

**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. 2020-ABC-03775
STUDENT AND LINCOLN COUNTY)	Agency Case No. DP-106
SCHOOL DISTRICT		

HISTORY OF THE CASE

On May 21, 2020, Parent filed a Request for Due Process Hearing (Complaint) with the Oregon Department of Education (ODE) on behalf of S.C. (Student) alleging that Lincoln County School District (District) violated federal and state statutes, regulations and state administrative rules during the 2017/2018, 2018/2019, and 2019/2020 school years (period at issue) resulting in a denial of FAPE to Student. ODE referred this matter to the Office of Administrative Hearings (OAH). OAH assigned Administrative Law Judge (ALJ) Jill Marie Messecar to conduct a due process hearing and issue a final Order in this case.

Pursuant to OAR 581-015-2360(3), ALJ Messecar conducted prehearing teleconferences on July 28, 2020, September 11, 2020, and September 24, 2020. During the teleconferences, the District was represented by Rich Cohn-Lee. Attorney Suzanne Gall, represented Parent, who was also present. At the first prehearing teleconference, Parent and the District requested the 45-day deadline for issuing the Final Order be extended to December 22, 2020. ALJ Messecar granted the request. During the first prehearing teleconference the parties agreed to conduct the hearing from October 19 through 26, 2020. During the second and third prehearing teleconferences, the parties confirmed that the hearing would be conducted from October 19 through 26, 2020.

The District filed a Motion for Determination of Sufficiency of Request for Hearing on June 3, 2020. The motion was granted, in part. Leave was granted to Parent to file an Amended Requestor Due Process Hearing. Parent filed an Amended Request for Due Process Hearing on June 22, 2020 (Complaint).

ALJ Messecar convened a videoconference hearing as scheduled on October 19, 2020. Suzanne Gall and Alice Nelson¹, attorneys-at-law represented Parent and Student. Nancy Hungerford, attorney-at-law, represented District. Susan Van Liew, Assistant Superintendent of District, served as District Representative. Stefanie Gould, Special Programs Administrator, acted as District Representative during Ms. Van Liew's testimony.

The following individuals appeared and testified on behalf of the District:

¹ Ms. Nelson of Tampa, Florida, was admitted by OAH *Pro Hac Vice*.

- Susan Van Liew, Assistant Superintendent for the District;²
- Aaron Belloni, Principal, Newport Middle School (NMS);³
- Karole Pickett, Special Education teacher, Structured Learning Center Teacher at NMS;⁴
- Judy Lilley, School Psychologist for the District;⁵
- Jennifer Paytas, Educational Assistant at NMS during the period at issue;
- Aaron Clair, Special Education teacher Resource Room at NMS;
- Lindsey Losier, Speech/Language Pathologist for the District;⁶
- Julie Turner, School District Nurse;⁷
- Taffy Perucci, School District Psychologist;⁸
- Stephanie Gould, Special Programs Administrator for the District;⁹ and
- Karen Fischer Gray, Superintendent for the District;¹⁰

In addition, the following individuals appeared and testified on behalf of Student:

- Amy McTighe, PhD, Children’s Institute, Pittsburgh, Pennsylvania;¹¹
- Maygen Blessman, LCSW, Olalla Center Family Therapist¹²;
- Kim Tula, Family Support Counselor Prader-Willi Syndrome Association;
- Anandam Hilde. M.D. Child and Adolescent Psychiatrist;¹³
- Student;
- KG, (Mother);
- Gerald Pouliot, M.Ed., Latham Center;
- Patrice Carroll, LCSW, Latham Center¹⁴; and
- Carol Quirk, Ed.D.¹⁵

² Ms. Van Liew was designated as an expert in the teaching, administration, and delivery of special education at the K-12 level.

³ Mr. Belloni was designated as an expert in teaching and administering middle school and high school.

⁴ Ms. Pickett was designated as an expert in elementary and special education teaching.

⁵ Ms. Lilley was designated as an expert in the administration, delivery of services, evaluation, and provision of services.

⁶ Ms. Losier was designated as an expert in the area of providing speech pathology services to students in K-12.

⁷ Ms. Turner was designated as an expert in the area of school nursing services for K-12.

⁸ Ms. Perucci was designated as an expert in providing direct services and working with students with behavioral challenges from K-12 and consulting, advising, and supervising other staff in addressing behavioral challenges.

⁹ Ms. Gould was designated as an expert in school administration and administration of special education programs.

¹⁰ Dr. Gray was designated as an expert in school administration and administration of special education programs.

¹¹ Dr. McTighe was designated as an expert in Prader-Willi Syndrome (PWS) behaviors and interventions for children with developmental disabilities, including the development and implementation of behavior plans and FBAs.

¹² Ms. Blessman was designated as an expert in social work, including clinical social work and serving the mental health needs of children.

¹³ Dr. Hilde was designated as an expert in child and adolescent psychiatry.

¹⁴ Ms. Carroll was designated as an expert in social work, including clinical social work and serving the mental health needs of children.

Subsequent to the hearing, the parties submitted written closing arguments on November 24, 2020. The record closed on that date.

Abbreviations used in this order:

AG - Annual Goal

BP - Behavior Plan, including behavior support plans and behavior intervention plans

ESY - Extended School Year

FAPE - Free Appropriate Public Education

FBA - Functional Behavioral Assessment

IEP - Individual Education Program

LRE - Least Restrictive Environment

NMS - Newport Middle School

PWS - Prader-Willi Syndrome

PLAAFP- Present Level of Academic Achievement and Functional Performance

SDI - Specially Designed Instruction

SLC - Structured Learning Center

TFS - Total Food Security

ISSUES

1. Whether the District denied Student FAPE in violation of the Individuals with Disabilities Education Act (IDEA) between May 21, 2018 and May 21, 2020.
2. Whether the District denied Student FAPE under of the Rehabilitation Act of 1973 (Section 504) by acting with deliberate indifference toward his/her need for SDI, services, and accommodations.

EVIDENTIARY RULING

Exhibits D1 through D15 and D17, offered by the District, were admitted without objection. The District subsequently replaced Exhibit D15 with a more complete document without objection from Parent. Later in the hearing, the District offered Exhibit D16 which was excluded from the record because the District failed to provide a copy to Parent at least five business days prior to the hearing in violation of OAR 581-015-2360(5)(b)(C).

Exhibits S1 through S124, S126, S127, S129 through S140, S142 through S166, S168, S170 through S172, S174 through S176, and S178 through S202 were admitted without objection. District made a general objection against using any exhibits that addressed the time period prior June 22, 2018,¹⁶ as the basis for finding a violation of either the IDEA or Section 504.

¹⁵ Dr. Quirk was designated as an expert in the development of FBAs and the development and implementation of behavior intervention plans in public schools.

¹⁶ At hearing, District counsel argued that the statute of limitations should run from June 22, 2020, the date that the Parent filed the Amended Complaint, instead of from May 21, 2020 the date the Original Complaint was filed. That argument was dismissed as without merit.

Statute of Limitations. The District waited until the first day of hearing to assert that a number of the Parent's allegations were time barred as being outside the statute of limitations. The allegations challenged as being outside the statute of limitations were those between January 5, 2018 and May 21, 2018. Parent's attorneys were given some latitude at hearing to present evidence that Parent did not know nor should have known about the alleged action that formed the basis of the complaint. In Parent's closing brief, the attorney's conceded that the period at issue is May 21, 2018 through May 21, 2020 and thus did not pursue claims prior to May 21, 2018.

FINDINGS OF FACT

1. Student has been attending school in Lincoln County School District since kindergarten. (Tr. v III 788: 3.)
2. Student has been diagnosed with a genetic condition of PWS. (Tr. v V 1264: 16-18.) Student has also been diagnosed with co-morbid conditions of anxiety and major depressive disorder. (Tr. v V 1191: 5-14.) Student has also expressed suicidal thoughts in recent years. (Tr. v IV 1115: 11.)
3. PWS is a genetic condition that affects the 15th chromosome. PWS affects the function of the hypothalamus disrupting the body's appetite-control center. When a person with PWS eats, the message of fullness does not reach their brain and they are always hungry. These signals to the brain relentlessly drive someone with PWS to eat more food. This urge to eat can vary in intensity for each person. PWS is also characterized by weak muscles, developmental delays, small hands and feet, incomplete sexual development, and cognitive defects. (Exs. S73, S75, S76, S78.)
4. Individuals with PWS typically exhibit behavioral problems such as verbal and physical aggression and sometimes psychiatric and psychotic behaviors. The most common characteristic of PWS is the inability to feel satiated. (Tr. v IV 915: 8-15.)
5. Individuals with PWS frequently live with sensory process disorder and struggle with their tactile senses. (Tr. v VI 1636: 20-22.) Smearing behaviors are a reaction to having an issue with whatever sense is bothering them at the time. Smearing behavior is a coping skill that is not socially appropriate way they relieve their anxiety around sensory processing. These behavior can be replaced with items like putty and finger-paint. (Tr. v VI 1637: 5-22.)
6. Individuals with PWS are on a continuum of severity. Indicators that a person is more severe than others include physical and verbal aggression, extensive food seeking thoughts and behavior, and fecal smearing. Student has one of the top five most severe cases Dr. McTighe has ever seen but not the most severe. (Tr. v IV 1059: 5-20.)
7. There are two major health risks associated with food seeking behavior for individuals with PWS; choking and severe gastric illness that could result in rupturing of the stomach. Over-

eating and binge-eating can cause life threatening situations for individuals with PWS. Individuals with PWS also have a slow metabolism and are frequently obese. (Ex. S83.)

8. For a student with PWS, being around food is extremely anxiety-producing. A student with PWS can experience anxiety if there is food present, or the strong smell of food, in the student's classroom or school. The presence of highly desirable food nearby can also produce anxiety. This anxiety can result in behavioral problems. (Ex. S75.)

9. Most children who have PWS also exhibit poor impulse control. Children with PWS cannot modify their behavior toward taking unauthorized food should the opportunity present itself to the child, regardless of rewards or incentive to not do so. While the child with PWS may be able to manage their behavior for a day or even a week or two, this does not constitute genuine modified behavior and there is always a risk that an instance will occur when the child, despite knowing that they should not, will take a found bag of chips, cookie, or half-eaten sandwich and eat them as quickly as they can. Keeping food items out of sight and inaccessible is imperative. (Ex. S75.)

10. Students with PWS should have a BP that teaches and emphasizes appropriate behavior in positive and supportive ways. In the event that a student steals or takes food, non-confrontational strategies should be used and the stolen items should not be retrieved using physical force. In cases where a student has a very strong food drive, staff may need to provide extra security measures and diligently remove all visible food, lock classroom doors when not in class, lock the teacher lounge, and keep food out of sight. (Ex. S83.)

11. Common behaviors seen in students with PWS are a rigid thought process and a strong need for routine and consistency in the learning environment, obsessive thinking, tenuous emotional control, strong food cravings, poor stamina, scratching and skin picking, and difficulty with peer interactions. (Ex. S83.)

12. Due to a defect in the hypothalamic and pituitary systems, a person with PWS feel their emotions with great intensity. A person with PWS feels high levels of anxiety which can be related to food or sensory integration impairments. (Ex. S84.)

13. The amount of time a person with PWS spends thinking about food is on a continuum from less severe to very severe. The amount of time does not necessarily relate to food being present. Individuals with PWS can be thinking about an episode of food exposure three days after the food exposure which can result in an inappropriate behavior occurring. (Tr. v IV 1046: 8-21.)

14. TFS is a term used by the professionals who treat people with PWS to refer to a system where food is present only during meal times and that food is locked up and out of sight in all other areas/times. In a school setting, there is no food during instruction, special events, or anywhere in the school building except during meal times in the cafeteria. (Tr. v IV 1074: 8-22.)

15. TFS is recommended by Dr. McTighe for children on the severe end of the continuum of PWS. (Tr. v IV 918: 1-3.) Providing a TFS environment at school would not stop food thinking for Student, but would decrease anxiety and inappropriate behaviors. (Tr. v IV 1047: 5-11.)
16. Mother provides TFS at home. Mother also does not keep highly desirable food like ice cream, chips, or crackers in the home because Student has told Mother that that even when highly desirable food is locked up it increases his/her anxiety. (Tr. v V 1267: 3-19.)
17. When Student is escalated he/she is unable to be reasoned with or argued with. (Tr. v V 1267: 18-23.)
18. Student is aware he/she has PWS and anxiety. When not in an escalated state, Student understands his/her emotions and how they impact his/her behaviors. Student sometimes gets very angry and aggressive as a result of his/her conditions. Sometimes this results in Student not thinking rationally. Student is sometimes able to express that he/she is having those thoughts or emotions before acting on them. (Tr. v V 1198: 17- 1201: 18.)
19. Student is able to talk about food exposures and his/her increased sense of anxiety. (Tr. v IV 93: 12-19.)
20. In the 2015-2016 school year, Student attended third grade at Sam Case Elementary. The District created a BP at some point while Student attended Sam Case Elementary. The BP stated that Student was not to be rewarded with food unless it was an emergency then food unless it was an emergency in which case food could be used as an incentive to move Student to a safe location. The BP also states that Student currently receives skittles and marshmallows as a reward and that the practice would continue. The BP states that the skittles and marshmallows must be locked up with other snack items and that food trash must be removed from the classroom after breakfast. The BP indicated that Student was given different directions based upon what level of escalated behaviors Student was exhibiting. The BP stated that Student was triggered by changes to his/her schedule, non-preferred items, using the restroom, difficult work. (Ex. S48 at 1-2.)
21. During the 2015-2016 school year, Student exhibited a variety of inappropriate behaviors at the school including throwing objects, disrobing, urinating on the floor, smearing urine, putting urine in his/her mouth, picking at his/her skin causing the wound to bleed, playing with his/her fecal matter, smearing fecal matter on clothes. Student was secluded by staff during and in response to these behaviors. (Ex. S25 at 3-7.)
22. On September 16, 2015. Student threw classroom objects, disrobed, urinated, and played with the urine before being secluded for 24 minutes. After that incident, Student's special education teacher Mr. Anderson and the school psychologist, Ms. Guidry discussed possibly having a FBA conducted and Mother was interested. (Ex. S26 at 79.)
23. On September 16, 2015, the District implemented a food protocol which provided for removal of all food items in the SLC including all food that was visible. All food items were to be brought out only at the meal and snack times. No food was to be thrown away in the trash in

the SLC. Candy was not to be purchased in the SLC. Student was to follow the same low carbohydrate and low sugar diet in SLC that he/she followed at home. Student's morning and afternoon snacks were to be provided by Mother. Student was to eat with Mr. Anderson in the SLC. Student was also allowed to take a nap after his/her lunch. (Ex. S26 at 79-80.)

24. On January 5, 2016 Ms. Jennifer Bolander, the National Special Education Consultant for the PWS Association¹⁷, sent a letter to the District requesting that Student be provided with a one to one aide after he/she eloped from Sam Case Elementary on December 4, 2015. In the letter Ms. Bolander explained Student's needs as a student with PWS would be met by a one to one aide who would implement necessary positive behavioral supports, help complete assignments and activities, would prevent elopement, and help Student stay on task. Ms. Bolander stated that the District needed to conduct an FBA and a BP to help Student. Ms. Bolander also explained the medical necessity for food security in the classroom which would provide Student no access to food beyond what he/she was given by his/her mother. (Ex. S98.)

25. On January 14, 2016, the IEP team created Student's annual IEP. The IEP team amended the annual IEP on April 21, 2016. (Ex. S1 at 128.)

26. The Olalla Center, a non-profit mental health organization, has a variety of programs including a psychiatric day treatment program, to treat students who exhibit inappropriate behaviors at school. The day treatment program includes a classroom where the District provides teachers who work on educational programs for the students. (Tr. v IV 1092: 3-17.)

27. Student was referred by Mother and the District to the day treatment program at the Olalla Center due to being physically aggressive, smearing feces, and disrupting learning. (Tr. v IV 1103: 16-1104: 13.)

