modified history and health. (Ex. D9 at 7.)

(78) On October 23, 2015 the District provided a Prior Written Notice (PWN) to Parents to inform them that Student would be placed temporarily at an alternative educational site known as ACES while the District conducted a formal Threat/Risk assessment (TRAC). The PWN stated that Student would have access to the same curriculum, but with a lower ratio of students to teachers. In addition, the PWN explained that the District made the decision based on Student's recurrent incidents of physical aggression, including the October 15, 2015 incident. The PWN stated that Student would attend ACES for 10 hours per week until the TRAC assessment was completed. The PWN also noted that the team considered, but rejected, the option of returning Student to his/her original placement (with some changes) or having Student receive home instruction pending completion of the TRAC assessment. Ultimately, however, the team concluded that Student would benefit from continuing to attend a school-based site. (Ex. D9 at 12.)

(79) The PWN also noted that Student had often been sleeping in class and sometimes acted with violence and aggression when staff attempted to wake him/her, or to insist that s/he complete class work. The PWN noted that the IEP team had discussed Student's sleeping difficulties and had suggested changes in his/her home routine to improve his/her sleep and nutrition. (*Id.*)

(80) Student attended ACES from November 2, 2015 through December 4, 2015. (Ex. S153 at 1.) While attending ACES, Student used Odysseyware to work on the subject of health and American history. (Ex. S330 at 2-4.) Although s/he was also assigned math while at ACES,

s/he had not begun work on it as of November 25, 2015. (Exs. S125 at 1 and S330 at 2-4.)¹¹

(81) Mr. Burton, Mr. Steinacher, and Ms. Billiu prepared a document labeled Behavior Management Plan, Functional Behavior Assessment and Positive Behavior Intervention (FBA) on October 13, 2015. The FBA was revised on October 25, 2015. (Ex. D14.) The FBA noted that Student engaged in problematic behaviors (including attempts to distract, physical posturing, and insults toward staff) as a means to draw attention away from what was being asked of him, to attempt to control his/her environment, and to avoid work to allow him/her to be sent home or to his/her comfort zone. (*Id.* at 1.)

(82) The FBA noted that Student's problematic behaviors are often triggered when staff insisted on Student meeting expectations and complete work that Student believed was difficult. The FBA noted:

[Student] perseverates on what [s/he] wants to do and will become inflexible and aggressive with little predictability. Sensing support or required compliance [s/he] will re-escalate to try and intimidate or create fear (posturing or language). [Student] will hyperfocus on negative reactions and have difficulty calming [his/herself]. [S/he] will often be seen exhibiting emotions too intense or out of proportion to antecedents.

(*Id.* at 2.)

(83) The FBA also included a Positive Behavior Assessment (PBI). The PBI included strategies to address Student's behavior under the categories of attention, control, and avoidance. The strategies including pre-teaching the rules of the classroom at the start of the day, rewarding Student for positive behavior, redirecting Student when s/he attempts to distract from his/her responsibilities and to begin each day with a goal to address areas in which Student needed the most help. (*Id.* at 3.)

(84) The FBA also included the following annual goal:

[Student] will successfully attend a structured classroom setting and address [his/her] social, emotional, and behavioral needs while working on academics. [S/he] will refrain from verbal and physical threats and not physically attack staff supporting [Student.]

(*Id.* at 5.)

(85) The District asked school psychologists Kelly Kirk and Karen O'Brien to complete the TRAC assessment for Student as a result of the October 15, 2015 incident. (Test. of Kirk, tr. at 869-870.) Ms. Kirk and Ms. O'Brien reviewed Student's school records and produced a Threat Assessment Summary on November 16, 2015. (Test. of Kirk, tr. at 839-841, 843; Ex. S20.)

¹¹ Student continued to attend ACES for approximately seven additional school days after November 25, 2015. The record contains no evidence of what, if any, academic subjects Student worked on during that time period.

(86) As part of the threat assessment, Ms. Kirk interviewed Parents and Ms. O'Brien interviewed Student. Ms. Kirk reviewed Student's March 13, 2012 FBA prepared when Student was in the sixth grade and also reviewed the October 25, 2015 BSP. (Test. of Kirk, tr. at 875-876, 908-909; Exs. S31, S32.)

(87) During their interview, Parents told Ms. Kirk that Student had difficulty sleeping, often going to bed late making it difficult to wake Student in the mornings. Ms. Kirk knew that "[s]leep disruption and sleep disturbance are really common" in students with autism and, for that reason, she believed it was necessary to make "some adjustment for [Student] in the educational setting." (Test. of Kirk, tr. at 843.) In addition, Ms. Kirk understood that sleep deprivation could interfere with a person's ability to regulate emotions and to function academically and that it could be particularly difficult for adolescents who have difficulty with social interactions. (*Id.* at 844.)

(88) The threat assessment resulted in a two page report dated November 16, 2015. The report included a number of recommendations designed to reduce the level of risk that Student would exhibit aggressive behavior in the future. Those recommendations included:

- Student should be allowed to carry food to each of his/her classrooms;
- Student's schedule should be adjusted to correct for his/her sleep pattern;
- Student should have a sensory diet designed by an occupational therapist;
- Be responsive to requests for reduced noise and allow Student to listen to music;
- Staff should not disrupt Student if s/he falls asleep;
- The school should reconsider Student's math and reading levels and consider including daily living skills in his/her schedule.

(Ex. S20.)

(89) The District completed a seven page Behavior Support Plan (BSP) for Student on December 3, 2015. The BSP included detailed strategies under the categories of Setting Events, Antecedents, Behavior Teaching, and Consequences. (Ex. S34 at 1-2.) The BSP also included a three page action plan detailing staff responsibilities in the areas of prevention, teaching, extinction, reinforcement and safety. (*Id.* at 3-5.)

(90) The BSP included a short term behavioral goal for Student to increase his/her time on task for non-preferred activities from 15 minutes with a 5 minute break to 30 minutes with a 5 minute break on 4 out of 5 days in a week. The BSP stated that the goal was to be met by March 18, 2016. The BSP included a long term behavioral goal for Student to remain non-aggressive for 95 percent of the time during instruction and when receiving feedback and direction and staff. The BSP stated that the goal was to be met by June 10, 2016. (*Id.* at 6.)

(91) The BSP also included a one page Safety Plan that included a description of steps to take if Student became aggressive or harmed him/herself or others. It also included a list of tips to follow to avoid Student becoming emotionally escalated. (*Id.* at 7.)

(92) On January 12, 2016, Mother signed a consent for cognitive assessments, including the Wechsler Intelligence Scale for Children IV, the Woodcock Johnson IV Test of Cognitive

Abilities, and the Universal Nonverbal Intelligence Test. (Ex. S43.) On January 22, 2016, Mother signed a consent for Occupational Therapy Observation. Student's case manager, Angela Hansen, recommended the observation to determine if Student has disabilities in sensory-motor, fine motor, or processing skills. (Ex. S44.)

(93) Mr. Burton spoke with Sharon Osborne, a District occupational therapist, and asked her to conduct an observation of Student. Ms. Osborne later informed Mr. Burton, during a conversation, that she had observed Student but did not see anything of concern. Ms. Osborne did not prepare a formal report detailing her observation or findings. (Test. of Burton, tr. at 175, 469, 515-16.)

(94) The February 25, 2016 IEP contains detailed descriptions of Student's present level of academic performance. The IEP states that since December 7, 2015, Student was attending school for three periods each day, starting with second period. Student's schedule included Adaptive PE, math, and a half period each of Odysseyware and social skills. The IEP states that the team agreed that a plan was needed to increase Student's schedule to six periods a day, but continuing not to have Student attend first period. (Ex. S232 at 3.) The IEP then recites:

The original plan was to have [Student] start 6 periods at the start of 2nd Semester (1/25/16), but when the time came [Student's] family felt that s/he wasn't ready, s/he has difficulties with transitions and routine changes. They also wanted more information and clarification on schedule options. At the 2/25/16 meeting, schedule options were again discussed and a schedule was built to accommodate [Student's] needs. One suggestion from parents was having [Student] come back full days 2 days a week and continue the ½ days the rest of the week until s/he is able to adjust. In the end, the team decided to build [Student] a full-day schedule for all 5 days a week and his/her mother will pick up on days [s/he] feels [s/he] needs to go home early.