28. Student participated in the day treatment program at Olalla Center from March 28, 2016 to November 2016. (Tr. v IV 1103: 9-19; 1106: 6-13; Tr. v V 1277: 6-12; Ex. S90 at 9.)

29. While Student attended the day treatment program at the Olalla Center, he/she participated in the education program operated by LCSD at the center. (Tr. v IV 1103: 20-22.)

30. While Student attended the day treatment program at the Olalla Center, the center implemented a TFS program which included locking up all food, and not allowing the sight, sound, or smell of food beyond what was planned because that was what the staff at the center believed Student required in order to reduce his/her anxiety and participate in the program. (Tr. v IV 1105: 11-19.)

31. Prior to implementing TFS, the Olalla Center had provided food rewards for the children who participated in their programs. (Tr. v IV 1106: 1.) It was difficult for the center to implement TFS and if Student noticed a lapse in TFS, Student would escalate his/her behavior but not always immediately. (Tr. v IV 1106: 23-1107: 17.)

¹⁷ PWS Association is national organization that provides information and support to families and individuals with PWS. (IV 1160:9-20.)

32. Ms. Blessman learned from her contact with Student at the Olalla Center that Student's anxiety was reduced when in a TFS environment and after stress reduction measures were taken at the center. Student's anxiety was also reduced when he/she was able to develop trusting relationships with the staff. (Tr. v IV 1110: 15-24.)

33. At Sam Case Elementary, Student continued to exhibit inappropriate behavior such as throwing objects, disrobing, urinating, smearing fecal matter, picking at his/her skin causing the wound to bleed, and destroying belongings and work of others. (Ex. S44, S46, S47, S49, S50.)

34. Student is currently too old to attend the day treatment program at the Olalla Center. (Tr. v VI 1098: 17-21.)

35. Dr. Hilde first met Student in the winter of 2017 when Student was at the emergency department at Oregon Health Sciences University after experiencing some pseudo-seizures at school and home. (Tr. v V 1186: 1-22.) Dr. Hilde continued to treat Student through September 2020 when her practice changed (Tr. v V 1188: 3-10.) Student has a severe level of PWS along with some significant psychiatric comorbidities. (Tr. v V 1188: 14-19.)

36. On January 10, 2017, the District created Student's annual IEP. (Ex. S2 at 203.)

37. During February and March 2017, Student exhibited inappropriate behavior several times, including disrobing, throwing items ignoring instructions from staff, urinating, inappropriate sexualized behavior, and feces smearing. (Ex. S44, S45.)

38. On June 14, 2017, the IEP team met upon Mothers request. (Ex. S3.) On September 21, 2017, the IEP team amended Student's January 10, 2017 IEP. (Ex. S5 at 256.) On October 3, 2017, the IEP team amended Student's January 10, 2017 IEP for a second time. (Ex. S5 at 256.)

39. On October 20, 2017, the District developed a BP for Student. The reason for the BP indicated that Student was a 5th grader diagnosed with PWS which primarily impacted Student's relationship with food and that he/she exhibited compulsions that impact his/her self-care at school. The BP also noted that when anxious or upset, Student may pick sores on his/her bottom, and may wipe or smear the resulting blood on his/her hands, clothing, restroom walls or other nearby surfaces. The BP focused on teaching Student to request a break and to remain with the class and complete work. The plan included a toileting plan to limit Student's time in the restroom and the steps to deal with urine, fecal matter, and blood. Setting event strategies included keeping food away from Student by locking it up and keeping it out of sight, increasing supervision and monitoring in transitions and unstructured areas, and maintaining a positive affect and calm tone with Student. There was no mention of food security in the BP. (Ex. S51.)

40. On October 24, 2017 Student was referred for triennial special education evaluation. The areas of concern were classroom performance, self-help skills, cognitive development, math, reading, social behavior, and written language. Student's most recent standardized test score was the STAR test given on September 18, 2017 and he/she performed in the 3rd percentile on reading and in the first percentile on math. No behavior problems were listed nor were strengths or weaknesses in classroom performance. (Ex. D7 at 10.)

41. On November 7, 2017 Student exhibited inappropriate behavior on a school bus including, hitting/kicking, spitting, touching, yelling, leaving his/her seat, and non-compliance on a school bus. An intervention plan was developed after the incident. The plan indicated that food should not be given as a reward, that Student should be distracted and redirected to his/her task using a calm voice, and if he/she gets out of the seat the driver should pull over and calmly redirect. The driver was noted as asking that Student not be placed on a bus. (Ex. D7 at 29.)

42. On November 30, 2017, the IEP team met to plan Student triennial reevaluation. In the meeting notes, the District indicated that Student qualifies under the category of Other Health Impairment for special education services. The team also noted that breakfast was a little bit of an issue because of the smell of food and due to others talking about food which could cause anxiety for Student. (Ex. D7 at 10.) Parent was given prior notice about the reevaluation and gave written consent for the evaluation. (Ex. D7 at 14-15.)

43. From January 2017 through March 2018, the District noted seven incidents that involved Student exhibiting non-epileptic seizures while at Sam Case Elementary. (Exs. S54 through S59.)

44. On January 5, 2018 Carol Stock, school psychologist, conducted an adaptive behavior assessment at the request of the IEP team as part of Student's triennial review. Ms Stock had Student's teacher, Ms. Schroeder, Mother, and a learning specialist, Ms. Maurer, complete the Adaptive Behavior Assessment System: Third Edition. The assessment was designed to assess functional skills necessary for daily living and focuses on adaptive behaviors that a person does without the assistance of others versus normally developing peers. Ms. Stock recommended giving Student instruction in the areas of self-care, personal safety, and self-advocacy. Ms. Stock also indicated that Student may benefit from learning how to formally distinguish between food items that are good and bad as well as strategies to use when tempted by food items he/she cannot have. (Ex. S53.)

45. On January 5, 2018, the IEP team created an annual IEP for Student. (Ex. S8 at 320.) On January 5, 2018, the District generated a PWN indicating that an IEP team meeting regarding placement and an IEP created would be held on that date. (Ex. D8 at 5.) Parent attended the IEP meeting. (Ex. D8 at 3.)

46. On March 9, 2018, Student was non-compliant, hit a staff member three times, threw items around in class, flipped over furniture, and destroyed items of others. As a consequence, Student was prohibited from attending outdoor school. (Ex. S49.)

47. On April 3, 2018, the IEP team met and amended Student's January 4, 2018 IEP as part of his/her transition to middle school. (Ex. S11 at 376.) During the meeting Mother shared information and concerns about Student's unique needs pertaining to food issues. (Tr. v V 1280: 5-1281: 9.)

48. After the meeting, Mother toured Ms. Pickett's classroom at the middle school and talked to her about removing food rewards and candy sold in the class. Ms. Pickett told mother she

would not do so. However, Mother was later learned that Ms. Van Liew had agreed to remove food from the class store and they would create a more food secure environment for Student. (Tr. v V 1281: 18 - 1282: 11.)

49. On April 11, 2018, Mother emailed the IEP team stating that Student was upset because students were given candy as a reward in the resource room. Mother mentioned the need for food security and offered to provide non-food items to be used as rewards. On April 12, 2018 Ms. Turner emailed Student's fifth grade teacher, Mr. Olson, about the issue and stated that at every meeting they have discussed the need to have no food in Student's classrooms. Mr. Olson stated that it was his understanding that Student could have food in the classroom if everyone in the class was getting food. (Ex. S104.)

50. On May 10, 2018, Ms. Bolander emailed Mother, Ms. Turner, and Shelley Moore explaining the need for TFS. She explained that individuals with PWS have a hyper-awareness of food, and that it was impossible to teach Student to not be bothered by food. Ms. Bolander explained that it was a requirement for there to be no food of any kind by students or staff in Student's classrooms. Ms. Bolander also explained why the hyper-awareness of food required food security. Ms. Bolander stated that Mother was asking that non-required foods including food rewards be eliminated from Student's class (Ex. S108 at 1063.)

51. On June 15, 2018, The District created a written food protocol for Student. The food protocol stated that it was prepared due to Student's medical diagnosis of PWS which results in physical, mental, and behavioral problems such as a constant sense of hunger. The plan asked staff to follow the guidelines when Student was in their classrooms. The guidelines stated that Student should not have access to food outside of the cafeteria and designated snack time in the SLC class. It also stated:

"If you observe [him/her] eating food in your class, please contact Ms. Pickett. Behavioral problems may arise when [Student] is given access to food outside of [his/her] meal plan or when peers have food or are eating near [him/her] outside of supervised meal times. Please make your best effort to keep food in your classroom locked away or out of sight when [Student] is in your class. Occasionally school celebrations involve food and [Student] should not be excluded from these celebrations but please make every effort to check in with Ms. Pickett in advance. Refrain from using food as a reward in your classroom. If [Student] is late to your class please check in with Ms. Pickett to determine [Student's] whereabouts. While at school, [Student] has one hot lunch, including one level scoop of fruit and vegetables from the self-serve bar and one snack." (Ex. S88.)

52. On June 15, 2018, Ms. Stock emailed a copy of Student's food protocol to Mother and Ms. Pickett. (Ex. S111.)

53. Dr. McTighe became more familiar with Student in June of 2018 when Student was enrolled in the Children's Institute PWS Care Coordination Program, of which Dr. McTighe was director. (IV 935:10-16.) During June 2018, Student was still in the midrange of the spectrum of PWS severity. (IV 936:6-9.) Dr. McTighe reviewed the District's June 2018 food protocol and in her opinion it was too vague specifically when asking staff to please refrain from using food

rewards. (IV 938:7-20.) Dr. McTighe also felt that the food protocol was too permissive because staff was directed to take action when they observed Student eating in the classroom which was contrary to TFS which does not allow food in the classroom. (Tr. v IV 93: 9-16.)

54. Student began attending NMS in September 2018. Ms. Pickett was Student's teacher in the SLC and Student's case manager. (Tr. v II 307: 24-308: 7.)

55. During Student's sixth grade year, he/she exhibited no inappropriate bathroom behaviors of which Mr. Belloni was aware. (Tr. v I 216: 12-19.)

56. NMS has reward-based food events such as the "Committed Cub" program where students are given a free Italian soda if they complete all of their homework during a six week period. NMS gives candy to students in their PBIS program who check in with their teacher. NMS also has a student store with food for sale and a concession stand at school dances. (I 225:11-226:5.) NMS provides free breakfast for all students. (Tr. v I 222: 14-18.)

57. Ms. Pickett tried to accommodate Mother's preference to have Student enrolled into specific classes as well as mother's preference for Student's school schedule. (Tr. v II 320: 24-321: 4.)

58. During Student's sixth grade year, Student slept a lot in the break room in Ms. Pickett's classroom. (II 310:15-17.) Student missed out on significant parts of the educational day when he/she was sleeping. (Tr. v II 344: 21-23.)

59. In March 2018, Student was completing math work sheets that included problems requiring a student to divide two and three digit numbers. (Ex. S95:33-35) Student was also completing math work sheets that included problems requiring a student to multiply two digit numbers. (Ex. S95 at 34-35.)

60. On October 1, 2018, Ms. Pickett disclosed to Mother that the District was having someone shadow Student to the bathroom to prevent episodes of Student wandering down to the cafeteria. (Ex. S112 at 408.)

61. On November 29, 2018, the District generated a PWN for an IEP team meeting scheduled for December 13, 2018 to review Student's eligibility for special education and to decide whether additional testing was needed. (Ex. D9 at 3, 5.) Parent attended the IEP meeting. (Ex. D9 at 1.)

62. On December 13, 2018, the IEP team developed an annual IEP for Student. (Ex. S12 at 418.)

63. On August 30, 2019, Mother asked Ms. Pickett to find a different first period class for Student to attend so that he/she would not be in the SLC when the students ate in the classroom. Ms. Pickett could not find a different class so Mother began dropping Student off at NMS after the students in the SLC finished breakfast. (Ex. S114 at 451-452.)

64. Mr. Clair one of Student's special education teachers was not provided with Student's seventh grade IEP. (Tr. v III 746: 20-747: 3.)
65. Ms. Pickett usually has around 16 or 17 kids in the SLC. (Tr. v II 146: 13-20.)
66. Ms. Paytas worked with Student as an educational assistant in sixth and seventh grade. (Tr. v III 619: 19-22.) During her work with Student, Ms. Paytas was addressing behavior and food exposure for Student which required her to be familiar with Student's BP. (Tr. v III 619: 23-620: 5.)
67. On September 5, 2019, Mother emailed Ms. Pickett about Student's issues with a boy who had been mean to Student in the past, about Student's new school binder, and about Student having independence at lunch while not being given too much food. Ms. Pickett replied the next day stating that school lunch staff were aware of the situation but that she did not have sufficient staff to have someone accompany Student to the lunch room or homeroom. (Ex. S117.)
68. On September 6, 2019, Mother emailed Ms Picket about a few issues Student was having with school supplies. Mother told Ms. Pickett that Student had difficulty adjusting to new challenges. Mother also stated that Student wanted to arrive at the start of school with his/her peers and asked about options for him/her to be at school but not at breakfast. (Ex. S118.)
69. On September 7, 2019, Mother emailed Ms. Turner information about Latham Center. Mother also talked about an incident on September 6, 2019 when Student had harmed another student due to a food reward in Mr. Clair's class. Ms. Turner forwarded that email to Ms. Gould, and Ms. Van Liew. (Ex. S135 at 607.)
70. In the fall of 2019, Mother talked to Mr. Belloni about food security. Mother gave Mr. Belloni multiple handouts on PWS and food security in schools. (Tr. v V 1285: 6-23.) Mother asked that food not be in Student's educational space. Mr. Belloni said it was not possible and that he could not change the whole school for one student. (Tr. v V 1286: 2-12.)
71. On September 9, 2019, Student completed math work sheets that included math problems requiring a student to add amounts less than 10 and to determine missing numbers. (Ex. S95 at 48-49.)
72. On September 18, 2019 Student started taking art class in first period and the class used snack chip bags in their art project. (Ex. S119.)
73. On September 20, 2019, candy was given out as a reward to some students then to all the students in one of Student's class. Student was also given a token for Committed Cubs. (Ex. S121.)
74. On September 20, 2019, Student wiped feces all over a school room and on a staff member. (Ex. S61.)

75. Ms. Pickett updated Student's 2017 BP by herself on or about September 21, 2019 to better fit NMS. On September 23, 2019, Ms. Pickett emailed Mother to notify her that she had modified the BP. (Ex. S122 at 502.) The BP appeared almost identical to the October 20, 2017 plan. The toileting plan attached to the BP included a reason for the plan which stated that Student was a 7th grader diagnosed with PWS which primarily impacted Student's relationship with food and that he/she exhibited compulsions that impact his/her self-care at school. The BP also stated that when anxious or upset, Student may pick sores on his/her bottom. He/she may wipe or smear the resulting blood on his/her hands, clothing, restroom walls or other nearby surfaces. While Student's BP also directed the activities of staff should restroom issues arise. (Ex. S62.)

76. Ms. Pickett did not understand why Student smeared feces and did not consult with a professional to understand that sensory behavior. (Tr. v II 151: 16-25.)

77. On September 26, 2019, Student threw feces at another student in the restroom. (Ex. S61.)

78. On October 2, 2019, the District generated a PWN for an IEP team meeting scheduled for December 13, 2019 to review Student's eligibility for special education and to decide whether additional testing was needed. (Ex. D10 at 7-8.) Parent attended the IEP meeting. (Ex. D10 at 6.)

79. On October 15 2019, Mother emailed Ms. Pickett that Student was feeling stressed because of how hard the general education classes were. Mother mentioned that when Student had recently locked himself/herself in the bathroom at school it was because he/she was feeling very anxious and was using it as a breakroom. Mother stated that Student was diagnosed with severe anxiety and was using the restroom to try to calm down. Mother also requested that Student's IEP be modified to allow Student access to self-soothing items like putty, play dough, or shaving cream. (Ex. S127.)