(*Id.*) The IEP team ultimately determined to increase Student's schedule to six periods per day and that s/he would be included with general education peers for 220 out of 370 minutes per day. (Ex. S291 at 2.)

(95) The February 25, 2016 IEP also stated that Student was enrolled in Math Foundations B, a specially designed math class consisting of a direct-instruction intervention math program and that s/he had tested at approximately the fourth grade level. (Ex. S232 at 3.) With regard to writing, the IEP stated that Student was not enrolled in a writing class while s/he was attending three periods per day. The IEP also stated that the team "plans to increase [Student's] day on 1/25/16, the start 2nd semester, and reading and writing will be added to [Student's] schedule." (*Id.*) The IEP also stated that Student would be given a placement test to ensure placement into the proper writing intervention program. (*Id.*) The IEP stated that Student had legible hand writing, and basic spelling "enough to be understood" (*Id.*) However, Student's needs included learning to formulate complete sentences, using punctuation, and getting thoughts on paper. (*Id.*)

(96) With regard to reading, the IEP noted that a January 19, 2016 assessment showed a grade level of 5.2 for speed and accuracy and 5.8 for comprehension. (Ex. S232 at 3.) In

addition, the IEP reported that Student had worked and tested at a 4th grade level for English using Odysseyware. (*Id.* at 4.)

(97) The February 25, 2016 IEP also contained a detailed description of Student's present level of developmental and functional performance. (Ex. S232 at 4.) With regard to behavior, the IEP stated:

[Student] has had difficulty applying functional behavioral skills when most needed. [S/he] has delayed development skills in areas of Functional Behavior such as: Flexibility; Adaptability; Frustration Tolerance; Problem Solving. [His/her] underdeveloped and compromised self-regulatory skills result in acting-out behaviors.

(*Id.*) The IEP referred to the October 25, 2016 FBA and the December 3, 2016 BSP. The IEP contained a detailed description of various triggers that could cause behavioral problems, physical indicators that Student was getting upset, and interventions that seemed to be effective. (*Id.*)

(98) The February 25, 2016 IEP included the following description of how Student's disability affected his/her involvement and progress in the general education curriculum:

Due to characteristics associated with having autism, [Student] has difficulty maintaining involvement in general education. [S/he] needs the added sensory support, social skills training, and behavior support outlined in this IEP and attached FBA/BSP documents. [Student] also experiences learning delays in math, reading and writing and [s/he] needs specialized instruction in order to make gains and progress toward grade level goals and benchmarks. [S/he] would have difficulty accessing the general education core curriculum without the supports and accommodations outlined in this IEP.

(*Id.* at 5.)

(99) The February 25, 2016 IEP noted that the team discussed the distinction between a certificate of attendance and a modified diploma. The IEP noted that Parents were provided additional information and elected to change Student from pursuing a certificate of attendance, and instead to have Student pursue a modified diploma. (*Id.*)

(100) Under a section labeled "Results of age-appropriate transition assessments" the February 25, 2016 IEP stated the following:

[Student] was assessed for transition (on 1/12/16) by [his/her] special education teacher, Mrs. Gummo, using the "Student Dream Sheet" transition survey. When asked where [s/he] wanted to continue [his/her] education, [s/he] stated [s/he] did not want to go to college after high school and was not able to answer questions about the types of things [s/he] would like to learn about. [S/he] does not know a specific job [s/he] would like to do, but did state that [s/he] wants to work on computers. When asked if [s/he] can use any tools or equipment, [s/he]

acknowledged that [s/he] can use saws and drills. Currently [s/he] is not employed but does help out with chores and taking care of cats at home. For independent living, [s/he] would like to learn to drive and be able to drive [him/her self]. [S/he] would also like to live in an apartment of [his/her] own as an adult.

(Ex. S232 at 6.) The “Student Dream Sheet” was a form that included 15 questions for students concerning what the student would like to do after graduation. The questions asked for information about where the student would like to live, whether the student wished to continue learning after graduation, what type of job the student would like to have, and what type of transportation the student intended to use. (Ex. S359.)

(101) The February 25, 2016 IEP included the following transition goals to be completed within one year after high school:

- Training: continue training through work experience in the community to further develop transferable work skills;
- Education: continue education by learning at a job site and enrolling in community college;
- Employment: Student will be employed in paid entry-level position in community;
- Independent Living Skills: Student will be able to independently get to and from a job site or a post-secondary school site.

(*Id.*)

(102) The February 25, 2016 IEP listed transition services for the 2015-2016 school year and for the following two school years. In each school year, the services included a behavior support plan and social skills training. The IEP also listed courses each year to assist in meeting post-secondary goals. For 2015-2016, the courses were English 9 Block, Math Foundations, Odysseyware, and PE/Health. For the 2016-2017 school year, the courses were Math Foundations, Odysseyware, Reading Support or English, Writing Support or English and an elective of Student’s choice. For the 2017-2018 school year, the courses were English or Reading Support, Odysseyware, Pre-Algebra, Science, Work Experience, and an elective of Student’s choice. (Ex. S232 at 6.)

(103) The February 25, 2016 IEP listed annual goals in math-calculation, reading-comprehension, written language, behavioral skills, and speech. (Ex. S232 at 10-13.) The math-calculation goal noted that Student was then working at a fourth grade level, and established a goal that [s/he] demonstrate fifth grade math proficiency by February of 2017. Similarly, for reading-comprehension, the IEP notes that Student was currently at the 5.8 grade level and set a goal of increasing his/her comprehension to the 6.8 grade level by the following February. With regard to the written language goals, the IEP noted that Student was not yet formulating sentences and stories, but set a goal of writing a five-sentence paragraph, and writing a five paragraph story, by February of 2017. (Ex. S232 at 10-12.)

(104) Ms. Kirk consulted with Student’s IEP team in developing Student’s February 2016

IEP. She participated in some but not all of Student's IEP team meetings in January and February 2016. (Test. of Kirk, tr. at 913-918.)

(105) On a page labeled "Special Factors to IEP Development," the IEP team marked "yes" in answer to the question "Does the student exhibit behavior that impedes his/her learning or the learning of others." (Ex. S232 at 7.) In an adjacent box (labeled "Explanation") the IEP states "Addressed in goals and present levels of performance; also see attached BSP and FBA." (*Id.*)

(106) Student's February 25, 2016 IEP included two goals under "Behavioral Skills." (Ex. S232 at 12.) The first goal stated:

Given social skills instruction, and verbal and/or nonverbal prompts to use coping tools, [Student] will increase [his/her] time involved with academic classroom tasks to 30 minutes on-task per class for 4 of 5 days a week by date of annual review (2/24/17), as measured by data tracking sheet and teacher/staff observation.

(*Id.*) The second behavioral skills goal stated:

Given social skills and self advocacy instruction, [Student] will self-initiate and communicate verbally and/or non-verbally when [s/he] needs a break by contacting a staff member and using a verbal or nonverbal cue (e.g. thumbs up/thumbs down; "fine" "not fine") that [s/he] is becoming upset or stressed; used 95% of the time when a break is needed; measured by data tracking and teacher observation of how often [s/he] requests a break or needs a prompt to take a break and decreasing incidents of inappropriate language and physical aggression.

(*Id.* at 13.) In addition, each behavioral skills goal included a description of Student's present level, and three "Mastery Criteria or Short Term Objective[s]" with anticipated achievement dates of April 4, 2016, June 10, 2016, and October 30, 2016. (*Id.*)

(107) The February 25, 2016 IEP included SDI in math (50 minutes per day), written language (50 minutes per day), reading (50 minutes per day) and social skills (30 minutes per day.) All of the SDI was to occur in a special education classroom. The IEP also stated that the available data supported the need for Extended School Year Services. Such services included SDI in the same subjects, and in the same number of minutes, as stated previously in the IEP. (Ex. S232 at 14.)

(108) The February 25, 2016 IEP included a statement of nonparticipation justification that stated that Student would be removed from the general education classroom for 150 minutes per day for PE, Math and Social Skills instruction, with 220 minutes per day with Student's general education peers. However, the 150 minutes per day did not include time for 50 minutes per day of written language and 50 minutes per day of reading as required by the IEP. (Ex. S232 at 14 and 16.)

(109) Student's team met to revise the BSP on March 3, 2016. (Ex. S36.) The revised BSP included a list of de-escalation tools and revised goals. The revised BSP also modified, discontinued, or added a number of items to the staff action plan and included a revised safety

plan. (Ex. S37.)

(110) The short term behavioral goal in the revised BSP called for Student to increase his/her time on task for non-preferred activities to 35 minutes with a 5 minute break on 4 out of 5 days in a week.¹² The BSP stated that the goal was to be met by May 3, 2016. The long term goal in the revised BSP called for Student to self-initiate when s/he needed a break if upset or stressed. The revised BSP stated that the goal was to be met by June 10, 2016. (*Id.* at 6.)

(111) An April 1, 2016 IEP Progress Report stated that Student had achieved short term objectives for both behavioral skills goals. With regard to the first goal, the progress report stated that Student was able to stay on task in 15 minute increments 100 percent of the time which met the first short term objective. With regard to the second goal, the progress report stated that Student was able to identify his/her chosen break areas and ways to calm him/herself, and that s/he complied with staff requests 87 percent of the time which exceeded the first short term objective for that goal. (Ex. S238 at 8.)

(112) Student's June 10, 2016 annual goals progress reports showed that s/he met or exceeded short term objectives in math-calculation, reading-comprehension, and behavioral skills. The reports also showed that Student made progress towards his/her goals in written language and speech, but that the goals might not be met. (Ex. S239.) Student's June 14, 2016 report card showed that s/he was passing all of his/her classes, with grades of A in adaptive PE and math foundations B, and C grades in Odysseyware and English 9. (S294 at 1.)

(113) For the 2015-2016 school year, Student received credits in Adaptive PE (1 credit), Math Foundations B (1 credit), English 9 Block (1 credit), Developmental Learning (0.5 credits) and Odysseyware Alternate (0.5 credits.) (Ex. S356.) After the end of the 2015-2016 school year, Student had earned a total of six high school credits in elective courses, one credit each in English, Health/PE, Second Language/Arts CTE, and Math. To complete graduation requirements, Student needed a total of 14 additional credits allocated as follows: an additional six credits in electives, two credits in English, one credit in Health/PE, one credit in Math, two credits in Science, and two credits in Social Studies. (Ex. S357.)

CONCLUSIONS OF LAW

The evidence produced at the hearing established the following with regard to the 2014-2015 and 2015-2016 school years:

1. The District did not fail to evaluate Student with regard to additional IDEA eligibility categories. However, the District did fail to evaluate Student in all areas related to Student's suspected disability in violation of OAR 581-015-2120(4) and 34 CFR § 300.304(b)(4).

¹² The short term goal actually states that Student would increase his/her time on task "from" 35 minutes. This appears to be the result of a typographical error. There is no evidence that Student was meeting that goal as of March 3, 2016, and the goal does not state that Student would increase his time on task to more than 35 minutes.

2. The District failed to place Student in the least restrictive environment by failing to ensure removal only under the requirements in violation of OAR 581-015-2250(1) when the District failed to educate Student in a placement selected by Student's IEP team and as reflected in Student's then-current IEP.
3. The District failed to provide appropriate and adequate transitional services to Student during the 2015-2016 school year, in violation of OAR 581-015-2200(2), 34 CFR §§ 300.320 (b) (1) and (2), and 300.321 (b) (3), by failing to comply with the requirements for transition assessments and appropriate services.
4. The District failed to develop an IEP that was reasonably calculated to enable Student to receive educational benefits during the 2014-2015 school year, and for 2015-2016 school year prior to February 25, 2016 in violation of OAR 581-015-2200 and 34 CFR §300.320
5. The District failed to issue a PWN to Parents when the District removed Student from general education classes under the then-current May 30, 2014 IEP, resulting in a change of placement which was not reflected in Student's IEP until the IEP team met in December 2014 in violation of OAR 581-015-2310 and 34 CFR §300.503.
6. The District failed to develop or implement a behavioral support plan prior to October 2015 when the behavior of Student impeded Student's learning or the learning of others in violation of OAR 581-015-2205 and 34 CFR §300.324. However, the evidence did not establish that the failure led directly to Student's conduct of October 15, 2015, subsequent change in placement, and a denial of FAPE.
7. The evidence did not establish that the District failed to adequately assess Student for assistive technology needs, failed to provide AT based on an adequate assessment needs and failed to provide related SDI related to appropriate AT, in violation of OAR 581-015-2205(2)(b) and 34 CFR §§300.5, 300.6, 300.36, 300.34, 300.38, 300.114 (k) (2) (ii) and 300.324.
8. The evidence did not establish that the District failed to provide Parents with sufficient and timely access to Student's educational records, in violation of 34 CFR §600.613, to allow Parents the ability to make fully informed decisions regarding the education and placement of Student and resulting in a denial of FAPE in violation of 34 CFR §§300.9 (a) and 300.503 (a) (1).
9. The District must provide an occupational therapy assessment, a transition assessment, and compensatory education as more fully set out in this Final Order.

OPINION

It is undisputed that Student was eligible for special education under the IDEA for the 2014-2015 and 2015-2016 school years. Parents have alleged that the District violated its

obligations to Student under the IDEA during that period. The burden of proof in an administrative hearing challenging a violation of the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 US 49, 59 (2005). Parents therefor have the burden of proof in this matter. The standard of proof in an administrative hearing is by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995). Proof by a preponderance of the evidence means that the factfinder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

The primary purpose of the IDEA is to “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services.” 20 U.S.C. § 1400(d)(1)(A), *J.L. v. Mercer Island Sch. Dist.* 592 F. 3d. 938, 947 (ninth Cir. 2010). The free and appropriate education provided to a student under the IDEA must be “tailored to the unique needs of the handicapped child by means of an 'individualized educational program' (IEP). *M.C. v. Antelope Valley Union high school District*, ___ F3d ___ (Ninth Cir. 2017) (slip op. at 5-6) (citing *Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982) (“*Rowley*”) quoting 20 U.S.C. § 1401(18)). The focus of IDEA is to meet the educational needs of the child the disability, enabling the child to be involved in and make progress in the general education curriculum, and to meet each of the child’s other educational needs that result from the child’s disability. 20 USC 1414 (d) (1) (A) (i) (II) (aa) and (bb).

A FAPE in special education includes both “special education” and “related services” which Oregon, as a state that accepts federal funding under IDEA, is obligated to provide. 20 U.S.C. § 1412(a)(1). Districts must provide eligible students with an IEP, as the foundational tool, that meets statutory requirements. If a District provides an IEP that meets those requirements, it will enable the child to be involved in and make progress in the general education curriculum and meet each of the child’s other educational needs that result from the child’s disability.

When a parent challenges a school district’s provision of FAPE, courts are required to follow a two-step analysis:

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

(*Rowley*, 458 U.S. at 206-207.) Furthermore, an IEP must be tailored to provide some level of meaningful educational progress. As the United States Supreme Court has recently recognized:

A child's IEP need not aim for grade-level advancement if that is not a reasonable prospect. But that child's educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

Andrew F. v. Douglas County School Dist., 580 U.S. ___, slip op at 3 (March 22, 2017).

The Ninth Circuit has held that an examination of the adequacy of a district's provision of special education begins by first considering whether District failed to comply with the procedures set forth in the IDEA before reaching the question of an IEP's substance. *R.B. ex rel. F.B. v. Napa Valley Unified School*, 496 F.3d 932, 938 (9th Cir., 2007) (citing *Rowley*, 458 U.S. 176, 205-206). Further, only those "procedural inadequacies that result in the loss of educational opportunity * * * or seriously infringe on the parent[s]' opportunity to participate in the IEP formulation process * * * clearly result in the denial of FAPE." *W.G. v. Bd. of Trustees of Target Range School Dist. No. 23*, 960 F.2d 1479, 1484 (Ninth Cir. 1992) (internal citations omitted). Thus, not every violation of the IDEA's procedural requirements will necessarily constitute a substantive denial of FAPE.

Parents have alleged a number of procedural and substantive violations by District resulted for the 2014-2015 and 2015-2016 school years. Each of the alleged violations is addressed separately below.

1. Failure to Evaluate in All Areas of Suspected Disability

The IDEA requires school districts to evaluate students "in all areas of suspected disability." 20 USC § 1414(b)(3)(B). Student was first identified as eligible for special education services in 2009 when Student attended school in another district. At that time, s/he was determined to be eligible solely under the category of autism spectrum disorder (ASD). That eligibility determination, in the sole category of ASD, remained unchanged from 2009 through the date of the hearing. All District personnel who testified at the hearing and who were familiar with Student's performance at school agreed that Student was appropriately identified as a student with ASD.