80. On November 8, 2019, Mother emailed the IEP team to explain that Student was reporting that some of the students in art class were eating breakfast and that he/she had stolen some food from one of the students. Student had explained that he/she was feeling awful about the theft of food, was experiencing anxiety, and feeling distracted due to the situation. Mother stated that she was exploring online learning for Student because Student was willing to give up having a hot lunch with his/her best friend and art class to avoid the food exposure and a student that Student had conflict with. Mother asked for details about a proposed fruit basket in the SLC and suggestions for resolving the food issues. (Ex. S129 at 518.)

81. On November 12, 2019, Ms. Turner replied to Mother's November 8, 2019 email asking what the team had come up with. Ms. Turner stated that the District needed to accommodate Student's medical needs and stated that food cannot be out when he/she is in the classroom. Later that same day, Mr. Belloni asked Mother to talk things over before she enrolled Student in online learning. (Ex. S129 at 518.)

82. On November 13, 2019, Student stole a Lego set and candy from a teacher and hid them in his/her locker. (Ex. S61.)

83. On November 25, 2019, Mother emailed Ms. Pickett about some issues that were causing Student to feel anxious and confused. Mother also explained that she was concerned that Student may be experiencing psychosis or a delusional state of mind as he/she had in the past. Ms. Pickett stated that Student had been regressing behaviorally but was not sure if Student was regressing cognitively as he/she was fine if he/she had someone sit and walk his/her through the work. (Ex. S131.)

84. On December 2, 2019, Student saw that another student had a candy cane in their binder and took the candy cane. Student refused to give it back and hit the other student when they tried to retrieve it. (Ex. S61.) Later that day, Student smeared feces all over the health room. Mother had to get Student calmed down and cleaned up right before the IEP meeting started. (Tr. v V 1314: 3-12.)

85. On December 2, 2019, the District conducted Student's annual IEP meeting. (Ex. S15.)

86. On December 2, 2019, the District generated a PWN regarding a proposal for Judy Lilley to evaluate Student through an FBA. The District requested Mother's consent for what was listed as an initial evaluation to be used to determine whether Student was a child with a disability and to determine special education needs. (Ex. D10 at 2.) The District planned to assess Student's behavior and social emotional by using the Behavior Assessment System for Children - 3 and to assess his/her attention by using a Behavior Rating inventory of Executive Functioning. The evaluator also planned to observe Student and interview his/her teachers. (Ex. D10 at 3.)

87. On December 4, 2019, Mother emailed Ms. Pickett and asked if Student's IEP stated that food needed to be secured at all times. Mother explained that it had in the past and wanted to make sure it still was in the IEP. Ms. Pickett replied that it was not and that it had never been part of the IEP but was part of the BP. Ms. Pickett also agreed to find out where the requirement to secure food needed to be stated and would include it. (Ex. S132.)

88. On December 4, 2019, Mother emailed the IEP team a request for the team to help come up with ideas to help Student remain in seventh grade lunch with his/her best friend. Mother explained that Student was eating food off of his/her friend's lunches. Mother asked if it was possible for Student to have support during lunch and explained that Student needs a controlled food environment. (Ex. S144 at 654) On December 11, 2019, Ms. Pickett replied that she was trying to figure out a solution but did not have enough staff to provide Student with an aide during seventh grade lunch. On December 14, 2019, Mother stated that Ms. Pickett had suggested that Student move to lunch in the SLC and asked that the whole team discuss the suggestion if that was the only option. Mother reminded the team that food was, more than ever, the main trigger for Student's anxiety. (Ex. S144 at 653.)

89. On December 6 2019, the District amended Student's BP again. The toileting plan was changed to include references to feces instead of just blood. The BP also indicated that when Student is anxious or upset that he/she may revert to throwing or playing with feces and may wipe or smear feces. In addition, staff were allowed to ask Student if he/she needed a break without using code words to mean a break. (Ex. S64.)

90. On December 7, 2019, Mother forwarded a letter to Ms. Turner from Ms. Tula, a family support person with the PWS Association, reinforcing Student's need for a one to one aide to Ms. Turner. Ms. Turner forwarded it to Ms. Gould who forwarded it to Ms. Van Liew. (Ex. S134.)

91. On December 7, 2019, Mother forwarded information about Latham Center to Ms. Turner who forwarded it to Ms. Gould, who forwarded it to Ms. Van Liew. Mother also explained that December 6, 2019 had been terrible because Student had harmed another Student over a situation involving a food reward. (Ex S135 at 607.)

92. On Saturday December 7, 2019, Mother again emailed Ms. Turner information about the Latham center. Mother also reported that Student had harmed another student when Student was escalated over a food reward issue in Mr. Clair's class.

93. On December 9, 2019, Mother forwarded to Ms. Turner a letter supporting a one to one aide for Student and PWS Association information on TFS. Ms. Turner then forwarded it to Ms. Gould, who forwarded it to Ms. Van Liew. (Ex S134.)

94. On December 10, 2019, Mother emailed Ms. Pickett to explain that Student was trying to not use the restroom at school because someone was always watching her. Mother asked for an emergency IEP meeting. Ms. Pickett explained that they would continue to use an upstairs bathroom for safety reasons. Ms. Pickett also explained that an aide would accompany Student to the restroom and waited outside for Student. (Ex. S136.)

95. Ms. Paytas, one of the aides in Ms. Pickett's class, was told to assist Student to some of his/her classes. Ms. Paytas was also directed by Ms. Pickett to keep notes to document her time with Student. (Tr. v III 626 at 8-17.) Ms. Paytas kept notes between December 10, 2019 and March 2, 2020. The following incidents were summarized from her notes for December 2019:

- December 10, 2019, another student ate a candy cane in art class. Student was overwhelmed later in the day in science and social studies.
- December 11, 2019, Student saw an aide in Clair's room with cashews and then heard a bag of crackers being opened on opposite side of class. Student was unfocused and took a break but then went to the nurse's office. Student missed science class.
- December 13, 2019, two other students eating cereal in art class. Ms. Paytas sent them out and Student thanked her. Extra ice cream was given to SLC when Student was not present but he/she walked in and became upset. Student dropped his/her stuff on stairs and said he/she was sick of food rewards in the school. Ms. Paytas told him/her that was how it was and they could not punish the whole school just for Student. Student said that is what he/she wanted and his/her mother too. Ms. Pickett came out while Student playing with putty and told Student he/she could have some ice cream but told Ms. Paytas to limit candy toppings. Student got some ice cream and toppings but was still upset. Student refused to do any work in social studies and asked to go home. Mother wanted Student to stay at school. Student yelled and cried at Mother stating that he/she did not get enough candy. Mother asked Ms. Paytas to take Student to break room and play music for him/her which she did. Student calmed down.

- December 19, 2019, Student opened his/her locker wide almost hitting another student. Ms. Paytas reprimanded Student who got mad and tried to hit Ms. Paytas who reprimanded Student again.
- December 20, 2020, Student did not participate in a quiz given in science class. Student put his/her head down for a while then opened computer to play a game but was told no computers were allowed. Student was frustrated and put head down again. A student behind Student ate some food, Student heard eating and looked angry. Ms. Paytas told other student to put it away. (Ex. S66 at 616-622.)

96. On December 11, 2019, Mother emailed Mr. Belloni stating that crackers were given to students during second period and Student became upset and was offered a break by an aide. Mother asked that it be explained to staff that students should not be given food during educational time. (Ex. S140.)

97. On December 17, 2019, Mother emailed Ms. Lilley and the IEP team and asked how Student's FBA was progressing. Mother explained that Student told her that candy was for sale at lunch and that made Student uncomfortable. Mother explained that creative food activities in art class were also upsetting Student and stated that Student had attacked Mother that evening due to all of the food triggers. Dr. McTighe replied to the email explaining that it was a perfect example of how a person with PWS would react to food exposures. Dr. McTighe explained that behaviors do not happen immediately after a food exposure and stated that she was confident that after PWS training the school would create an environment to support Student and decrease food exposure. Ms. Lilley replied to the email by stating that she had not finished observing Student but did plan on having the FBA ready for the IEP meeting on January 9, 2020. (Ex. S147.)

98. Ms. Lilley conducted an FBA in December 2019, which was completed on December 20, 2019. (Ex. S67.) The purpose of the FBA was to determine if there was a link between food exposure and Student's behaviors (Tr. v II 209: 5-12.) Between 1992 and 2000, Ms. Lilley worked with two high school boys who had PWS but did not conduct FBA's for either child. (Tr. v II 507: 11-19, 508: 7-12.) Ms. Lilley did not review any literature about PWS nor consult with anyone about PWS prior to conducting the FBA. (Tr. v II 509: 1-9.)

99. A functional behavior assessment (FBA) is gathering of data and information from a variety of sources and using that information to detect patterns to come to a hypothesis about the function of behavior. It includes the use of both details about observed behavior and reports of conclusions about behaviors. (Tr. v VII 1856: 24 - 1857: 19.)

100. The FBA prepared by Ms. Lilley indicated that Student was eligible for special education due to Other Health Impairment due to PWS. The FBA indicated that Student had a history of exhibiting unsafe behavior with peers and staff. Under the heading of behaviors of concern were identified by Student's IEP team as Student's "ongoing thoughts regarding whether incidents leading to maladaptive behaviors were related to food exposure in classroom settings." Under the heading of contributing issues area, the FBA stated that as the calendar progressed there would be more events in which food was used to celebrate at school, and that it was difficult to control food involving students in general education classes. The FBA did not mention food exposure as a setting event. The FBA did state that an antecedent or trigger was seeing food, observing other

children eating, holiday food events, and frustration in challenging classes. The Functional Hypothesis section indicated that when Student is exposed to areas of the school where students have free access to food including holidays when food is part of the culture of celebration or when Student is exposed to challenging curriculum, Student may access food without permission and display aggression, smear feces, or withdraw to gain access to food or to leave the challenging environment. The FBA does not recommendation that the school adopt a TFS or any food security plan. Instead, the FBA recommended the IEP team consider whether or not Student needed a BP or schedule adjustments. (Ex. S67.)

101. Ms. Lilley did not interview Parent separately for the FBA and instead merely noted Mother's concerns as expressed in the planning meeting and in emails to the IEP team. (Tr. v II 488: 18-489: 2.) Ms. Lilley did not list the documents or emails that she reviewed to create the FBA. (Tr. v II 523: 10-11, 525: 18-24.)

102. Ms. Perucci, the District's FBA expert, opined that the FBA contained 16 of the 18 of the requirements for a proper FBA. (Tr. v VI 1590: 16-17.) Ms. Perucci did not review the contents of the components to determine if the contents of each component were sufficient. (Tr. v VI 1669: 10 -1671: 16.) Ms. Perucci also opined that it was not necessarily required for the person developing an FBA for a student with PWS to have a significant understanding of the condition. (Tr. v VI 1640: 9-13.)

103. According to Ms. Perucci, the FBA is an information gathering framework and that a BP targets the behaviors that are listed in the IEP. The BP may have teaching strategies to it and may have recommendations for the classroom set up, and ways to respond to a behavior that would be too long to be included in an IEP. (Tr. v VI 1628: 7-13.)

104. Dr. Quirk, Parent's expert in the development of FBA's and BP's, opined that to develop an FBA for a student with PWS, the person must have at least a basic understanding of the condition, including which aspects of the disability are intrinsic and which part of the behavior may be able to be modified. The person would need to understand the link between food exposure and behaviors that result from anxiety. (Tr. v VII 1693: 14-17, 1858: 5-20.)

105. Dr. Quirk reviewed both the components and contents of the 2019 FBA. Dr. Quirk opined that the FBA contained the necessary components but that the contents of the components were insufficient, providing only six of 18 requirements. (Tr. v VII 1902: 11-16, 1924: 12-15.) Dr. Quirk opined that the 2019 FBA interviews were flawed because it failed to provide information about Student's motivations, interests, strengths, and challenges which are necessary in order to determine motivators and potential reinforcers. (Tr. v VII 1903: 10-19.) Dr. Quirk opined that the 2019 FBA observations were flawed because they did not provide useful data such as frequency counts and other qualitative data. (Tr. v VII 1904: 7-18.) Dr. Quirk opined that the 2019 FBA failed to utilize the information learned in the Behavior Assessment System for Children in a helpful or useful manner. (Tr. v VII 1907: 13- 1908: 18.) Dr. Quirk opined that the 2019 FBA intensity section was insufficient because it did not contain enough information. (Tr. v VII 1910: 9- 1911: 13.) Dr. Quirk opined that a problem with the 2019 FBA is that it is not clear what consequences are related to what behaviors. (Tr. v VII 1914: 4-6.)

106. Dr. Quirk opined that in order to complete a FBA for a child with PWS, the evaluator needs to have at least a basic understanding of the condition including which aspects of the PWS are part of the disorder so the evaluator will understand which aspects of behavior will not be able to be modified. (Tr. v VII 1858: 5-20.)

107. On December 19, 2019, Mother emailed Ms. Pickett and asked if there was any place Student could go to avoid the distribution of candy grams at school. Mother indicated that Student was struggling. Ms. Pickett replied that there was no way to control the candy grams, that the reality was that candy would be all over the school all afternoon. (Ex. S148.)

108. The District did not assess Student for recouplement and regression data over the Christmas break. (Tr. v II 164: 2-7.)

109. Ms. Paytas documented her time as working as an educational assistant with Student. The following incidents involving were summarized from her notes for January 2020:

- January 6, 2020, Student was upset at lunch due to confusion about his/her lunch schedule but recovered quickly.
- January 8, 2020, Student was sleepy and had difficulty focusing during social studies. Ms. Paytas offered him/her a nap and Student accepted. Student ended nap when students were getting a cookie in 6th/7th and class watched movie for a student's birthday.
- January 9, 2020, three food exposures throughout day and Student did not follow all of the teacher's expectations. Student was picked up early but no mention of acting out or toileting issues.
- January 10, 2020, argument in art about pencil shared by a group of students including Student. Student A gave Student a jolly rancher in a sneaky manner and Student tried to hide it. Ms. Paytas told Student that was not okay because they had rules about food for Student. Student argued and said he/she was taking it home.
- January 13, 2020, another student had a lollypop but put it away when Ms. Paytas said to do so.
- January 14, 2020, while at the lockers before lunch, Student A gave Student some jolly ranchers in a sneaky manner and Student tried to hide it. Ms. Paytas told Student that he/she was not supposed to have anything [Ms. Paytas does not mention whether she took the candy away in the notes] Student replied that his/her mother was okay with it. Student A ran away from them and Student said to Ms. Paytas, "Thanks a lot now she's mad." Ms. Paytas told Student that she was simply enforcing the rules that exist for Student and there was nothing for Student A to be mad about. Student argued by saying he/she knew Student A was upset. After 10 minutes of eating alone, while Student A ate with others, Student began to disrobe slowly. Ms. Paytas asked if she was okay but Student shrugged and continued to disrobe. Ms. Paytas tried to stop him/her but was unsuccessful. Student disrobed in the cafeteria. Later Mother talked to Student on the phone and Student spent rest of day in peace room listening to music.
- January 15, 2020, Student spent all day in SLC and was on his/her computer most of the day.
- January 21, 2020, Student ate breakfast in the SLC. Student was frustrated during math until Ms. Paytas helped her. Later two other students escalated. Student then escalated, pushed his/her desk, and kicked at teachers. Student started playing with his/her chest and would not stop. Student then undressed and the room was cleared. (Ex. S66 at 622-635.)