Parents, however, assert that the District should have evaluated Student for suspected disability under additional categories, particularly under the category of emotional disturbance. In support of this contention, Parents noted that Student often exhibited problem behaviors including aggression, assault, and withdrawal.

While these behaviors were undoubtedly concerning, and could have been better addressed by the District, the Parents did not provide sufficient evidence to demonstrate that the District was required to evaluate Student under another *eligibility category*. As the Eighth Circuit noted:

Given the IDEA's strong emphasis on identifying a disabled child's specific needs and addressing them, we believe that the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs. Consequently, while the IDEA intends that IEPs contain accurate disability diagnoses, we will not automatically set aside an IEP for failing to include a specific disability diagnosis or containing an incorrect diagnosis. *See generally* 20 U.S.C. § 1414(d) (stating the general requirements of an IEP). Instead, as with any other purported

procedural defect, the party challenging the IEP must show that the failure to include a proper disability diagnosis “compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of educational benefits.” [*Lathrop R–II Sch. Dist. v. Gray*, 611 F.3d 419], *** at 424 (internal quotation marks omitted).

The District provided testimony from multiple District personnel who were familiar with Student’s academic performance. All of them concluded that Student was appropriately determined to be eligible under the ASD category. None of them expressed any suspicion that Student might be eligible under another category. In addition, Student’s eligibility under the ASD category has been in place since 2009 when Student attended school in another school District. At that time, the former school district specifically found that Student was not eligible under the category of emotional disturbance.

In contrast, Parents presented the report and testimony of Dr. Sherman. Her testimony with regard to whether Student should have been evaluated under the category of emotional disturbance was very limited. When asked, hypothetically, whether she would be concerned about a moderately autistic child with increasing behavioral outbursts, Dr. Sherman replied that she would “recommend to parents that we consider an evaluation for an emotional disturbance just [to] see if we’ve covered all of our bases in understanding what was going on with this child.” (Test. of Sherman, tr. at 1768-69.) When asked if she would be concerned about a moderately autistic child with increasing withdrawal behaviors, she testified that “withdrawal and anxiety pains and concerns about attending school are one of the indices of an emotional disturbance.” (Test. of Sherman, tr. at 1769.) Her report was similarly brief on the issue. Dr. Sherman noted that Student had been placed in a therapeutic treatment facility from 2007 through 2008 and had been diagnosed with an anxiety disorder, Pervasive Developmental Disorder, Not Otherwise Specified, and with ADHD. She also noted that Student’s school records showed that Student had struggled with maintain appropriate behavior, and that Parents believed Student’s behavior was getting worse. Dr. Sherman opined, based on this history, that the District should have sought an evaluation under the category of emotional disturbance. Parents presented no other experts, assessments, or evaluations that would provide a reasonable basis to conclude that Student should have been evaluated under the category of emotional disturbance.

More significantly, however, Parents did not demonstrate that the failure to evaluate student for eligibility under another *category* compromised Student’s ability to receive FAPE.¹³

¹³ It is undisputed that a child identified as eligible under the ASD category may also be eligible under the category of emotional disturbance. OAR 581-015-2000(4)(a) provides, in relevant part:

The term [Autism] does not apply if a child’s educational performance is adversely affected primarily because the child has an emotional disturbance. However, a child who qualifies for special education under the category of autism may also have an emotional disturbance as a secondary disability if the child meets the criteria under emotional disturbance.

Student had significant behavioral challenges which often interfered with his/her ability to access education. However, Parents have not demonstrated that the District erred by failing to evaluate Student under the category of emotional disturbance. Indeed, Dr. Sherman acknowledged the possibility that a failure to identify a student in another category may not result in a change to the services offered to a child who has previously been identified in another category. However, she opined “Whether this is true for this student, in my opinion, the District has a duty to evaluate children in all areas of suspected disability.” (Ex. S169 at 5; emphasis in original.)

Moreover, Districts are not required to find a child eligible under more than one eligibility category, even for a child with multiple disabilities. OAR 581-015-2120(4) provides:

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

Thus, in this case, the District did not err by failing to find that Student was eligible for services under the category of emotional disturbance. Nevertheless, as noted by the rule above, the District did have an obligation to evaluate Student in all areas “related to” Student’s disability or disabilities.¹⁴ In addition, the District was required to craft IEPs that addressed all of Student’s special education needs – regardless of the eligibility category.

The District took the position that Student’s behavioral problems were an outgrowth of his/her ASD. And while they may have been correct in that contention, they failed to take reasonable steps to assess the causes of the problematic behaviors, and little to address the impact they were having on Student’s education. Indeed, despite behavior that caused Student to be removed from math and science classes, “blow outs,” and extensive use of the “quiet room,” the District did not perform an FBA or develop a BSP at any time during Student’s ninth grade year. Student’s IEP for that year contained a behavioral “goal” that merely encouraged Student to employ some sort of unspecified “coping skills” to manage his/her frustrations in order to stay in the classroom and perform classwork 95% of the time. While this may have expressed the District’s sincere hopes, the IEP did not provide any guidance on how this goal was to be achieved. Indeed, the IEP in effect for Student’s ninth grade year included only 15 minutes per week in SDI in social skills, and 90 minutes per month in communication skills. Nothing in the IEP indicates how Student would learn to use “coping skills” to better manage his/her frustration.

The District asserted that Student had a BSP in middle school, including in the eighth grade, and that the BSP would follow Student to high school. However, at the hearing, the District did not produce a copy of the alleged BSP. The District’s witnesses were either uncertain if they had seen the BSP, or were seemingly unaware of its contents. The May 30, 2104 IEP, crafted with Student’s transition to high school in mind, stated that Student’s behavior impeded his/her learning or the learning of others. Despite that acknowledgement, the IEP did

¹⁴ This obligation is also set forth in OAR 581-015-2110(4)(d) which requires Districts, as part of the evaluation and reevaluation process, to ensure that “The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]”

not reference or include a BSP or otherwise address what steps would be taken to minimize the impact of Student's behavior on Student's access to education. Parents produced a copy of behavior plan dated December 9, 2011, that was created when Student was in the sixth grade at another school district (Ex. S-30.) Parents also produced a copy of a functional behavior assessment dated March 13, 2012, also during Student's sixth grade year which includes the recommendation that staff "[f]ollow the positive behavior support plan consistently." (Ex. S31 at 2.)

In short, despite ongoing difficulties with Student's behavior which indisputably interfered with Student's access to education, the District did not conduct an FBA or develop a BSP during Student's ninth grade year. Without such an assessment, and a meaningful plan to address Student's behavior, the District failed to gain information that was critical to the crafting of an IEP that would allow Student to better access his/her education.

Parents also asserted that the District should have evaluated Student for a possible sleep disorder, post-traumatic stress disorder, anxiety, and a suspected intellectual disability. The District was aware that Student had difficulty staying awake in class. Early in Student's ninth grade year (2014-2015), Student's teacher observed that Student was having difficulty staying awake. On December 4, 2014, in planning for Student's upcoming IEP meeting, Ms. Billiu suggested that Student's school day be shortened to allow him/her to get more sleep. Concerns about Student's sleep habits extended to the following year. During Student's September 21, 2015 IEP meeting, the team discussed Student's lack of sleep, his/her propensity to fall asleep in class, and the possibility that Student's sleep at home was being interrupted by a cat in his/her bedroom.

Ms. Kirk, a school psychologist, knew that Student was having difficulty sleeping, knew that it was interfering with his/her education, and knew that "[s]leep disruption and sleep disturbance are really common of students with autism." (Test. of Kirk, tr. at 843.) The District did not order any evaluations or assessments to determine the nature or cause of the sleep disturbance, or take any actions (other than to shorten Student's school day) to accommodate Student's lack of sleep and resultant fatigue. In addition, Ms. Kirk testified that Student's sleeping problems likely exacerbated his/her problematic behaviors and further affected his/her ability to access education.