110. On January 3, 2020, Mother sent the IEP team a letter providing the team with some documents regarding PWS for the team to read before the next IEP meeting. Mother requested that Student be provided with a one to one aide at all times, that the school adopt a TFS environment, that Student be provided with a 12 month IEP to support him/her during the summer, and that all staff be required to attend PWS training by Dr. McTighe. Mother also explained that she had created a calendar so that the IEP team could see how Student's attendance and education was affected by the lack of food security. Mother explained that Student was spiraling down quickly. Mother included letters supporting Student's need for a TFS environment and a one to one aide from Ms. Tula and from Student's primary care physician, Dr. Rash. (Ex. S149, Tr. v V 1325: 13-20.)

111. On January 6, 2020, Mother emailed the IEP team about multiple food exposures that Student had related to her. Mother asked if anything could be done due to the anxiety that these situations were causing Student. Ms. Pickett explained why food was allowed in the SLC. Mother again explained that food exposures were anxiety triggers for Student. (Ex. S151.)

112. On January 9, 2020, the IEP team met to discuss the FBA that had been completed by Ms. Lilley and to amend Student's annual IEP. (Ex. S17.) Dr. McTighe participated in the IEP team meeting to support Mother and to provide information about PWS to the IEP team. (Tr. v VI 1726: 25-1727: 1.)

113. Ms. Gould is responsible for training District special education staff. (Tr. v VI 1715: 20-23.) Sometime after the January 9, 2020 IEP team meeting, Ms. Gould emailed Dr. McTighe about potential dates for obtaining PWS training for District staff regarding how to support students with PWS. None of the January dates that Dr. McTighe proposed worked for the District. (Tr. v VI 1726: 17-24.)

114. The PWS training for District staff occurred in August 2020 and October 2020. (Tr. v VI 1772: 20-22.)

115. On January 13, 2020, Student met with Ms. Blessman and talked about his/her anxiety when his/her environment lacks food security. (Ex. S68.)

116. On January 15, 2020, the District changed Student's placement and kept in the SLC for most of the day. Student stopped participating in any general education classes or going to the cafeteria. Student and Ms. Paytas went to Mr. Clair's room to read or work on math during first period while the students in the SLC were eating. The IEP was not changed to reflect the new placement. (Ex. S158 at 736.)

117. On January 15, 2020, the District completed a threat assessment form after an incident involving Student on January 14, 2020. Mother reported that Student was angry at another Student who had candy in the classroom and had acted out, hurting the other student while stating that he/she wanted to kill the student. The District determined that Student's threats and aggression were not causing considerable fear or disruption to the school because no one other than Ms. Pickett, the school resource officer, and Mr. Shindelman were aware of them. The

District also determined that it did not believe that there was an intent to harm on Student's part. Under a section of the incident report headed Additional Action, the District noted that they continued to strive for a food safe environment. (Ex. S69.)

118. The District was aware that Student exhibited many of the same behaviors in the 2019-2020 School year that he/she exhibited in 2015-2016 prior to being admitted to the day treatment program at the Olalla Center. (Tr. v I 150: 4-21.)

119. On January 17, 2020, the District prevented Student from participating in career day at NMS after Mother reported that Student had been talking about killing students who had candy. (Ex. S159.)

120. On January 17, 2020, the District generated a PWN for an IEP team meeting scheduled for January 22, 2020, to review existing information about Student's eligibility for special education and to develop or review an IEP. (Ex. D13:1.) Parent attended the IEP meeting. (Ex. D12 at 1.)

121. On January 21, 2020, Mother sent a long emotional email to the IEP team explaining Student's diagnosis of PWS and how she had fought against the limitations for her child but that the reality was that Student needed TFS to live. Mother reported that she had been attempting to provide TFS at home. Mother also explained that she has found a school that catered to children with complex special needs and PWS in Cape Cod, Massachusetts called Latham Center. Mother stated that Latham Center is a residential school that provides total food security, 7:1 teacher to student ratio, and had many students with PWS. Mother then detailed many of the recent food triggers and issues that Student had experienced at NMS. Mother ended with a request for the District to consider sending Student to a place where he/she would fit in and be able to go to a school where he/she did not experience any anxiety over food. Later that evening, Ms. Gould sent Ms. Van Liew a copy of Mother's request and stated that she believed that the plan at the IEP team meeting the next day was for Student to be pulled back into more SLC classes. (Ex. S162.)

122. On January 22, 2020, the IEP team met to discuss what was happening with Student and to amend Student's annual IEP. (Ex. S19.)

123. On January 22, 2020, Melissa Alberti-Araujo, a skills trainer with the Olalla Center, met with Student for skills training focused on lunch at school. They went to the cafeteria before other students arrived and ate in a pullout room. Student stated that food around the school made him/her anxious and uncomfortable and Student became upset. Student was reassured that even though it is hard and may always be hard that he/she could do it. Student agreed. Ms. Alberti-Araujo used conversation, empathy, games, and praise. After their session, Ms. Alberti-Araujo believed that eating lunch in a safe environment relieved some pressure Student felt about his/her food addiction. (Ex. S68.)

124. Ms. Paytas documented her time as an educational assistant with Student. The following incidents were summarized from her note for February 2020:

- February 3, 2020 Student chose not to create art as he/she felt weird from medication. Student played with putty and fidgets instead.
- February 4, 2020, Student and the class practiced using money during 3rd period. Student did not participate in 5th and 6th period because he/she felt weird.
- February 6, 2020 Student ate a hot lunch then remembered he/she had a cold lunch and stated that he/she made a big mistake. Student became very upset. Student disobeyed the teacher and aide during fifth period by using his/her computer and became upset when Ms. Paytas took the computer away. (Ex. S66 at 636-641.)

125. On February 17, 2020, Mother informed the IEP team that Student's mental health was declining and they had attended an appointment with a psychiatrist at the Olalla Center. The psychiatrist was extremely worried about Student's safety and the safety of others. Mother also shared that Student was feeling very isolated at school and had been experiencing hallucinations and delusions. Mother also reported that Student had been upset after a school Valentine's Day party where another student had hot chocolate and grapes and another student had chocolate milk. (Ex. S164.)

126. On February 21, 2020, Ms. Pickett was notified that Student was hospitalized. (Tr. v II 399: 19-23.)

127. Student returned to NMS on March 2, 2020 after spending eight days in the emergency department of the hospital in Lincoln City for mental health issues. Student was given a new medication and stabilized during his/her time at the hospital. Mother emailed this information to Student's IEP team. Mother described the new medication's side effects. She also informed the team that Student had a new focus on self-harm and asked them to remove any sharp items from his/her environment. (Ex. S168.)

128. NMS planned a school field trip for March 3, 2020 for the students to see a play Cinderella, at the local performing arts center. (Tr. v I 228: 2-9.)

129. On March 2, 2020, Student and another student were discussing the upcoming Cinderella field trip. Ms. Pickett told Student that he/she would not be going as it was a team decision. (Ex. S170 at 778.) Mr. Belloni actually made the decision that it was not safe to send Student on the field trip. (II 397:10-25.) During the evening of March 2, 2020, Mother sent an email to Ms. Pickett asking her to reconsider the decision to exclude Student from the field trip and explained the reasons for her request. (Ex. S172:787.) The District agreed to allow Student to attend if Mother went along. (Ex. S172 at 787.)

130. On March 13, 2020, the District closed its schools due to the Covid-19 pandemic. (Tr. v II 403: 20-21.)

IEP meeting notes and general information.

131. The District superintendent expects District principals to monitor the implementation of IEPs and seek resolution when there are issues. (Tr. v VII 1838: 15-22.) She also expects District

staff do whatever it takes to allow the student to be successful and make educational progress. (Tr. v VII 1839: 2-1840: 1.)

132. On June 14, 2017, the IEP team met upon Mothers request to discuss home-schooling Student the following school year. The District generated notes indicating that Mother, Mr. Anderson, Carol Stock, and Olivia Shroeder were present. Mother explained that she was concerned about the makeup of the SLC class. Mother also explained that Student was upset that other students were being rewarded with jelly beans but he/she was not due to his/her food restrictions. The team discussed SDI, home schooling, and Student's goals. The team also discussed the possibility of mainstreaming Student but agreed to meet in the fall to discuss it further. (Ex. S3.)

133. The January 5, 2018 reevaluation indicated that Student was behind his/her current grade level in academic performance. At that time Student read at a second grade level and had math skills at a high first grade level. (Ex. D7 at 7.)

134. On January 5, 2018, an IEP team meeting was held. Listed as present were Mother along with District employees Makenna Maurer, Olivia Schroeder, Carol Stock, Nikki Holland, Taylor Olson, Taylor Turnbull, Linda Shamey. (Ex. S8 at 321.) The IEP team indicated that Student exhibited behavior that impeded his/her learning or the learning of others and that Student had communication needs. (Ex. S8 at 322.)

135. The District amended the January 5, 2018 IEP on April 3, 2018. Listed as present at the April 3, 2018 meeting were Mother, along with District employees Makenna Maurer, Olivia Schroeder, Carol Stock, Nikki Holland, Taylor Olson, Taylor Turnbull, and Linda Shamey. (Ex. S11 at 376-377.) The IEP team indicated that Student continued to exhibit behavior that impeded his/her learning or the learning of others and that Student had communication needs. (Ex. S11 at 378.)

136. The District-created notes from a January 5 2018 IEP team meeting indicated more people attended the meeting than were listed on the IEP. It appears that the notes actually are referring to a meeting held on April 3, 2018 IEP team meeting that was held to address Student's transition from Sam Case Elementary to Newport Middle School. The attendees listed in the notes were Mother, along with District employees Makenna Maurer, Olivia Schroeder, Carol Stock, Nikki Holland, Taylor Olson, Taylor Turnbull, Linda Shamey Susan VanLiew, Aaron Clair, Judy Lilley, Karole Pickett, and Julie Turner. The notes indicated that Mother wanted the team to know that sugar was harmful to Student but that Student was to participate if other children were getting sugary treats. Mother planned to bring Student to school at 8:00 a.m. and so he/she would avoid breakfast eaten in the SLC first period. Ms. Schroeder indicated that Student worked best with consistent schedules. Mother shared that Student liked to spend time in each area of SLC, resources room, and general education. (Ex. S8, S10 at 343.)

137. The District created notes from a December 13, 2018 IEP team meeting. Mother, along with District employees Nikki Holland, Karole Pickett, Julie Turner, Amanda Kennedy, and Aaron Clair attended. The team discussed Student's progress in math and writing. The notes indicated that Student was behind in writing because he/she often slept at school in the mornings.

Student was noted to be behind in math because of issues with a morning snack. The team discussed a new plan. The notes indicate the team reviewed each element in the IEP form including ESY and based their ESY determination on prior year's data. There was no mention of why the food protocol was removed as an aid. The notes do not indicate if the team discussed making up the time Student slept in class or missed class due to a morning snack. (Ex. D9 at 6; S13 at 439.).

138. The December 2018 IEP indicated that Student did not exhibit behavior that impeded his/her learning or the learning of others. However, they did indicate that Student continued to have communications or the learning of others but did continue to have communications needs. (Ex. S12 at 420.)

139. The District created notes from a December 2, 2019 IEP team meeting. Mother along with District employees Karole Pickett, Mike Pearce, Bob Shindelman, Julie Turner, Lindsay Losier, and Judy Lilley attended. Mother asked about math and Ms. Pickett indicated that Student struggled when he/she did the same math as everyone else but that when Student was given a writing prompt, Student could write three or four sentences. The team indicated that Student's behavior had changed since the last meeting and that the day of the IEP meeting was a rough day for Student. There was no mention of the June 2018 food protocol. The notes indicated the AGs were reviewed but no specifics were written down. (Ex. D10 at 6.)

140. Different notes for the December 2, 2019 IEP team meeting were generated at some point by the District. Ms. Losier is not listed as attending on the second set of notes and Cody Rosenthal is listed as attending. These notes provide a paragraph of details that were not included in the other set of notes. These notes indicate Mother felt overwhelmed at the meeting as Student had exhibited inappropriate behaviors at school prior to the meeting. Mother expressed concern about the school's food security and asked for a one to one aide which she felt would keep Student safer and be less restrictive than putting him/her in the SLC all day as the District proposed. Mother asked for an FBA to be done and signed consent for it to be conducted. The team discussed modifying the curriculum. The team indicated that they had a plan to provide Student with an aide during general education classes. The notes indicate that the team believed that Student's behavior escalation were due to a change in Student's medication. (Ex. D12 at 1)

141. The December 2019 IEP indicated that Student exhibited behavior that impeded his/her learning or the learning of others and continued to have communications needs. (Ex. S14 at 534.)

142. The District created notes from a January 9, 2020 IEP team meeting. Mother, Karole Pickett, Mike Pearce, Bob Shindelman, Julie Turner, Cody Rosenthal, Stefanie Gould, Aaron Belloni, Michelle Deegs Davis, Nikki Holland, Kayla Schmidt, Judy Lilley, Dr. Amy McTighe, and Lucy Krut¹⁸ attended. Mother indicated Student saw a psychiatrist at OHSU before winter break and was diagnosed with depression, possible bi-polar disorder, and was being assessed for narcolepsy, liver damage, and gastroparesis. Ms. Lilly provided information from the FBA and indicated that Student showed a higher level of engagement in his/her special education classes than in the general education classes. The general education teachers discussed how Student was doing and requested accommodations of having Student and his/her aide sit away from any food

¹⁸ Lucy Krut is a PWS specials at the Children's Institute of Pittsburgh. (Ex. D14 at 2.)

storage areas and for Student to be given a copy of the class notes. The team decided that Student needed adult support for all transitions, all general education classes, and the cafeteria. The team also discussed setting up a daily behavior chart or tracker system for interactions, work refusals, and use of the breakroom for the mother to review every day. The team discussed where Student would eat lunch and decided that with additional adult support Student would continue to eat lunch in the cafeteria with the option for revisiting the issue if Student was not successful. (Ex. D12 at 1-2.) The District did not provide evidence it set up a daily behavior chart or tracker system for interactions, work refusals, or use of the break room.

143. During the January 9, 2020 IEP team meeting, Mother asked that Student be allowed to have lunch in the cafeteria even though it was not recommended by Dr. McTighe because Mother was aware that the most anticipated part of Student's day was his/her time with his/her best friend Student A. Mother was hoping that a one to one aide with his/her would make it safe for Student. (Tr. v V 1331: 4-15.)

144. The District created notes from a January 22, 2020 IEP team meeting. Mother, Grandmother, Bob Shindelman, Julie Turner, Stefanie Gould, Aaron Belloni, Nikki Holland, Judy Lilley, Missy Arajo, Maygen Blessman, Lindsey Losier, LaVon Olson attended the meeting. The team decided to use a specific phrase when Student began to escalate "It's Okay; we are going to get through this," and to continue to reassure Student. The team talked about Student's lack of self-confidence after the disrobing incident in the cafeteria. The team decided to keep Student in the SLC the entire day for the remainder of the semester and to allow him/her to return to Mr. Clair's class in the following semester. The team also decided to remove Student from PE. Mother asked to talk about food security and indicated that food should never be taken from Student's hands. Mr. Belloni indicated that he was trying to figure out what to do as far as school-wide food security. Ms Blessman indicated that she would recommend residential treatment for Student if he/she did not have PWS. (Ex. S19 at 755.)

145. The IEP team met and created an IEP on September 18, 2020. Student was noted to exhibit behavior that impeded his/her learning or the learning of others, had communication needs, and had assistive technology needs indicated on the special factors page of the IEP form. (Ex. S21 at 966.) The District created notes from the September IEP team meeting. During the meeting the team discussed the specific details to be added to the food security protocol. Mother stated that Student experienced anxiety when he/she knows that other students are eating different or desirable food in a room nearby. Mother asked for all students to eat together and have the same food. The District's attorney indicated that they believed the food security protocol already created was appropriate and declined to make changes. Mother disagreed that it was appropriate. The team discussed the BP before discussing the IEP. The team discussed placement. Mother stated that Dr. McTighe's recommendation was for a TFS environment and placement at the Latham Center. Mother expressed concern with the District's plan to have Student in a special education class 100% of the time. Ms. Van Liew stated that putting Student in special education 100% of the time was to support his/her access to his/her goals. Mother's attorney stated that if placement was not to be at their preferred placement of Latham Center, then Student should be included in general education classes at the District school. The notes indicated that "the district rejected Latham, which is the parents preferred option for placement." (Ex. S23 at 989.)

Present Levels of Academic Achievement and Functional Performance from the various IEPs.

146. The October 2018 IEP included the following descriptions of Student's PLAAFP:

- In Writing. Student has all basic writing functions in place and is capable of writing a four sentence paragraph with proper punctuation on a single topic. Student has difficulty physically writing when rushed. (Ex. S5 at 258.)
- In Math, Student's levels were difficult to get an accurate gauge but was on average at 1.5 grade level. Student is more proficient at times than others. Testing must be done in chunks. (Ex. S5 at 257.)
- In reading, Student can currently read a 180 word third grade reading passage in about two minutes with three or less error. When reading longer or more complicated passages, Student can become lost or lose focus. (Ex. S5 at 257.)

147. The January 5, 2018 IEP included the following descriptions of Student's PLAAFP:

- Mother reports that Student's strengths include being imaginative, brave, creative, empathetic, loving, determined, witty, smart and aware. Student enjoys being with peers as much as possible. Student is skilled in ignoring people and letting a teacher know if a student is being unkind or saying untrue things about him/her. Mother reports that Student can become anxious and repetitive at times. (Ex. S8 at 323.) Student's areas of strength are that he/she is great at art and has an academic strength in math. Student's areas of need are that he/she is behind in the area of math, reading, and writing and has specialized instruction in these areas¹⁹. (Ex. S8 at 324.)
- In writing, Student met his/her goal of writing a five sentence paragraph with sentences of five words or more with proper punctuation in five of six opportunities. Student is able to write a paragraph with an average of six sentences. When given a simple sentence, Student is able to determine if it asks a question, tells about something, or is a command. Student is able to read a sentence and tell if it is a general statement or if it is about the topic. (Ex. S8 at 323.)
- In math, Student is completing an average of 24 lower/smaller single digit multiplication problems in one minute with 100% accuracy. Student is doing up to three digit column addition, including money with carrying and three digit column subtraction without borrowing with 100% accuracy. Student is telling time on an analog clock to the five minute mark and doing simple addition and subtractions problems correctly. (Ex. S8 at 324.)
- In reading, Student was averaging 75% accuracy on multiple choice reading comprehension measures at the second grade level and has improved in generalizing the main idea of the story. Student is challenged when determining the sequence of events. Student is reading an average of 133 words a minute with 100% accuracy on a 3rd grade level. (Ex. S8 at 323.)
- Student's disability affects his/her involvement and progress in general education curriculum because he/she is functioning two or more years behind same age peers in reading, writing, and math. Student receives SDI in those three areas. (Ex. S8 at 323.)
- In the area of behavior, Student has made great progress and has not had a teacher directed break since September. All the breaks that Student has taken area happening when

¹⁹ Parent's copy of the January 5, 2018 IEP does not include areas of strength or need. (Ex. S9:294.)

something is changed like on his/her schedule. Student still needs help when his/her special education and general education schedules conflict. (Ex. S8 at 325.)

148. The April 2018 IEP PLAAFP is summarized as follows:

- The section for Student's strengths from Parents is identical to that listed in the January 5, 2018 IEP (Ex. S11 at 379.) Student's areas of strength and need are identical to that listed in the January 5, 2018 IEP. (Ex. S11 at 380.)
- Student's writing PLAAFP is identical to that listed in the January 5, 2018 IEP. (Ex. S11 at 379.)
- Student's math PLAAFP is identical to that listed in the January 5, 2018 IEP. (Ex. S11 at 379-380.)
- Student's reading PLAAFP is identical to that listed in the January 5, 2018 IEP. (Ex. S11 at 379.)
- Student's remained functioning two or more years behind same age peers in reading, writing, and math. Student was receiving SDI in those three areas. (Ex. S11 at 380.)
- In the area of behavior, this section was identical to that listed in the January 5, 2018 IEP. (Ex. S11 at 381.)

149. The December 2018 IEP included the following descriptions of Student's PLAAFP:

- Student's overall strengths, interests and preferences indicate that Student is delightful and a wonderful addition to the classroom. That he/she loves fashion and music and is not afraid of new challenges. Mother explained Student was on new medication and Mother is concerned that Student sleeps a couple of times a weeks. Mother is interested in Student taking Spanish class next semester. (Ex. S12 at 421.)
- In writing, Student is writing well however his/her conventions and grammar are still a concern. His/her writing has been hard to assess due to absences. Student did a writing prompt on December 8, 2018 in the SLC and he/she was able to write multiple sentences with capitals and punctuation. (Ex. S12 at 421.)
- In math, Student is working on third and fourth grade concepts and is doing well but organization is a bit of a struggle. When doing multiple step problems, Student does well with explicit instruction. (Ex. S12 at 421.)
- In reading, Student is reading and comprehending at a second grade level very successfully. (Ex. S12 at 421.)
- In behavior, Student has used the break room a few times when he/she has gotten overwhelmed, but mostly he/she uses it to rest when he/she is tired. Student's behavior has not been an issue in our classroom (no notes on which classroom the IEP team is referring to. (Ex. S12 at 421.)

150. The December 2019 IEP included the following descriptions of Student's PLAAFP:

- Student's overall strengths, interests and preferences indicate that Student loves to be social and mix with kids. That he/she loves animals and music. Mother expressed concern about Student's anxiety, that she would like to see Student keep up with grade level curriculum, and that with extra support Student could continue grade level work in the SLC. Mother requested a one to one aide for Student to assist with safety and health. Mother requested and consented to an FBA. (Ex. S14 at 535.) Student has PWS which impacts him/her in several ways. In all academic areas Student needs a very high level of emotional encouragement and reinforcement from

his/her teacher when doing all work and tasks. Student also needs frequent breaks and difficult work to be completed in bursts. In all academic areas lessons need to be refreshed and retaught often in order for him/her to make progress.²⁰ (Ex. S14 at 535.)

- In writing, when given a writing prompt Student can produce three to four sentences with minimal grammatical errors. (Ex. S14 at 535.)
- In math, Student is working on fractions, mixed, irregular, and reducing fractions. (Ex. S14 at 535.)
- In reading, on his/her most recent CBM assessment, Student is reading and comprehending at a 3.1 grade level. Student scored 96% on her comprehension. (Ex. S14 at 535.)
- In behavior, Student has used the break room a few times when he/she has gotten overwhelmed, but mostly he/she uses it to rest when he/she is tired. Student's behavior has escalated somewhat and we are using break rooms as needed. We also have him/her using the single bathroom in the hallway due to several bathroom issues this year. (Ex. S14 at 535.)

151. The January 9, 2020, IEP contained identical PLAAFP information to the December 2019 IEP. (Ex. S16 at 705.)

152. The copy of the January 22, 2020 IEP submitted at the hearing was incomplete and contained PLAAFP regarding occupational therapy and physical education only. (Ex. S18 at 748.)

153. The September 18, 2020 IEP included the following descriptions of Student's PLAAFP:

- In writing from May/June 2020, when given a writing prompt Student can produce three to four sentences with minimal grammatical errors, with subject prompt and a person sitting with his/her to help with spelling and some letter formation he/she is not quite independent as of yet. During spring learning, Student completed a few writing tasks on the computer. He/she did well and was able to write a series of complete sentences with few grammatical errors. (Ex. S21 at 968.)
- In math from May/June 2020, Student is working at a 1.9 grade level with 88% accuracy on his/her January 2020 assessment. When online learning occurred in March Student struggled with the math presented being too low so it was up to second grade math equations and he/she did much better and completed all his/her assignments. (Ex. S21 at 968.)
- In reading from May/June 2020, on his/her most recent CBM assessment in January 2020, Student is reading 126 CWPM at a 3.1 grade level. When the school went to online learning in March, Student completed all his/her reading tasks provided virtually. (Ex. S21 at 968.)
- In behavior from May/June 2020, Student works best in one on one situations, is easily distracted by activity in a classroom, needs one person sitting with him/her to assist him/her in working. From September 2019 to January 2020, Student took seven self-breaks in the break room. There was one room clear on December 6, 2019. On January 4, 2020 Student disrobed in the cafeteria. During distance learning there has been no noted behavioral incidences. From April to June there were seven group meets and Student attended all with no problems. (Ex. S21 at 968.)

²⁰ The IEP references an attached behavior plan which was not attached to the Exhibit

Extended School Year Considerations 2018 – 2020 school years.

154. When the District has a concern about regression or the need for ESY services, the District looks at data points that show where a student was before and after a break. (Tr. v I 135: 7-19.)

155. The January 5, 2018 IEP included the following descriptions of Student's regression/recoupment. The IEP indicated that Student was able to pick up where he/she left off after winter break and did not need long periods of time to get back information that he/she had already learned. Student was able to learn a skill quickly when he/she did need to be retaught it. (Ex. S8 at 324.) The IEP team therefore decided that Student did not need ESY²¹. (Ex. S8 at 341.)

156. The April 2018 IEP made no changes to either of the ESY sections included on the January 5, 2018 IEP. (Ex. S11 at 389, 397.)

157. The December 2018 IEP contained no narrative information about data gathered, regression or recoupment, or need for skill re-teaching. The IEP did contain a sheet with check boxes indicating that the IEP team decided that Student did not need ESY because the Student did not experience regression or have a prolonged recoupment period. (Ex. S12 at 435.) Meeting notes from the December 2018 IEP team meeting indicated that the team used prior year's data to reach its decision. (Ex. S12 at 439.)

158. The December 2019 IEP contained no narrative information about data gathered, regression or recoupment, or need for skill re-teaching. The IEP contained a sheet with check boxes indicating that the IEP team decided that Student did not need ESY because the Student did not experience regression or have a prolonged recoupment period. (Ex. S14 at 549.)

159. The January 2020, IEPs contained no narrative information about data gathered, regression or recoupment, or skill re-teaching. The IEP contained a sheet with check boxes indicating that the IEP team decided that Student did not need ESY because the Student did not experience regression or have a prolonged recoupment period. (Ex. S16 at 719.)

Annual Goals 2018 – 2020 school years.

160. The January 5, 2018 IEP included the following descriptions of Student's AGs:

- Writing AG. Student will write two paragraphs with four to six sentences with correct English Language conventions in 4 of 5 times. STO one states Student will write a paragraph with four to six sentences, STO two states Student will write two paragraphs with proper English Language conventions, STO three states Student will write two paragraphs with proper organization, STO four states Student will write two paragraphs with planning taken in the areas of ideas and content, and STO five states Student will write two paragraphs and have correct letter placement on the line and line spacing²². (Ex. S8 at 332.)

²¹ Parent's copy of the January 5, 2018 IEP does not indicate whether or not Student requires ESY. (Ex. S9:310.)

²² Parent's copy of the January 5, 2018 IEP does not include STOs three, four, or five. (Ex. S9:302.)

- Math AG. Student now doing average of 24 lower/smaller single digit multiplication problems in one minute 100% accuracy. Over the next year, Student will receive instruction and will grow in knowing all the single digit multiplication and division facts with 100% accuracy in 30/minute. No STO. (Ex. S8 at 333.)
- Reading AG. Student now scoring 75% correct on multi choice reading comprehension at 2nd Grade level. Over the next year, Student will score 85% correct on multi choice reading comprehension measures at 3rd Grade level. No STO. (Ex. S8 at 334.)
- Behavior AG. Student will be able to express how he/she feels about the conflicts in his/her schedules and tell to a teacher about what can be done in four of five opportunities. STO one states Student will be able to see he/she has an issue with his/her schedule. STO two states Student will be able to tell an adult that he/she has an issue with his/her schedule. STO three states Student will be able to express an idea of what can be done. STO four states Student will talk to a teacher at the end of the day and express what went well and what did not go so well²³. (Ex. S8 at 335.)

161. The April 2018 IEP AGs for writing, math and reading were identical to those listed in the January 5, 2018 IEP. (Ex. S11 at 388-390.)

162. The behavior AG on the April 2018 IEP was changed to a social emotional goal. The AG indicated that Student would be given SDI in emotional regulation skills and identification of various tools such as breathing and breaks. Student would resolve social problems he/she experiences as measured by receipt of 90% of points for calm and safe behavior on his/her daily point sheet over three consecutive weeks. STO one indicated that Student would use words or nonverbal cue to indicate he/she needs a break or help. STO two indicated that Student will use his/her words with peers to initiate, take turns and resolve conflict as measured by teacher observation of peer interactions. (Ex. S11 at 291.)

163. The December 13, 2018 IEP included the following descriptions of Student's AGs:

- Writing AG. Student will independently write a complete paragraph with proper conventions and grammar. (Ex. S12 at 430.)
- Math AG. Student will master multiplication facts and work on solving single and multi-digit multiplication and division problems. (Ex. S12 at 428.)
- Reading AG. Student will independently read and comprehend at a fourth grade level. (Ex. S12 at 429.)
- Behavior AG. The AG states "Student will" but is otherwise blank. (Ex. S12 at 431.)

164. The December 2, 2019 IEP included the following descriptions of Student's AGs:

- Writing AG. Student will independently write a complete paragraph with proper conventions and grammar. (Ex. S14 at 544.)
- Math AG. Student will work on money concepts with 80% accuracy over three of four assessments. (Ex. S14 at 542.)
- Reading AG. Student will independently read and comprehend at a fourth grade level. (Ex. S14 at 543.)

²³ Parent's copy of the January 5, 2018 IEP does not include STO four. (Ex. S9:305.)

- Behavior AG. In a situation where Student has reached a level 2 escalation (picking of ears, refusal to follow directions, cursing at staff, toileting issue) Student will respond to the following prompt “[Student] I want you to go to a table to talk with a teacher and get putty or you can take a break with the blanket and we can talk after.” by safely picking one of the options in four of five instances per week as measured by the break log or teacher observations. (Ex. S14 at 545.)

165. The January IEPs contain the same AGs as the December 2019 IEP. (Ex. S16 at 712-715, S18 at 751-752.)

166. The September 18, 2020 IEP included the following descriptions of Student’s AGs.

- Writing AG. Student will independently write a complete paragraph of three to five sentences with proper conventions and grammar with 75% accuracy on three of four probes or work samples. STO one states Student will independently write a complete opening topic sentence for a paragraph with 75% accuracy. STO two states Student will independently construct sentences that will address the topic of the paragraph with 75% accuracy. STO three states Student independently self-check his/her work for grammatical errors with 75% accuracy. (Ex. S21 at 978.)
- Math AG. Student will demonstrate with 75% accuracy, using place value that he/she is able to add/subtract/multiply/divide with decimals on three of four trials. STO one states Student will add multi digit decimals by multi digit decimals with 75% accuracy. STO two states Student will subtract multi digit decimals by multi digit decimals with 75% accuracy. STO three states Student will multiply multi digit decimals by multi digit decimals with 75% accuracy. STO four states Student will divide multi digit decimals by multi digit decimals with 75% accuracy. (Ex. S21 at 976.)
- Reading AG. Student will read fiction and nonfiction text at approximately the fourth grade level and independently answer comprehension questions on the given reading with 75% accuracy on three of four trials. STO one states Student will be able to tell the theme of the text with 75% accuracy. STO two states Student will be able to compare and contrast the point of view of the text with 75% accuracy. STO three states Student will be able to summarize what he/she read in his/her own words with 75% accuracy. (Ex. S21 at 977.)
- Behavior AG. Student will ask for help with problem solving before his/her behavior reactions get to a physically aggressive level 75% of the time STO one states Student will be able to identify how his/her body feels when he/she is becoming frustrated with 75% of the time. STO two states Student will be able to request a break by saying, “I need a break” 75% of the time. STO three states Student will be able to take a break, either in place or a designated area, when prompted 75% of the time. (Ex. S21 at 979.)