However, Parents did not establish that the District was required to conduct a formal sleep assessment in order to formulate an appropriate IEP. At the January 22, 2018 hearing, Parents submitted a report from Dr. Sherman which included two medical journal articles discussing the link between autism and sleeping difficulties. Based on those two articles, Dr. Sherman suggested that sleep disorders could be assessed through questionnaires, a sleep study, or "actigraphy" by wearing a device that measures movement. However, Dr. Sherman did not explain how these techniques would have provided information to the District that would have allowed it to better serve Student's needs. As noted by the District, it is not clear how the use of a questionnaire would be likely to yield better information than the District was able to ascertain previously by speaking with Student and the Parents. Further, neither the journal articles nor Dr. Sherman articulated how a medical sleep study, or actigraphy, would have provided information that would have helped the District better formulate an IEP for Student. In short, Parents did not

present sufficient evidence to demonstrate that there were additional evaluations of Student's sleeping difficulties that the District was required to conduct and that would have been performed that would have been useful to the IEP team.

Student's special education case manager, Angela Hansen, specifically recommended that Student receive an occupational therapy observation in January 2016. Parents agreed and signed a consent form to allow that observation to occur. The District's occupational therapist, Sharon Osborne, observed Student and informally reported to Mr. Burton that she didn't see anything of concern. She did not prepare a report of her observations and apparently never communicated her findings to the Parents. Such informal evaluations are insufficient to fulfill a District's obligations under the IDEA. *Timothy O. v. Paso Robles Unified School Dist.*, 822 F.3d 1105, 1118-19 (9th Cir. 2016.) In this case, the District failed to ensure that the occupational therapy evaluation was completed and therefore failed to evaluate Student in an area related to Student's disability.

Parents also contended that the District failed to evaluate Student for post-traumatic stress disorder (PTSD.) The possibility of PTSD was raised by Parents at a December 2015 IEP meeting. Mother testified that she had suggested that Student was possibly experiencing PTSD caused by his/her experience with "teachers that were very persistent on having things done in a certain way which caused (Student) a lot of stress." (Test. of Mother, tr. at 1467.) However, Mr. Burton testified that the issue was not discussed in detail and that Parents' former attorney (who was present at the IEP team meeting) indicated that they were not there to discuss PTSD. Although the issue was briefly discussed, neither the Parents nor their attorney pressed the issue or requested further evaluations. (Test. of Burton, tr. at 518-521 and 1977-78.) Parents presented no other evidence to suggest that the District was on notice that Student may have been experiencing PTSD, or to suggest that the District was under an obligation to evaluate Student for that condition. Parents have therefore not established that the District erred by not evaluating Student for PTSD.

Parents also contended that the District failed to evaluate Student for a possible anxiety disorder. While it is true that Student was diagnosed with a possible anxiety disorder in 2009, Parents did not establish that Student's behaviors necessarily required additional assessments for anxiety. Notably, Parents' expert, Dr. Sherman, did not specifically address the need for additional assessment in this area. Parents provided no other expert testimony or evidence to demonstrate that the District erred by failing to evaluate Student for an anxiety disorder.

Nevertheless, Parents have established that the District failed to conduct appropriate assessment in all areas related to Student's disability, including Student's behavior and failed to conduct an appropriate occupational therapy evaluation that had been recommended by Student's case manager. Without such assessments, the District lacked critical information that was necessary to craft an IEP that would be reasonably calculated to provide educational benefit to Student.

2. Failure to Place Student in the Least Restrictive Environment

Parents contend that the District failed to place Student in the least restrictive environment. The requirement that students be educated in the least restrictive environment appropriate is set forth in OAR 581-015-2240 which provides as follows:

School districts must ensure that:

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

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

See also 34 CFR §300.114. In addition, placement standards are set out in OAR 581-015-2250 which provides, in part:

School districts must ensure that:

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

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

(b) Is made in conformity with the Least Restrictive Environment (LRE) provisions of OAR 581-015-2240 to 581-015-2255.

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

(d) Is determined at least once every 365 days; * * *

* * * * *

See also 34 CFR §300.116.

The evidence demonstrated that the District repeatedly failed to adhere to the placement decisions reflected in Student's IEP. Student's May 30, 2014 IEP, which was in effect when s/he enrolled in high school, stated that Student would be enrolled in special education classes for three periods per day. Nevertheless, when Student began high school, s/he was enrolled in special education classes for five out of seven periods. Student's sole general education classes were science and "Freshman House." However, Student was removed from his/her science class (and a special education math class) in October based on "insubordination." Thereafter, Student's only general education class was Freshman House.

The changes to Student's schedule in October 2014 were made without Parents' input, without the input of the IEP team, and without any change to the IEP. Student's December 11, 2014 IEP seemingly ratified these changes by removing Student from first period altogether and finding that Student would be removed from general education for five out of the six remaining periods of the day. However, the IEP did not explain why Student was being removed from first period nor did it explain why his/her time in a general education setting was being so drastically curtailed. The justification for the removal from the general education setting was not significantly different than what was contained in the May 30, 2014 IEP, which stated that "[Student] needs small group instruction in order to make gains toward grade level goals and as a safe place to decompress." (Ex. S222 at 10.) The December 11, 2014 IEP used that same language, but added that Student needed "a place where [s/he] does not feel threatened by the amount of students within a classroom." (Ex. D7 at 12.) The justification says nothing about why Student's schedule was being reduced by one full class period.

Student's actual placement from September 2, 2014 through December 11, 2014 was not consistent with the May 30, 2014 IEP that was then in effect. Student started out the year with five out of seven periods where s/he was removed from the general education environment. By October 2014, his/her removal was increased to six out of seven periods. However, Student's IEP explicitly called for him/her to be removed for a total of only three periods per day. By failing to ensure that Student's schedule was consistent with his/her then-current IEP, the District changed Student's placement and failed to comply with OAR 581-015-2250(1)(c)¹⁵.

In addition, for much of Student's school day during the period at issue, s/he was not in a classroom at all. Rather, s/he spent significant amounts of time in a "quiet room," where no instruction occurred. Sometimes this was the result of Student's personal decision. At other times, Student's teacher would require him/her to go to the quiet room. But in any event, it was not a place where instruction was occurring and it did not include other students (disabled or otherwise). To the extent that Student's use of the quiet room was needed due to Student's behavior, such use demonstrated that the District was not taking adequate steps to ensure that Student's behavior did not interfere with his/her access to education.

Parents also asserted that the District violated its obligations to Student by eliminating his/her first period class altogether, thus resulting in a shortened school day. While this unquestionably reduced the amount of instructional time available to Student, the Parents have not established that a shortened school day violated Student's right to receive instruction in the least restrictive environment. Indeed, because Student was not attending first period, s/he was not restricted by the District in any true sense of the word.

Parents also alleged that requiring Student to attend one class per day for where s/he used the Odysseyware program for academics amounted to a violation of the District's obligations to ensure that Student was educated in the least restrictive environment. While it is true that

¹⁵ Parents alleged that the District placed Student in a special class, or classes, without consideration of placement in regular classes with the use of supplementary aids and services. In fact, the evidence showed just the opposite – in the May 30, 2014 IEP the District actually did place the Student in regular education classes for the majority of Student's school day. However, in practice, the District did not follow this placement.

Student used the Odysseyware program while s/he was in the Success classroom, Parents have not established how the use of that program violated the District's legal obligations to ensure that Student was educated, to the maximum extent appropriate, with his/her general education peers. Odysseyware is an electronic instructional tool that the District uses for both general and special education students. Although it can be used in conjunction with a program of SDI, the program itself does not constitute SDI. The use of any specific instructional tool, electronic or otherwise, does not amount to a "placement." Nor does the use of such an instructional tool constitute (by itself) a removal from the general education environment. Thus, Parents have not established that the use of Odysseyware violated the District's obligation to ensure that Student was educated with his/her general education peers to the maximum extent appropriate.

3. Failure to Provide Appropriate Transitional Assessments and Transitional Services to Student during the 2015-2016 School Year

Parents asserted that the District failed to provide Student, who turned 16 in the fall of 2015, appropriate transitional assessments and services during the 2015-2016 school year. The evidence supports that allegation.

OAR 581-015-2200(2) provides, in relevant part:

For the purposes of transition, the IEP must include:

(a) Beginning not later than the first IEP to be in effect when the child turns 16, or younger, if determined appropriate by the IEP team, and updated annually thereafter:

(A) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills; and

(B) The transition services (including courses of study) needed to assist the child in reaching those goals.