Supplemental Aid/Services/Modifications 2018 – 2020 school years.

167. The January 2018 IEP included the following summary of Student’s several aids and services. The District would implement Student’s behavior plan in full throughout the day at all school sites. The behavior plan indicated that an intervention was needed on average once per day. The break area aid and service indicated that a break space is used on average a couple of times a month and that it was important for a break space to be available throughout the day across all school setting. The District also indicated that it would implement the bathroom and

seizure protocol. (Ex. S8 at 339.) The District planned to consult with the special education teacher regarding behavior twice a year as needed. (Ex. S8 at 340.)

168. Parent's copy of the January 5, 2018 IEP included the provision that the District would provide Student with adult support who was trained in Student's behavior plan and appropriate PWS positive interventions at all times and all school sites starting on January 6, 2018. (Ex. S9 at 308-309.)

169. The April 2018 IEP listed the same behavioral and break area supplemental aid from the January 2018 IEP along with the consultation on behavior. A food protocol was listed as a supplemental aid to be used daily in all school sites starting on June 15, 2018 but no details were provided in the IEP. (Ex. S11 at 395.)

170. The December 2018 IEP listed the same behavioral and break area supplemental aids from the January 2018 IEP along with a consult for behavior. No food protocol was listed as a supplemental aid on the December 2018 IEP. (Ex. S12 at 433.)

171. The December 2019 IEP included the following summary of Student's aids and services. The District would provide a break area and that a restroom and seizure protocol would be available. No food protocol was listed as a supplemental aid. (Ex. S14:547-548.) The December 2019 IEP also indicated that the District would provide Student with adult support by individuals who were trained in Student's behavior plan and appropriate PWS interventions and that the support would be provided at all times and all school sites. The District would also implement Student's behavior plan at all times and all school sites. The District would also provide Student a seat away from any food storage areas. (Ex D12 at 4-6.)

172. The January 3, 2020, IEP included the following summary of Student's aids and services. The District indicated that a behavioral plan would be implemented, that a break area would be available, that a restroom and seizure protocol would be available, that adult assistance would be available during transitions and general education classes, that Student would be given class notes in general education classes, that Student would be seated away from any potential area that may contain food, and that the District would provide Student with adult support by individuals who were trained in Student's behavior plan and appropriate PWS interventions and that the support would be provided at all times and all school site. No food protocol was listed as a supplemental aid. (Ex. S16 at 717-718.)

173. The January 22, 2020, IEP included fewer supplementary aids and services than prior IEPs. The services of the behavior plan, the break area, the bathroom and seizure protocol, and adult assistance during transitions and general education classes were removed. The provision requiring that adult support be provided by individuals who were trained in Student's behavior plan and appropriate PWS interventions service was included. (Ex. S18 at 754.)

174. The September 2020 IEP included the following summary of Student's aids and services. The District indicated that a behavioral plan would be implemented all day at school, that a break area would be available, that there would be daily communication between the school and home, that adult support would be provided by individuals who were trained in Student's behavior plan

and appropriate PWS interventions and that the support would be provided at all times and all school sites. The IEP also provided that class notes would be given. (Ex. S21:982.) The services section of the IEP also indicated that food security would occur in all in-school environments school wide, that the District would develop a food plan for each activity outside of school, and that the food safety protocol would be implemented. (Ex. S21:983.) The District also listed a support of a three hour PWS training for staff and ongoing consultation. (Ex. S21 at 984.)

Specially Designed Instruction 2018 – 2020 school years.

175. The October 3, 2017 IEP included the following description of Student's SDI:
- Writing 15 minutes daily by special education teacher in the special education class.
 - Math 20 minutes daily by special education teacher in the special education class.
 - Reading 20 minutes daily by special education teacher in the special education class.
 - Behavior 30 minutes weekly at all school sites. (Ex. S5 at 260.)
176. The January 2018 IEP included the following description of Student's SDI:
- Writing 15 minutes weekly in the special education class.
 - Math 50 minutes weekly in the special education class.
 - Reading 50 minutes weekly in the special education class.
 - Behavior 30 minutes weekly at all school sites. (Ex. S8 at 338.)
177. The April 2018 IEP included the following description of Student's SDI:
- Writing 15 minutes daily by special education teacher in the special education class.
 - Math 50 minutes weekly by special education teacher in the special education class.
 - Reading 50 minutes weekly by special education teacher in the special education class.
 - Behavior 30 minutes weekly at all school sites. (Ex. S11 at 394.)
178. The December 2018 IEP included the following description of Student's SDI:
- Writing 15 minutes weekly by special education teacher in the special education class.
 - Math 50 minutes weekly in the special education class.
 - Reading 50 minutes weekly in the special education class.
 - No minutes for SDI in behavior are listed. (Ex. S12 at 432-433.)
179. The December 2019 IEP included the following description of Student's SDI:
- Writing 15 minutes daily by special education teacher in the special education class.
 - Math 10 minutes weekly by special education teacher in the special education class.
 - Reading 50 minutes weekly by special education teacher in the special education class.
 - No minutes for SDI in behavior are listed. (Ex. S14 at 546.)
180. The January IEPs contain the same amount of SDI as the December 2019 IEP. (Ex. D12 at 4, S18 at 753.)
181. The September 2020 IEP included the following description of Student's SDI:
- Writing 15 minutes daily by special education teacher in the special education class.
 - Math 50 minutes weekly by special education teacher in the special education class.

- Reading 50 minutes weekly by special education teacher in the special education class.
- Behavior 50 minutes weekly in the special education class.
- Self-care skills 50 minutes weekly by special education teacher in the special education class. (Ex. S21 at 981-982.)

Placement 2018 – 2020 school years.

182. The June 6, 2018 IEP included a summary of Student's placement options. The placement option for 40 to 79% of day in general education listed a possible harmful effect of having fewer staff who were trained in Student's behavior plan and was rejected as not meeting Student's needs. The placement option of 80% or more in general education was rejected as having the same possible harmful effect and reason. Neither option listed training more staff in Student's behavior plan as an option. (Ex. D8:3) The placement option for less than 40% of the day in general education classes was selected. That option listed the possible harmful effects as less time exposed to grade level academics or social situations and the benefits were listed as having multiple staff trained in Student's behavior plan, modified curriculum, heavy supports in the classroom environment, and access to a break space. (Ex. D8 at 4.)

183. The December 13, 2018 IEP included the following summary of Student's placement options. The placement options for 40 to 79% of day in general education listed a possible harmful effect of less staff who were trained in behavior plan and the benefits were listed as more time exposed to grade level academics or social situations. This option was selected as best meeting Student's needs. (Ex. D9 at 1) The placement option for 80% or more in general education was rejected with a possible harmful effect of less staff who were trained in behavior plan and reduced time learning at current academic level. The placement option for less than 40% of the day in general education classes was rejected. That option listed the possible harmful effects as less time exposed to grade level academics or social situations and the benefits were listed as multiple staff trained in Student's behavior plan, modified curriculum, heavily supports classroom environment, and access to a break space. (Ex. D9 at 2.)

184. The December 2, 2019 placement options were all identical to the December 2018 IEP. The team selected the identical option of 40 to 79%. (Ex. D11.)

185. The placement option in the January 9, 2020 and January 22, 2020 was identical to the December 2018 and December 2019 IEPs. The form indicates that the team selected the identical option of 40 to 79% in general education classes. (Ex. D12 at 3, D113 at 3-4.)

186. The September 2020 IEP included the following summary of Student's placement options. The placement option for less than 21% of the day in special education classes and 80% or more of the day in general education was rejected as not being optimal for complete food security. The placement option for 21 to 60% in special education classes and 40 to 79% in general education classes was rejected as not being optimal for complete food security. The placement option of more than 60% special education classes and less than 40% in general education classes was selected as providing food security and assistance to the Student. The placement option of residential placement was rejected and indicated that FAPE was being provided for Student in the public school setting. (Ex. S24 at 990-991.)

187. Progress Reports 2018-2020 school years.

188. The District included the following description for the writing progress reports:

- February 1, 2018 making progress. Student has not made much progress since IEP created on January 5, 2018. Student is averaging six sentences per paragraph but has not started to write two paragraphs yet. Student is using correct letter placement on the line. (Ex. S91 at 314.)
- June 15, 2018 making progress. Student will write two paragraphs with four to six sentences each with correct English Language conventions. Student is able to write a paragraph with four or more sentences with 100 percent accuracy. (Ex. S91 at 314)
- February 1, 2019 making progress. Student can write a paragraph with support and guidance but is not quite independent yet. He/she has good letter formation but his/her spacing is still an area of struggle. His/her will continue to work on this in Mr. Clare's class. (S92 at 417.)
- March 15, 2019 making progress. Student still requires support for writing. Spacing is still an issue. (S92 at 417.)
- May 3, 2019 making progress. Student continues to require support in his/her writing. Spacing is tough and it will just take time and practice. (S92 at 417.)
- June 13, 2019 making progress. Student enjoys writing and next year she will do more writing on the computer. This will help with spacing and spelling. (Ex. S92 at 417.)
- January 31, 2020, making progress. Student does well support. The ideas are there he/she needs support for the conventions and organizational portion of the writing. (Ex. S93 at 530.)

189. The District included the following description for the math progress reports:

- February 1, 2018 making progress. Student is working on multiplication facts. He/she is averaging 23 problems per minute with 100% accuracy. On a two minute test including smaller numbers he/she scored 17/19. (Ex. S91 at 315.)
- June 15, 2018 progress report 2. Student is averaging 23 multiplication problems a minutes 100% accuracy. In a two minute test, Student scored 17/19 including smaller numbers. (Ex. S91 at 315.)
- February 1, 2019 making progress. Student continues to work on mastery in Mr. Clair's math class. Ex. (S92 at 415.)
- March 15, 2019 making progress. Student is working hard in Mr. Clair's class and also worked on facts in the SLC as well. We are getting there. (Ex. S92 at 415.)
- May 3, 2019 making progress. Student continues to work hard in Mr. Clair's math class.
- June 13, 2019 making progress. Student continues to work hard, he/she would benefit from practicing his/her multiplication facts over the summer. (Ex. S92 at 415.)
- January 31, 2020, making progress. We have not spent a lot of time on this goal as of yet, our next unit will focus on money. (Ex. S93 at 528.)

190. The District included the following description for the reading progress reports:

- February 1, 2018. None listed.
- June 15, 2018 closely monitor progress. Student scored 60% on 3rd Grade level reading comprehension. (Ex. S91 at 316.)

- February 1, 2019 making progress. Student is reading 120 CWPM at the later end of 2nd grade. He/she works on reading in Mr. Clair’s classroom. (Ex. S92 at 416.)
- March 15, 2019 making progress. Student just reached third grade level on fluency. He/she scores 80% on comprehension at a second grade level. (Ex. S92 at 416.)
- May 3, 2019 making progress. Student continues to make great progress with reading. (Ex. S92 at 416.)
- June 13, 2019 making progress. Student is reading well and reading over the summer will help that. Student continues to struggle with comprehension so asking questions as he/she reads will help. (Ex. S92 at 416.)
- January 31, 2020, Student is reading at a fourth grade level with regards to comprehension. His/her word fluency is 126 CWPM at a fourth grade level. (Ex. S93 at 529.)

191. The District included the following description for the social emotional or behavior progress reports:

- February 1, 2018 making progress. Not much change in present levels. Student working on this goal. Student expressed concern to staff one day about his/her schedule “it was very emotional” for him/her and Student was struggling to see that we were trying to come to an agreement about what it would look like for the day.
- June 15, 2018 making progress. Student is doing well with AG by learning to breathe and has used his/her tool of the excuse me sheet. Student is making progress on emotional regulation skills and identification of various tools to use to resolve social problems he/she experiences. (Ex. S91 at 317.)
- January 31, 2020, closely monitor progress. This goal is a work in progress that we are constantly adapting to support Student. He/she in the past week handled himself/herself very well and prevented himself/herself from getting worked up. (Ex. S93 at 531.)

192. When Dr. McTighe first met Student in about 2017 Student he/she was on the midrange of the continuum of PWS severity and was able to handle some food exposure but he/she had to be well prepared in advance. (Tr. v IV 922: 20-23, 923: 17-24.) As of October 22, 2020, Dr. McTighe believed that Student was at that time on the severe end of the spectrum. (Tr. v IV 923: 25-924: 1.)

193. The District has not attempted to provide TFS at NMS. (Tr. v I 125: 14-15.)

194. While Student was attending NMS, the District attempted to provide what they understood was the necessary level of food security in Student’s classes. (Tr. v I 125: 10-126: 3.)

195. The District provided Parent with all of the data they had regarding all of Student’s IEP goals. (I 127:22-128:3.)

196. The IEP team met in May and June 2020 to amend Student’s annual IEP. (Ex. S20.) During the May and June 2020 IEP team meetings, Mr. Belloni felt that the District did not have clarity on the food security protocol. The District decided to develop a food security protocol to show Parent what the District could provide. (Tr. v I 117: 1-6.)

197. The June 2020 IEP provided Student with little involvement with other students in the school building in order to control his/her access to food. (Tr. v I 184: 9-19.)

198. As of October 20, 2020, Ms. Pickett remains uncertain what triggers Student and what does not. (Tr. v II 348: 11-12.)

199. On September 18, 2020, the District created a food safety protocol for Student. The protocol stated that Student would enter the classroom from an outside door, that Student would be met at arrival by an adult who received Student's meals from the parent. The protocol stated that Student would eat only the food provided by the parent, that Student would need to eat in a separate location from his/her peers with an adult who was not eating, and that after meals, the trash would be immediately removed from the room. The protocol stated that food should not be used as a reward or instruction in the classrooms that Student attends, that the classrooms that Student attends must have locks on the cabinets, that students in classes that Student attends should be pre-taught that no food is allowed in the classroom, that students will be reminded they cannot bring food into the SLC, that lessons will not include food topics, that events in the classroom will not involve food, and that staff will work with the parent to determine food access at the event if there is an off-campus activity. The protocol stated that if Student obtained food that was not provided by the parent, the staff should not punish him/her and that parent should be notified. It also provided that if Student was provided a small amount of food, that Student should be allowed to eat the item but that if it was a large amount that it must be taken from Student. It also provided that if food was taken from Student, she/he might exhibit problem behavior and that staff should follow Student's BP, and that staff should not debrief the situation. The protocol also addressed how food should be addressed in distance learning situations. (Ex. S89 at 962-963.)

200. On September 18, 2020, the District created a BP. The BP contained a hypothesis statement that when Student was exposed to many different areas of school where students have free access to food, or when food may become part of the culture of celebration, or when he/she is exposed to more challenging curriculum, or when he/she encounter social situations he/she is unsure of, Student may access food without permission, become aggressive to peers and adults, or shut down to gain access to food or withdraw from a challenging environment. Listed under short term replacement behaviors were having Student be able to identify how his/her body feels when he/she is becoming frustrated, Student being able to talk calmly with medium voice projection when he/she is responding to activities. Listed under desired goal behavior was having Student ask for help with problem solving before his/her behavioral reactions are physically aggressive. The proactive strategies and supports were maintaining a positive affect and calm tone when working with Student, checking in frequently while Student was working, phrasing directives as a choice, and using picture icons of first and next for academics. Keeping food locked, out of sight, and away from Student locked, adult support, and allowing for the use of putt were identified as methods to modify antecedent behaviors. The BP also listed the teaching strategies for helping Student learn to identify how his/her body feels when he/she is becoming frustrated, and being able to request a break and how the District would reward Student for appropriate behaviors. The BP listed a crisis plan indicating that if Student was destructive or disruptive an adult should direct Student to take a break in the break area, that if Student removed his/her clothes, urinated, or defecated to initiate a room clear, inform administration,

attempt to de-escalate, and notify the parent by the end of the school day. The crisis plan also indicated that if Student was escalated and left the campus, staff should follow and attempt to de-escalate Student enough to get him/her to return to the classroom but if Student did not return, to contact parent and potentially law enforcement. The BP listed the data to be collected weekly and that the BP should be reviewed every 9 weeks, that adjustments to the BP may be made, and that Student, the parent and staff who work with Student should receive updated BPs. The BP also talked about what to do during distance learning if Student exhibited inappropriate behavior. (Ex. S72.)