See also 34 CFR §§ 300.320 (b) As noted by Judge Acosta in *Forest Grove School Dist. V. Student*, 63 IDELR 163, the IDEA imposes three distinct obligations on school districts with regard to transition:

First, a school district must conduct "age appropriate transition assessments related to training, education, employment, and ... independent living skills." Second, the district must draft a transition plan, including "appropriate measurable postsecondary goals" Third, a school district must actually provide transition services reasonably calculated to aid student in achieving those goals.

The IEP in effect when Student turned 16 was drafted on December 11, 2014. With regard to Student's preferences, needs and interests, the IEP stated only that Student loves his/her DS (a portable video game device), food, and swimming. The section for the results of age-appropriate transition assessments is blank. For post-secondary goals, the IEP states that Student

will learn how to navigate through Google Earth, will continue his/her high school education through age 21, and would “look into” volunteering at a pet shelter. The IEP also stated that independent living skills were not appropriate in light of Student’s disabilities. The only service listed to meet these rather rudimentary “goals” was a statement that Student would work on controlling his/her behaviors. However, while nominally listed as a service, that statement actually only described what the District believed Student should “work on.” Nothing in the IEP stated what services the District intended to provide to allow Student to meet his/her goal of using Google Earth or of volunteering to work in a pet shelter.

The December 14, 2014 IEP did not meet the requirements of OAR 581-015-2200(2). It did not contain measurable post-secondary goals of any significance. There were *no* assessments (age appropriate or otherwise) conducted to support the rudimentary goals of learning to use Google Earth and looking into a volunteer opportunity. As noted in *Forest Grove School Dist. V. Student*, the absence of a formalized assessment alone is enough to constitute a violation of the District’s obligations under the IDEA. The education goal was merely to stay in high school through age 21. More significantly, however, the December 14, 2014 IEP contained no services that would be provided to allow Student to meet such goals. Under these circumstances, the Parents have established that the District failed to meet its obligations under OAR 581-015-2200(2) with regard to the December 14, 2016 IEP.

The February 25, 2016 IEP was somewhat more detailed with regard to transition. It noted that Student’s special education teacher, Ms. Gummo, assessed Student for transition on January 12, 2016 using a “Student Dream Sheet.” The dream sheet consisted of 15 fairly short questions that asked Student about his/her goals for life after high school. Student told Ms. Gummo that s/he did not want to go to college and was unsure what specific kind of job s/he would like after high school, but that s/he would like to work on computers. Student told her that s/he could use saws and drills and helped out with chores at home, including taking care of cats. For independent living, Student stated that s/he would like to learn to drive and would like to live alone in an apartment as an adult.

However, it does not appear that the transition goals were reflective of the information gathered with the Dream Sheet. The IEP stated that Student would continue training through work experience – although the type of work was not specified. For education, the IEP included a goal of learning at a job site and enrolling in community college. However, Student had specifically informed Ms. Gummo that s/he did *not* want to attend college. For employment, the IEP included a goal that Student would be employed in an entry-level job. The only independent living skill that was included was a goal to be able to travel independently to a job site. Taken together, the transition goals required Student, within one year after high school, to (1) secure entry level employment; (2) and be able to travel independently to a job site; and (3) enroll in community college.

The transition services listed in the February 25, 2016 (with one exception) do not appear to be directly related to the stated goals. The services included a behavior support plan and social skills training, core academic courses, PE/Health, and unspecified electives. These may be important educational goals, but they do not appear to be tied to Student’s transition goals that were primarily focused on securing employment and learning to travel independently. For the 2017-2018 school year, transition services included work experience. Although the IEP is

unclear as to how Student was to secure this experience, it was the sole transition service that appeared to directly relate to the IEP's stated transition goals.

Training in social skills and core academic is unquestionably vital to allow Student to be successful in employment following high school. However, the IEP does not contain any services that could reasonably be expected to allow Student to achieve the goal of traveling independently. Furthermore, the goal of attending community college is directly contrary to information provided as part of the Dream Sheet evaluation. Under these circumstances, the Parents have established that the District also failed to meet its obligations under OAR 581-015-2200(2) with regard to the February 25, 2016 IEP.

Parents also asserted that the District violated its transition obligations by failing to invite to the IEP team meeting a representative of a public agency likely to be responsible for providing or paying for transition services. However, the evidence did not establish that Student would be receiving transition services from a public agency. Therefore, the Parents did not establish that the District erred by failing to include such a representative.

4. Failure to Develop an IEP that was Reasonably Calculated to Enable Student to Receive Educational Benefits

Parents asserted that the District failed to develop IEPs for Student that were reasonably calculated to enable Student to receive educational benefits during the 2014-2015 and 2015-2016 school years. The Parents met the burden of proof on with regard to the IEPs that were in effect from September 2014 through February 24, 2016.

The December 2014 IEP failed to address, in any meaningful way, the behavior and sleep issues that were preventing Student from fully accessing his/her education. Rather than completing additional assessments, or providing additional services, to address Student's behavior and sleeping problems, the December IEP removed goals and services for core academic areas that the IEP expressly found to be areas of need. In addition, rather than making an attempt to address Student's sleep difficulties, the District simply shortened Student's school day to allow him/her to sleep longer in the morning. The District did not attempt to compensate for that lost instructional time, but merely deprived Student of one-seventh of his/her school day.

In addition, despite acknowledged behavioral difficulties, the IEP provided for only 15 minutes *per week* of SDI in social skills. In light of Student's demonstrated behavior problems, it was not realistic for the District to offer social skills instruction for an average of three minutes per school day. The only behavioral "goal" was for Student to use "coping skills" to manage his/her frustrations. However, the IEP is silent as to how Student was to learn such coping skills.

The December 11, 2014 contains no SDI or supports directly related to Student's behavior. Indeed, despite the IEP's acknowledgment of Student's behavioral difficulties, and his/her need for SDI in language arts, the December 11, 2014 IEP limits SDI solely to math. The IEP includes no explanation for the absence of SDI in other areas of identified need. The IEP also stated that Student would only attend periods two through seven during the school day. The IEP does not explain why Student's school day was being shortened and does not offer additional instruction to make up for the lost time.

In summary, the December 11, 2014 IEP details Student's struggles with behavior and the need for SDI in language arts. Despite those recognized needs, the IEP contains only *de minimis* SDI in social skills and no SDI in language arts. The IEP was therefore not "appropriately ambitious in light of [Student's] circumstances, and did not offer Student "the chance to meet challenging objectives." *Endrew F. v. Douglas County School Dist.*, 580 U.S. ___, slip op at 3 (March 2, 2017.) The December 11, 2014 IEP therefore did not meet the District's obligations under the IDEA.

However, the February 25, 2016 IEP represented a significant improvement. Notably, the IEP included detailed discussions of Student's present levels of performance and his/her behavioral challenges. The IEP included social skills goals that were expressly tied to the IEP's SDI. Significantly, the IEP included a tenfold increase the amount of social skills instruction from 15 minutes *per week* to 30 minutes *per day*. In addition, the IEP expressly incorporated Student's FBA and BSP and included a discussion of interventions that had proven effective. Furthermore, the IEP required all staff who worked with Student to receive 60 minutes of annual training on Student's BSP.

The February 25, 2016 IEP also included significantly improved goals and supports for core academic subjects. Unlike the December 11, 2014 IEP, the new IEP included SDI in reading and writing. It also set appropriately ambitious goals in math, reading and writing with the aim of Student progressing by a full grade level in each subject.

In short, the evidence established that the February 25, 2016 IEP was reasonably calculated to provide Student with educational benefit. Therefore, the Parents have not established a violation with regard to that IEP. The Parents did, however, establish that the IEPs in effect from September 2014 through February 24, 2016 were not consistent with the District's obligations under the IDEA.

5. Failure to Provide Prior Written Notice when Student was Removed from General Education Classes

As noted earlier, the May 30, 2014 IEP, in effect when Student began his/her ninth grade year, stated that Student would be removed from the general education environment for three periods per day. With no prior written notice, the District initially enrolled Student in five periods of special education classes per day, and, in October 2014, increased that to six out of seven periods in special education classes. This was a change in placement. The District did not provide prior written notice to the parents before making this change.

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

(2) Prior written notice must be given to the parent of a child, and to the adult student after rights have transferred, within a reasonable period of time before a school district.

(a) Proposes to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child;

* * * * *

(3) The content of the prior written notice must include:

(a) A description of the action proposed or refused by the school district;

(b) An explanation of why the district proposes or refuses to take the action;

(c) A description of each evaluation procedure, assessment, test, record, or report the school district used as a basis for the proposed or refused action;

(d) A statement that the parents of a child with a disability have protection under the procedural safeguards and, if this notice is not an initial referral for evaluation, the means by which a copy of the Notice of Procedural Safeguards may be obtained;

(e) Sources for parents to contact to obtain assistance in understanding their procedural safeguards.

(f) A description of other options that the IEP Team considered and the reasons why those options were rejected; and

(g) A description of other factors that are relevant to the agency's proposal or refusal.

(Emphasis added) *See also* 34 CFR §300.503.

Student's initial schedule when s/he enrolled at the high school was not consistent with the placement decision reflected in the May 30, 2014 IEP that was then in effect. That IEP, specifically crafted with the transition to high school in mind, provided that Student would be removed from the general education environment for only three periods per day. Student's initial high school schedule removed him/her from general education for five periods per day, with only two periods in general education. On October 14, 2014, the District removed Student from his/her general education science class, and placed him/her in the Success room.

Despite the obvious departure from the May 30, 2014 placement decision, the District did not provide prior written notice to Parents, as required by OAR 581-015-2310, to advise them of the change. Indeed, Parents did not learn that Student was removed from his/her general education science class until Mother came to the school for a parent teacher conference. While, presumably, Parents were told of Student's schedule when s/he enrolled at the high school, they were not provided written notice that explained why his/her initial high school placement varied

so radically from the placement decision noted in the May 30, 2014 IEP prepared less than four months earlier.

6. Failure to Develop or Implement a Behavioral Support Plan

As noted above, the Parents established that the District did not have a behavioral support plan in place during the 2014-2015 school year. The District prepared a functional behavior assessment (FBA) in October 2015, and drafted a behavioral support plan (BSP) in early December of 2015. The FBA was initiated following an incident in September 2015 when Student assaulted a staff member. However, neither the FBA nor the BSP was completed or in place as of October 15, 2015 when Student was involved in another serious behavioral incident that resulted in an injury to Ms. Billiu. The Parents allege that the District's failure to have a BSP in place earlier, led directly to the October 15, 2015 incident.

OAR 581-015-2205(3)(a) provides:

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

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

See also 34 CFR §300.324(a)(2)(i).

As noted above, the District knew that Student's behavior was interfering with his/her education and should have taken steps to address the issue earlier. However, whether the absence of such a support plan led "directly" to the October 15, 2015 incident is speculative. While a BSP is an important tool in helping to address problematic behaviors, no support plan can guarantee that behavior will not escalate. Furthermore, District staff were taking some steps, including following suggestions in Mother's "Getting to Know [Student]" document, to try to alleviate the behaviors. While that was clearly not effective on October 15, 2015, the evidence did not establish that a properly crafted BSP would have prevented the incident.

To be clear, the District violated its legal obligation to Student by not taking more affirmative steps, including conducting an FBA and implementing a BSP, prior to October 2015. However, the evidence did not establish that its failure to do so led directly to the October 15, 2015 incident.

7. Failure to Adequately Assess Student for AT Needs

Parents also asserted that the District failed to adequately assess Student for AT needs and therefore failed to provide necessary AT based on such an assessment. However, the Parents did not establish that such an assessment was necessary to address Student's needs, nor did they offer evidence to suggest what, if any, AT would have been helpful.

Moreover, the evidence established that Student would likely not have benefitted from the use of AT devices that are useful with Students with who have physical barriers to communication. In addition, although OAR 581-015-2205(2)(b) requires an IEP team to “consider” whether a child needs AT devices and services, the rule does not require a formal assessment in every case. Indeed, for many students, a formal assessment would be entirely unnecessary where the nature of the disability would clearly not be aided by AT.

Furthermore, Parents did not establish that the failure to conduct a formal AT assessment deprived Student of educational opportunity. Nor have they identified that the failure to provide Student a particular type of AT resulted in a loss of FAPE. The evidence therefore did not establish that the District erred by failing to conduct a formal AT assessment.

8. Failure to Provide Parents with Sufficient and Timely Access to Student’s Educational Records

Finally, the Parents alleged that the District failed to provide them with sufficient and timely access to Student’s educational records in violation of 34 CFR §600.613. As a result of such denial, the Parents allege that Parents were deprived of the ability to make fully informed decisions regarding Student’s education and placement.

The IDEA requires school districts to provide parents of children with disabilities the right to examine all of the child’s educational records. 20 USC § 1415(b)(1) requires states to adopt procedures that include:

An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

Federal regulations under the IDEA reflect that same requirement. 34 CFR § 300.501(a) states:

(a) Opportunity to examine records. The parents of a child with a disability must be afforded, in accordance with the procedures of §§ 300.613 through 300.621, an opportunity to inspect and review all education records with respect to -

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

34 CFR § 300.613 provides:

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and

before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes -

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

In support of this allegation, Parents presented evidence of several instances where they requested the District to provide *copies* of various documents from the District and asserted that the District either failed to provide such copies, or that they delayed providing them to Parents. However, as correctly noted by the District, while school districts have the legal obligation to provide *access* to educational records, the IDEA does not expressly require districts to provide *copies* of such records.

Parents did not present evidence that the District denied them access to Student's educational records or that they were somehow unable to review records at District facilities. The District's alleged failure to provide copies of requested records, by itself, is insufficient to establish the alleged violation.

REMEDIES

As noted above, the Parents have established several violations of the IDEA including, most notably, the District's to craft appropriate IEPs during the period from September 2014 through February 2016.

Given the scope and duration of the violations, remedial relief is clearly required. Under the IDEA, compensatory education services can be awarded as appropriate equitable relief. 20 U.S.C. § 1415(i)(2)(C)(iii) (the court shall grant such relief as the court determines appropriate based on a preponderance of the evidence); "Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F3d 1489, 1496-97 (9th Cir.1994); *see also Park v. Anaheim Union School Dist.*, 464 F3d 1025 (9th Cir. 2006). To be "appropriately educated" within the meaning of the IDEA means that a school district must provide an education that is appropriately

ambitious in light of the student's circumstances. Furthermore, to comply with its legal obligations under the IDEA, a school district must provide a student a chance to meet challenging objectives. *Board of Educ. v. Rowley*, 458 US 176 (1982). *Andrew F. v. Douglas County School Dist.*, 580 U.S. ___, slip op at 3 (March 22, 2017).

However, during the hearing before ALJ Bignon, Parents failed to present sufficient evidence to allow for formulation of an appropriate remedy. Therefore, the record was reopened to allow Parents to submit additional evidence with regard to appropriate the following issues:

- The amount of hours of compensatory education, if any, Student requires under the areas of behavior, social skills, reading, writing and math;
- Whether the District should be ordered to allow Student an opportunity to recover credits necessary to achieve a diploma, and, if so, in what amount;
- What evaluations or assessments, if any, are appropriate to assess Student's sleep difficulties;
- What formal transition assessment tools are appropriate in light of the District's failure to provide adequate transition assessments in the 2015-2016 school year.
- Any other remedies that are appropriate in light of the District's violations

The parties presented additional evidence and argument with regard to these issues at the January 22, 2018 hearing and in their closing briefs. Parents have requested several forms of relief, each of which are addressed below.

Sleep Assessment

With regard to evaluations or assessments in connection with Student's sleep difficulties, as noted previously in this order, Parents failed to establish that the District was required to conduct any additional formal evaluations of Student's sleeping difficulties. Therefore, the District will not be required to conduct such evaluations or assessments.

Private School Tuition Reimbursement

Parents asserted that the District should be required to pay for Student's unilateral placement in the private school s/he currently attends. The District correctly notes that Parents did not request such a remedy at the time of the original complaint. Evidence at the hearing established that Parents placed Student at the private school in October of 2017, approximately one year after filing the complaint in this case. Furthermore, Parents did not raise the issue of private school placement during the hearing before Judge Bignon. None of the evidence presented at the January 22, 2018 hearing suggested that a private school placement would be an appropriate remedy in light of the violations. Although, as indicated in this order, the evidence demonstrated that the District's actions did not comply with the IDEA in several respects, the evidence did not demonstrate that the District was incapable of providing an appropriate education to Student.