201. Dr. McTighe opined that the hypothesis statement in the September 18, 2020 described behaviors that are common in children with PWS and not behaviors that staff would be able to decrease or eliminate through a behavior plan. When a child with PWS is in these situations they will withdraw and shut down as an expected response. (Tr. v IV 959: 7-15.)

202. The District proposed that at NMS, and in high school, that Student be educated in the SLC full-time because the District believes it can provide food security in that classroom. The District proposed this placement in order to keep Student insulated from food exposures at school. Under this proposed placement, Student would need to remain in the SLC the entire day to maintain food security. (Tr. v III 880: 3-18.)

203. The District believed that in order to provide food security to Student, on an ongoing basis, it would be necessary for Student to have no contact with students other than those in the SLC (Tr. v I 184: 14-19.)

204. Latham Center is a comprehensive residential educational center located in Brewster, Massachusetts (Tr. v VI 1459: 22-1460: 4). The Center is accredited by the Council of Accreditation. (Ex. 195 at 598.) The Center has been in existence for fifty years, serving the educational needs of its students for approximately thirty of those years. (Tr. v VI 1510: 7-9.) The Center has served hundreds of students with PWS have been served over that time. The majority of the students with PWS are on the severe end of the continuum. (Tr. v VI 1510: 10-20.) The Center serves students with various disabilities, including PWS, between the ages of eight and 22 (Tr. v VI 1459: 22-1460: 25.) Their current enrolment is 43 students and half of the current student population has been diagnosed with PWS. (Tr. v VI 1460: 20-1461: 4.) Students at The Center are taught by certified special educators in classes no larger than seven students. (Tr. v VI 1464: 22-25.) A class of seven students is taught by one special educator and one paraprofessional. (Tr. v VI 1464: 22-25.) The Center collaborates with sending school districts to create IEPs, provide instruction, monitor, and update progress on educational goals quarterly. (Tr. v VI 1465: 1-6, 1466: 4-18.) The Center uses a multidisciplinary approach to ensuring educational, behavioral, social, emotional, and medical needs are appropriately addressed. The Center includes the local educational agency and Latham's clinical, residential, and nursing teams in quarterly progress meetings. (Tr. v VI 1466: 4-1467: 20.) The Center practices frequent communication with staff members through month team meetings, weekly behavior support meetings and other consults as needed. (Tr. v VI 1544: 21-1545: 7, 1467: 11-20.) Staff at The Center undergo 80 hours of behavior, crisis interventions, and PWS training at the beginning of their tenure and eight hours of annual training (Tr. v VI 1470: 23-1471: 3.) The Center provides TFS throughout its entire campus. (Tr. v VI 1461: 8-19.) The Center provides hundreds of extra-

curricular opportunities to its PWS students in a variety of ways by working with community members to provide either a TFS environment or a food secured environment. (Tr. v 1467: 21-1469: 25.) The cost of The Center is \$260,000 a year. (Ex. S193 at 588.)

205. Student has been accepted as a student at Latham Center pending financial funding. (Tr. v VI 1548: 5-8.)

206. Ms. Blessman believes that a TFS environment is the most critical requirement to calm Student's central nervous system in order for Student to use the coping skills he/she was taught at the Olalla Center to deal with his/her anxiety. (Tr. v IV 1116: 8-18.)

207. Dr. McTighe opined that the LRE for Student "would be a location that provides Student with an opportunity to be with peers that are also diagnosed with PWS." (Tr. v IV 927: 18-25.) She opined that Student needs to be in a place where services can be provided in a TFS environment in order for Student to be able to concentrate enough to make gains in academics. (Tr. v IV 928: 1-6, 986: 5-20.) Dr. McTighe opined that Student needed to attend a school that was specific to PWS because the staff would provide TFS on a 24-hour basis and be around other PWS peers. (Tr. v IV 928: 11-24.)

208. The District is aware that the experts on PWS believe it would be very hard for the District to provide TFS when Student is in high school. (Tr. v I 166: 9-20.)

209. Dr. McTighe opined that providing food security in one room would not be enough to meet Student's needs because there would be an awareness that food was accessible outside the classroom thereby causing Student increased anxiety and food seeking behaviors which would prevent Student from focusing on academic tasks. (Tr. v IV 1075: 11-1076: 4.)

210. Dr. Hilde opined that Student currently needs a very structured environment where there is TFS and where Student can be with peers who are similar to Student. (Tr. v V 1206: 10-25.)

211. Mother does not believe that the Districts offer of food security in the SLC will work for Student because it is not clear from the IEP that Student would be allowed to attend assemblies, school activities, elective classes, field trips, or even walk through school hallways because he/she might see advertisements of activities including food events going on at the school. (Tr. v V 1337: 9-1338: 4.)

212. PWS training in August and October 2020, was provided to select District staff by Dr. McTighe. Dr. McTighe provided both general information about PWS and specific information about Student including the role anxiety played in Student's behavior, positive supports, behavior supports, Student's triggers, and food security needs. (Tr. v VI 1774: 2-23.) Dr. Gray did not attend the PWS training. (Tr. v VII 1844: 12-14.)

213. Dr. Gray speaks with District principals on a regular basis. (Tr. v VII 1834: 15-24.) Dr. Gray has never spoken to Mr. Belloni or any other District staff about food security or about developing a plan for TFS at any school in the District. (Tr. v VII 1845: 10-22.)

CONCLUSIONS OF LAW

1. The District denied Student FAPE in violation of the IDEA between May 21, 2018 and May 21, 2020.
2. The District did not deny Student FAPE under Section 504 by acting with deliberate indifference toward his/her need for SDI, services, and accommodations.

OPINION

In due process hearings where a party is alleging violations of the IDEA, 20 U.S.C § 1400 *et seq.*, the party seeking relief has the burden of proof. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter, Parent, filed a due process complaint on March 20, 2019, on behalf of Student and herself, alleging procedural and substantive violations of the IDEA resulting in a denial of FAPE for Student during portions of the 2018-2019 and 2019-2020 school years.

Specifically, the period in issue in this case began on May 21, 2018 and continued through the date Parent filed the original due process complaint, May 21, 2020. Parent seeks the following remedies; *a comprehensive evaluation of Student; an IEP meeting with the applicable experts to produce an appropriate IEP, appropriate BP, and appropriate safety plan; an order requiring the District to fund residential placement at Latham Center or an appropriate alternate placement; an order requiring the District provide TFS school-wide; training for District staff; compensatory education; and attorney's fees incurred for bringing this action.*

In administrative hearings, a party who bears the burden must establish each fact or position by a preponderance of the evidence. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (the standard of proof that generally applies in agency proceedings, is the preponderance standard.); see also *Cook v. Employment Division*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

The IDEA was enacted to require educational agencies receiving federal funds to provide special education services for students with qualifying disabilities. See 20 U.S.C. § 1400(d)(1)(A). To meet its substantive obligation under the IDEA, a school must offer an “individualized education program” reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). Under the IDEA, all children deemed eligible for special education have a right to receive a FAPE. 20 U.S.C. § 1412(1). The IDEA defines FAPE as special education and related services that: (a) have been provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the state educational agency; (c) include an appropriate preschool, elementary, or secondary school education in the state involved; and (d) are provided in conformity with the IEP required under § 1414(a)(5) of the IDEA. 20 U.S.C.

§1401(a)(18); *Amanda J. v. Clark County School Dist.*, 267 F3d 877, 890 (9th Cir. 2001).

Determining whether a school district provided a student with a FAPE is a twofold inquiry: (1) whether the district complied with the procedures set forth in the IDEA; and (2) whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefits. *Board of Educ. of Hendrick Hudson School District v. Rowley*, 458 US 176 (1982) (*Rowley*). Further, the United States Supreme Court has determined that, in order for an IEP to be deemed sufficient to meet the stated goals, it must be appropriately ambitious in light of the child's unique needs and circumstances. *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017).

In this case, Parent alleges both procedural and substantive violations of the IDEA. With regard to procedural violations, 34 CFR §300.513(a)(2) permits an ALJ to find a denial of FAPE only where the alleged procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' right to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefit to the child.

To provide a FAPE in compliance with the IDEA, a public school district must identify, locate, and evaluate a student in all areas of suspected disability, determine whether that student is eligible for special education, and formulate and implement an IEP with appropriate measurable goals and related services. 20 U.S.C. §§ 1412 and 1414; *see also* OARs 581-015-2080, 581-015-2100 through 2205.

Parent's allegations are addressed individually in the sections below.

1. Whether the District denied Student FAPE in violation of the IDEA between May 21, 2018 and May 21, 2020, by

a. Failing to reevaluate Student.

In the Complaint, Parent alleged that the District failed to evaluate Student on three separate occasions. For the reasons below, I agree that the District failed to reevaluate Student.

OAR 581-015-2105 identifies the reevaluations requirements and provides, in relevant part:

* * * * *

(4) Reevaluation:

(a) The public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with OAR 581-015-2115, subject to subsection (b) and OAR 581-015-2110(2):

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

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

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

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

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

The District's failure to properly evaluate to understand the extent and nature of Student's needs when it was clear Student was either regressing or was at least failing to progress, significantly undermined District's ability to put together an appropriate behavioral and academic program.

* * * * *

OAR 581-015-2100 provides the evaluation and reevaluation procedures and provides, in relevant part:

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

* * * * *

(3) Conduct of evaluation. In conducting the evaluation, the public agency must:

(a) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining:

(A) Whether the child is a child with a disability under OAR 581-015-2130 through 581-015-2180; and

(B) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(b) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(c) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(4) Other evaluation procedures. Each public agency must ensure that:

(a) Assessments and other evaluation materials used to assess a child under this part:

(A) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(B) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to do so;

(C) Are used for the purposes for which the assessments or measures are valid and reliable;

(D) Are administered by trained and knowledgeable personnel; and

(E) Are administered in accordance with any instructions provided by the producer of the assessments.

- (b) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.
- (c) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).
- (d) 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;
- (e) The evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified; and
- (f) The evaluation includes assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.

(5) Evaluation timelines:

* * * * *

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

(c) Exceptions. An evaluation may be completed in more than 60 school days under the following circumstances documented in the child's educational record:

- (A) The parents of a child repeatedly fail or refuse to produce the child for an evaluation, or for other circumstances outside the school district's control.
- (B) The student is a transfer student in the process of evaluation and the district and the parents agree in writing to a different length of time to complete the evaluation in accordance with subsection (d);
- (C) The district and the parents agree in writing to extend the timeline for an evaluation to determine eligibility for specific learning disabilities in accordance with OAR 581-015-2170.

* * * * *

In its closing brief, the District argued that it continuously evaluated Student through regular educational data collection by its teachers and service providers. While the evidence did demonstrate that the District regularly collected worksheets and similar data on Student's educational performance, such data collection does not meet the IDEA's requirements for formal evaluation and reevaluations.

In the Ninth Circuit, "the sufficiency of a school district's actions, including evaluation decisions and decisions regarding the student's substantive educational curriculum are judged by the snapshot rule." *Forest Grove Sch. Dist. v. Student*, No. 3:12-cv-01837-AC, 2014 WL 2592654 at *20 (D. Or. June 9, 2014) (citing *Adams v. State of Oregon*, 195 F.3d 1141, 1149

(9th Cir. 1999).) When making an assessment of whether an eligibility determination is “appropriate” under the IDEA, the administrative law judge looks to the time of the student’s evaluation by the school district. *See also, L.J. v. Pittsburg Unified Sch. Dist.*, 835 F.3d 1168, 1175 (9th Cir. 2016.) In applying the snapshot rule, a court must determine whether the school district’s actions were reasonable considering the facts known when the decision was made. *Adams*, 195 F.3d at 1149. Moreover, the team’s decision is judged based on whether it took into account all relevant information from the snapshot period. *L.J.*, 835 F.3d at 1175.

The Ninth Circuit has also held that a disability is suspected, and therefore must be assessed by a school district, when the school district has notice that the child has displayed symptoms of that disability. *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d. 1105, 1120 (9th Cir. 2016). Inherent in that rationale is the requirement that a school district must investigate what the symptoms result from a student’s disability.

Further, at least one court has held that a school district’s knowledge of a student’s anxiety and absences required the school district to arrange an evaluation of student. *Independent Sch. Dist. No. 413, Marshall v. H. M. J. by A.J. and M. N.*, 66 IDELR 41 (D. Minn. 2015). In *Timothy O.*, school administrators noted that a three-year-old child displayed autistic-like characteristics. In response, the district hired an outside consultant to informally observe the child. The consultant then concluded, erroneously, that the child did not have autism. The court specifically held that school districts cannot circumvent their responsibility “by way of informal observations, nor can the subjective opinion of a staff member dispel such reported suspicion.” 822 F.3d. at 1119. The school district’s failure to assess the child in all areas of suspected disability “deprived his IEP Team of critical evaluative information about his developmental abilities as an autistic child,” denying him “critical educational opportunities and substantially impairing his parents’ ability to fully participate in the collaborative IEP process.” *Id.*

In this case, beginning in September 2019, Student began to exhibit an increasing number of inappropriate behaviors at school including smearing and throwing feces. Through October and mid-November 2019, Student locked himself/herself in the bathroom, stole food from another student, and stole candy and a Lego set from a teacher. Mother reported that Student was experiencing anxiety and stress from these incidents. The District responded by arranging for a school psychologist to complete an FBA to develop a functional hypothesis of Student’s behavior.

While Student began struggling with severe behavioral issues at the start of the 2019-2020 school year for the first time at NMS, this was not the first time that the District had observed these behaviors. Based upon what District employees observed in 2015 and 2016 when Student exhibited similar inappropriate behaviors at Sam Case Elementary, the District should have watched closely for escalations of inappropriate behavior. The subsequent frequency and severity of Student’s behaviors should have indicated to the District that it needed to reevaluate Student using a variety of assessment tools and strategies, as required by OAR 581-015-2100(3), to gather relevant functional, developmental, and academic information about Student and the symptoms of Student’s disabling conditions rather than simply conducting an FBA.

While having an FBA conducted shows that the District used an assessment tool, the District relied on that single FBA to determine the likely function of Student's behavior. Unfortunately this record demonstrates that the FBA was inadequate and the information it provided was insufficient to assess Student in all areas of suspected disability. The testimony of the District's FBA expert's, Ms. Perucci, is of limited value regarding the adequacy of the FBA as she admitted that she failed to analyze whether the components of the FBA contained the required elements. Dr. Quirk, the parents FBA and BP expert, opined that the FBA was flawed because it failed to provide information about Student's motivations, interests, strengths, and challenges, useful quantitative data, helpful information from assessment given, insufficient information in the intensity section, and because it failed to indicate what consequences were related to what behaviors.

In this case, Ms. Lilley (who conducted the FBA) never spoke to Student (who had demonstrated some insight into his/her condition) nor did she interview Mother. In addition, the District failed to put forth any evidence that once the FBA had been presented at an IEP team meeting that the District changed Student's BP to address the findings of the FBA. The evidence makes it clear that Student's behavior continued to escalate after the FBA was completed and became more dangerous even after he/she was removed from general education and put into a special education class full time. Furthermore, the District did not provide adult support, by individuals who were trained in Student's behavior plan and trained in appropriate PWS interventions²⁴, as required by Student's December 2019 IEP.