Moreover, OAR 581-015-2515 sets out the standards that apply to a request for private school tuition reimbursement where, as here, an administrative law judge finds a denial of FAPE.

The rule provides, in pertinent part:

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

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

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

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

In this case, I find that the remedy of private school tuition reimbursement is not appropriate. However, even if such a remedy was appropriate, it may be reduced or denied, where, as here, the evidence does not establish that the Parents complied with the notice requirements of OAR 581-015-2515(4).¹⁶ Thus, the record does not establish that it would be appropriate to award tuition reimbursement in this case.

Credit Recovery

Parents have also requested that the District be ordered to allow Student the opportunity to recover credits needed for graduation. Parents' request, however, includes two alternative and somewhat contradictory calculations. In their brief, Parents initially requested that Student be given the opportunity to recover a total of 6 credits allocated in six separate course requirements. However, in that same brief, Parents have requested, in the alternative, that Student be given the opportunity to recover a total of 15 credits toward either a standard or modified diploma.

¹⁶ OAR 581-015-2515(6) provides some exceptions to the notice requirements in situations where the Parents had not received a notice of procedural safeguards, were prevented by the District from providing such notice, or where failure to provide such reimbursement could result in physical or serious emotional harm to the student. None of those exceptions apply in this case.

(Student's February 12, 2018 Post Hearing Brief.) Nothing in Parent's brief explains the discrepancy in the requests. Furthermore, evidence at the January 22, 2018 hearing indicated that Student has already received additional credits and is making progress toward graduation. Given the discrepancy in Parent's request, and the fact that Student has earned additional credits, the record does not establish that it would be appropriate to order the District to allow Student the opportunity to recover credits as a remedy for the violations as found in this order. However, nothing in this order eliminates the District's ongoing duty to provide FAPE through age 21. OAR 581-015-2040. Given that obligation, it is likely that Student will be given the opportunity to receive the required number of credits in the normal course of Student's education.

Compensatory Education

As noted by Parents, compensatory education is an equitable remedy that is intended to make up for "educational services the child should have received in the first place." *R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117 (9th Cir., 2011) (quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005)).

The District proposes a total of 64 hours of total SDI to be provided over the next two summers during the period of SDI. The District does not allocate such hours among the various subject areas, but asserts that it should be given flexibility to provide such services as the District believes is necessary. The District's calculation appears to be based primarily on Student's "academic stamina" and ability to access education over extended amounts of time. In the District's view, ordering more compensatory education would be "too much for Student." (District's Second Closing Brief at 36.) The amount of hours of compensatory education proposed by the District appears to be based solely on the District's normal extended school year (ESY) schedule, and does not appear to bear any relation to the deprivation of FAPE. As such, the District's calculation is not a reasonable basis upon which to craft a remedy.

Parents, on the other hand, have requested compensatory relief of a total of 970.5 hours of SDI in a classroom setting, or allocated in reading, math, writing, and behavioral and social skills. Alternatively, Parents have requested 397 hours of SDI in the areas of reading, math, and writing through the use of private tutors, and an additional 175 hours of SDI in behavioral and social skills.

Parents have allocated the request as follows:

Reading – 250 minutes of SDI each week over a period of 60 weeks in a classroom setting for a total of 250 hours. Or, alternatively, 125 minutes per week of SDI over a period of 60 weeks through a private tutor for a period of 125 hours.

Math – 250 minutes of SDI each week over a period of 56 weeks in a classroom setting for a total of 233 hours. Or, alternatively, 125 minutes per week of SDI over a period of 56 weeks through a private tutor for a period of 116 hours.

Writing – 250 minutes of SDI each week over a period of 75 weeks in a classroom setting for a total of 312.5 hours. Or, alternatively, 125 minutes per week of SDI over a period of 70 weeks through a private tutor for a total of 156 hours.

Behavior and Social Skills – 175 hours in SDI in behavioral skills necessary to build

academic stamina. The parents do not indicate how such SDI should be provided.

Parents have based the requested relief on the contents of the February 25, 2016 IEP which, as previously determined, was reasonably calculated to provide Student with educational benefit. I therefore find that the Parents calculation of compensatory education to be reasonable and supported by the record.

With regard to delivery of the SDI, however, I concur with the District that an award of SDI must take into account the Student's ability to access the proffered education. Parents' calculations for SDI delivered in a classroom setting would require Student to receive approximately three hours of compensatory education in academic subject areas every day for an extended period of time. Given that Student is currently attending school full time, scheduling such additional time would be impractical and may not be effective. It is therefore more reasonable to require such instruction to be delivered by tutors under the alternative schedule proposed by Parents. However, the record does not support that such tutoring be given by private tutors, as opposed to District personnel. Therefore, the District will be ordered to provide one-on-one instruction but may do so either with a private tutor or with District staff. It would also be unreasonable to require that such SDI be provided in consecutive weeks for extended periods of time. Rather, such compensatory education must be provided at times and locations reasonably convenient to the District, Parents, and Students. Given the extent of the SDI, it is appropriate to require that such SDI be provided over the next three years.

Transition Assessments

As found in this order, the District failed to provide an appropriate transition assessment for the 2015-2016 school year. Parents have requested an independent educational evaluation in the area of transitions which would include assessments with a number of formal and informal tools. Parents' expert, Dr. Sherman, described such tools as "robust" and designed to identify a variety of Student's strengths and challenges when entering into a variety of post-secondary school environments. (Student's Supp. Ex. S-8 at 15.)

While Dr. Sherman's description of these tools may be accurate, such an extensive transition assessment is not required in light of the District's violation. However, both the District and Dr. Sherman concurred that the University of Oklahoma's Transition Assessment and Goal Generator (TAGG), is an appropriate transition tool, and in fact, is one that is recommended by the Oregon Department of Education. The District asserted that it should not be ordered to administer this assessment because it has already offered to do so. While that may be the case, the record did not establish that the assessment was ever completed. The District will therefore be ordered to administer and complete the assessment.

Occupational Therapy Evaluation

As noted in this order, the District failed to conduct an occupational therapy evaluation as requested by Parents. The District will therefore be ordered to conduct such an evaluation no later than May 4, 2018.¹⁷

¹⁷ Because the record before Judge Bignon was adequate to find this violation and to support a remedy, no additional evidence was requested or provided for the January 22, 2018 hearing.

ORDER

The District failed to comply with its obligations under the IDEA with regard to the 2014-2015 and 2015-2016 school years as found in this Final Order. The District is therefore ordered to provide the following remedies:

- (1) No later than May 4, 2018, the District will conduct an Occupational Therapy evaluation of Student;
- (2) No later than May 4, 2018, the District will conduct a transitional assessment of Student using the University of Oklahoma's Transition Assessment and Goal Generator (TAGG). The District must then convene an IEP team meeting to formulate transition goals based and must develop an amended IEP to include appropriate transition goals and services that based on the IEP team's evaluation of information provided by the assessment and any other information that the team believes is relevant;
- (3) No later than May 4, 2018, the District shall offer compensatory education as follows:

Reading – 125 minutes per week of SDI over a period of 60 weeks through a one-on-one tutor for a period of 125 hours. The District must provide at least 42 hours of such SDI no later than March 2, 2019, an additional 42 hours no later than March 2, 2020, and an additional 41 hours no later than March 2, 2021.

Math – 125 minutes per week of SDI over a period of 56 weeks through a one-on-one tutor for a period of 116 hours. The District must provide at least 39 hours of such SDI no later than March 2, 2019, an additional 39 hours no later than March 2, 2020, and an additional 38 hours no later than March 2, 2021.

Writing – 125 minutes per week of SDI over a period of 70 weeks through a one-on-one tutor for a total of 156 hours. The District must provide at least 52 hours of such SDI no later than March 2, 2019, an additional 52 hours no later than March 2, 2020, and an additional 52 hours no later than March 2, 2021.

Behavior and Social Skills – 175 hours in SDI in behavioral skills necessary to build academic stamina provided by a one-on-one tutor. The District must provide at least 59 hours of such SDI no later than March 2, 2019, an additional 59 hours no later than March 2, 2020, and an additional 59 hours no later than March 2, 2021.

The District may vary from this schedule only with the written consent of Parents and Student.

John Mann

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 2nd day of March, 2018, with copies mailed to:

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