Because Student's inappropriate behavior was school related and prevented his/her from making meaningful progress, the District was required to gather additional relevant functional, developmental, and academic information about Student and it failed to do so when it failed to investigate how Student's condition was affecting his/her functioning, development, and academic performance. The ineffectiveness of its supports and services should have prompted the District to conduct a more thorough reevaluation. The failure to reevaluate Student using a variety of assessment tools and strategies deprived the IEP team of crucial information that was readily available from PWS experts who eventually provided that information to the District in August 2020. The District's failure to properly evaluate Student denied him/her educational opportunities resulting in a denial of FAPE beginning in September 2019 and continuing through May 21, 2020.

b. Failing to develop appropriate IEPs for Student.

In the Complaint, Parent alleged that the IEPs during the period at issue contained inappropriate PLAAFP, AGs, and supports, aids, and services. The Complaint also alleged that the IEPs lacked appropriate behavioral supports.

The IDEA contemplates that, by the time a school district convenes an IEP meeting, it has complied with the detailed procedural requirements of locating, identifying, evaluating, and determining as eligible children with disabilities in need of special education and related services. Only after compliance with those strict procedural requirements will a school district be

²⁴ There was no evidence presented to establish that Ms. Paytas was trained in positive PWS interventions.

adequately prepared to craft an educational plan with content appropriate to meet the substantive requirements of the IDEA. *See* OARs 581-015-2080, and 581-015-2015, through 581-015-2120.

OAR 581-015-2200 provides the requirements for IEPs in Oregon and provides, in relevant part:

- (1) The individualized education program (IEP) must include:
 - (a) A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum.
 - (b) A statement of measurable annual goals, including academic and functional goals (and, for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of short-term objectives) designed to:
 - (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
 - (B) Meet each of the child's other educational needs that result from the child's disability.
 - (c) A description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
 - (d) A statement of the specific special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child:
 - (A) To advance appropriately toward attaining the annual goals;
 - (B) To be involved and progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and
 - (C) To be educated and participate with other children with disabilities and children without disabilities,
 - (e) The projected dates for initiation of services and modifications and the anticipated frequency, amount, location and duration of the services and modifications described in subsection (1)(d) of this rule.
 - (f) An explanation of the extent, if any, to which the child will not participate with children without disabilities in the regular class and activities described in subsection (1)(d) of this rule.
 - (g) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments of student achievement that are needed for the child to participate in the assessment:
 - (A) A child may not be exempt from participation in State or district-wide assessment, including extended and juried assessments, because of a disability, unless the parent has requested an exemption under OAR 581-022-0612.

(B) If the IEP team determines that the child must take the alternate assessment instead of the regular Statewide or a district-wide assessment, a statement of why the child cannot participate in the regular assessment, and why the alternate assessment is appropriate for the child.

The December 13, 2018, December 2, 2019, and January 2020 IEPs were created during the period at issue. To analyze these IEPs the PLAAFPs, AGs, and supports, aids, and services of each of the IEPs will be examined.

To meet its substantive obligation under the IDEA, a school must offer an individual education program (IEP) reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). A school district must "be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.*, 137 S. Ct. at 1002.

Present Levels. In Oregon the PLAAFP section of the IEP must contain a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum. OAR 581-015-2200(1)(a).

There are several problems with the December 13, 2018 PLAAFP section. In the January 2018 IEP, the PLAAFP section provided numerous details about what specifically Student was able to perform academically and behaviorally. As an example the January 2018 IEP stated that Student met his/her goal of writing a five sentence paragraph with sentence of five words or more with proper punctuation in five of six opportunities and was able to write a paragraph with an average of six sentences. The January 2018 IEP also described Student's progress in taking breaks on his/her own as opposed to being directed by a teacher. When examined as a whole, the January 2018 IEP establishes that the District was aware of how to provide a statement of present levels of academics and functional performance along with information about how Student's disability affects him/her.

However when the information included in the PLAAFP section of the IEP in the December 2018 IEP is examined, this IEP is found to be insufficient. The December 2018 IEP present levels are vague and use conclusory language such as "writing well" and working on "third and fourth grade concepts." When the December 2018 PLAAFP section of the IEP is examined, the overall conclusory wording contained insufficient details about Student actual present levels of achievement either in function or academics. The IEP team would be unable to tell what Student's performance levels were for writing, reading, math, or behavior. The IEP team also would be unable to use the information to write appropriate goals and supports or judge if such goals and supports that were included were appropriate. In addition, the IEP provided no details about how Student's conditions were affecting his/her functional performance including such behaviors as sleeping for significant portions of the school day in the SLC or missing math for a snack.

When the December 2019 IEP and its two January 2020 IEP amendments are examined, they are also inadequate for the same reasons as the December 2018 IEP. The January 2020 amendments did not provide any additional information about Student's present levels. The December 2019 IEP provided a few additional details about what impact Student's conditions caused in academic areas but failed to provide details about how Student's conditions affected his/her functional performance at school. By this point in the school year, Student had several incidents involving feces, hit another student, stole food, stole items from a teacher, and had been reported to be experiencing stress and anxiety multiple times. At that point, the District was in the process of having an FBA conducted, however, the PLAAFP section failed to provide sufficient details about Student's present performance to create proper AGs and supports or to judge if the ones listed in the IEP were appropriate.

For the above reasons, December 13, 2018, December 2, 2019, and the January 2020 IEPs fail to meet the procedural requirements with regard to PLAAFP.

Annual Goals. In Oregon AGs must be measurable and designed to meet a child's needs in order for him or her to make progress in light of their disability. OAR 581-015-2200(1)(b).

The January 2018 IEP shows that the District was able to generate AGs that could both be measured and designed to meet Student's needs. As an example, the reading AG indicated that Student was scoring 75% correct on multi choice reading comprehension at 2nd Grade level. Over the next year, Student was expected to score 85% correct on multi choice reading comprehension measures at third grade level. The January 2018 IEP behavior AG stated that Student was expected to be able to express how he/she feels about the conflicts in his/her schedules and talk to a teacher about what can be done in four of five opportunities. The AG contained four STOs that broke that goal down further.

The December 2018 IEP is much more vague and contains no behavioral or social/emotional AGs despite Student missing significant amounts of instructional time due to his/her behavior. When the December 2018 IEP AGs are examined, they are not all measurable. The reading AG indicated that Student would need to read and comprehend independently but the present level statement made no mention of independence. In addition, the reading AG does not appear to meet Student's specific needs as the present level statement indicated that Student was reading and comprehending at the second grade level in contrast to the January 2018 IEP which indicated that he/she had been reading an average of 133 words a minute at a third grade level. That difference indicates that there was either regression or that the January 2018 present level statement was inaccurate. In any event, the AG in reading as set forth in the December 2018 IEP does not appear to specifically address Student's then-current needs in reading.

The writing AG like the reading AG is vague due to the use of the words "complete" and "proper." It is unclear what the District meant by either complete or proper which make it difficult for a parent to know what exactly was being worked on or measured. In addition, Student was writing paragraphs of five sentences containing five words with proper punctuation in five of six opportunities in January 5, 2018 and was averaging six sentence paragraphs. There is no indication in the meeting notes or the December 2018 IEP to explain why the writing AG was so different. It might well be that the District was working on nine sentence paragraphs or

something similar. It is simply not clear. The math AG in the December 2018 is also vague as it indicated that Student would master multiplication facts and work on solving single and multiple digit multiplication and division problems. The present level for math referred to working to third and fourth grade concepts. It is unclear what mastering multiplication facts might involve. The math AG does not sufficiently indicate if this goal would meet Student's needs nor how to measure the difference between solving problems and mastering facts.

Finally, the behavior AG for the December 2018 IEP is measurable as it indicates that Student will follow a prompt and take an action in four of five instances per week. However, it is not clear from Student's present levels why this AG would meet Student's needs. The December 2018 PLAAFP indicates that Student had been using the break room successfully and that Student's behavior was not an issue in the classroom.

The December 2019 IEP contained the same writing AGs as the December 2018 IEP. The 2019 PLAAFP section indicated Student could write three to four sentences with minimal grammatical errors. The present level in writing appeared to indicate even more possible regression as there was no mention that Student was still able to write paragraphs. As in the December 2018 IEP, there was no indication of how this AG would be appropriate if Student was now only able to write a few sentences. The December 2019 reading AG and behavioral AG are also identical to the December 2018 reading AG and are inappropriate for the same reasons. In addition, repeating goals when there is no explanation provided for the repetition makes the AGs appear unsuitable for Student in light of Student's repeated and unexplained failure to meet them. The December 2019 math AG is vague as it indicated that Student would work on "money concepts." There was simply not enough detail to determine what exactly the AG was measuring nor to tell if this goal would meet the needs of a student with PWS.

For the reasons above, the AGs in reading, math, writing, and behavior do not meet the requirements of the Oregon administrative rules and are procedural violations.

Supplementary aids and services. In Oregon an IEP must specifically list aids, services, and supports that would help a student advance appropriately toward attaining the student's AGs, to help a student participate and progress in the general education curriculum, to help a student participate in nonacademic activities, and to enable a student be educated and participate with other children both disabled and non-disabled. OAR 581-015-2200(1)(d).

In the Complaint, Parent alleged that the IEPs at issue lacked the appropriate aids, supports and services. The December 2018 IEP listed the same behavioral and break plan supports that were listed in the January 2018 IEP. However, the December 2018 IEP did not list the 2018 food protocol as an aid. It is clear from the June 2018 food protocol, Ms. Turner's April 2018 email, Ms. Bolander's May 2018 email, and the evidence that Student was missing significant instructional time due to sleeping, that food security was necessary at school. The District food protocol indicated that Student was not to have access to food outside of designated meal times. The protocol also listed the steps to take if school celebrations involved food. The 2018 food protocol, while too vague in hindsight according to Dr. McTighe, was an important aid that should have been referenced in the aids and services page.

The December 2019 IEP included a reference to a BP being implemented throughout the day and added an aid of preferential seating away from any potential area that might contain food. It also modified Student's curriculum. The IEP also provided for adult support of a person trained in PWS interventions and Student's BP at all times at school. However, there was no mention of the 2018 food protocol or any aid to limit food exposures in a classroom as Ms. Turner's November 12, 2019 email makes clear were necessary to accommodate Student's medical needs at school. The January 2020 IEPs contain the same deficiency.

Some of the services that were to be provided were listed in the SDI section of the IEP form. The December 2018, December 2019, and January 2020 IEPs contained the same 15 minutes of writing SDI that had been listed in the January 2018 IEP. From a review of the progress notes and present levels, Student appeared to have regressed from the ability to write a five sentence paragraph with sentences of five words or more with proper punctuation in five of six opportunities in January 2018 to writing three to four sentences with minimal grammatical errors when given a writing prompt in December 2019. There was no rationale listed in the IEP or meeting notes for providing 15 minutes of SDI in writing versus a greater or lesser amount. On this record, the evidence failed to establish that the writing SDI the District offered in the December 2018, December 2019, and January 2020 IEPs were sufficient to advance Student appropriately towards attaining his/her writing AG.

For the area of math, the January 2018 IEP indicated that 150 minutes of services would be provided weekly. The December 2018, December 2019, and January 2020 IEPs indicated that 50 minutes would be provided weekly. Again there was no rationale listed in the IEP or meeting notes for that amount of time or why it had been reduced. When the present levels and progress notes are examined, it is unclear that Student was progressing because the PLAAFP and progress notes do not appear to be measuring the same thing. The evidence also failed to establish that the math SDI the District offered in the December 2018, December 2019, and January 2020 IEPs were sufficient to advance Student appropriately towards attaining his/her math AG.

For the area of reading, the same problems arise. The January 2018 IEP indicated that the District would provide 100 minutes of reading services per week. The December 2018, December 2019, and January 2020 IEPs indicated that 50 minutes would be provided weekly. There was no rationale listed in the IEP or meeting notes for that amount of time or why it had been reduced. The present levels and progress notes use different language and metrics so that it is impossible to if Student was progressing towards attaining his/her reading AG. The evidence failed to establish that the reading SDI the District offered in the December 2018, December 2019, and January 2020 IEPs were sufficient to advance Student appropriately towards attaining his/her reading AG.

The January and April 2018 IEPs both provided for 20 minutes of behavior services weekly. The December 2018, December 2019, and January 2020 IEPs provided for no behavior services. Again there was no rationale given. While it might appear at first glance that there would be no need for behavior services in the December 2018 IEP, Ms. Pickett's testimony indicated that Student missed out on significant parts of the educational day because he/she was sleeping in the break room. The administrative rules indicate that services are to be provided to help a student attain their annual goals. From this record, Student needed services to address

his/her sleeping during the school day which was causing Student to miss significant amounts of school. The December 2019, and January 2020 IEPs also should have contained SDI for Student's behavior. As mentioned above, Student engaged in numerous inappropriate behaviors during the fall of 2019 and winter of 2020.

The District developed three food protocols as a service in their IEPs. However, only one food protocol was developed during the period at issue. The June 15, 2018 food protocol was removed from the December 2018 IEP with no explanation or discussion about the protocol listed in the meeting notes. No food protocol was added to the December 2019 or January 2020 IEPs and there was no discussion about the June 2018 food protocol listed in the meeting notes.

The services the District offered in the December 2018, December 2019, and January 2020 IEPs were insufficient because they did not include additional needed items discussed above. There was no indication that Student no longer needed previously offered supports and services to attain his/her AGs.

Behavior. OAR 581-015-2205 identifies team considerations and special factors to be weighed by a student's IEP team in drafting an appropriate educational plan. Among those considerations are the use of positive behavioral interventions for any child whose behavior impedes his or her learning or that of other students. OAR 581-015-2205(3)(a). According to that administrative rule, if the IEP team determines that a child needs a particular device or service (including an intervention) for him or her to receive a FAPE, the IEP team must include a statement to that effect in the child's IEP. OAR 581-015-2205(4). Similarly, the United States Department of Education (U.S. DOE) has stated that, where required to provide a FAPE to a disabled student, IEP teams must consider and include in the IEP appropriate behavior goals and objectives and other appropriate services and supports for children whose behavior impedes their own learning or the learning of peers. *Questions and Answers on Endrew F. v. Douglas County School District Re-1*, 71 IDLER 68 (ED 2017).

OAR 581-015-2181 identifies the requirements for conducting functional behavioral assessments and provides, in part:

(1) As used in this rule:

(a) "Behavior intervention plan" means an individualized plan, including positive interventions, designed to:

(A) Assist a student to decrease inappropriate behavior; and

(B) Increase or teach an alternative appropriate behavior.

* * * * *

(c) "Functional behavioral assessment" means an individualized assessment of a student that results in a hypothesis about the function of a student's behavior and, as appropriate, recommendations for a behavior intervention plan.

(d) "Qualified person" means an individual with training and/or experience in conducting functional behavioral assessments.

(e) "Serious bodily injury" has the meaning given that term in ORS 339.285.²⁵

²⁵ ORS 339.285(4) reads, "Serious bodily injury" means any significant impairment of the physical condition of a person, as determined by qualified medical personnel, whether self-inflicted or inflicted by someone else.

- (f) “Service provider” includes school personnel who:
 - (A) Are or will be providing services related to the implementation of an individualized education program or a 504 Plan to the student; and
 - (B) Do not hold a teaching license or an administrative license.
 - (2)(a) A school district must conduct a functional behavioral assessment and develop, review or revise a behavior intervention plan within 45 school days of receiving parental consent to conduct the assessment for every student who has:
 - (A) An individualized education program or a 504 Plan; and
 - (B) Placed the student, other students or staff at imminent risk of serious bodily injury as a result of the student’s behavior.
 - (b) For purposes of this subsection, if a functional behavioral assessment has been previously completed, the school district must review and/or revise the existing functional behavior assessment.
 - (3) When a behavior intervention plan is developed, reviewed or revised as provided by subsection (2) of this section, the school district must:
 - (a) Ensure that the behavior intervention plan is based on a functional behavioral assessment that was conducted by a qualified person;
 - (b) Ensure that the behavior intervention plan appropriately addresses the student’s needs;
- * * * * *

The only IEP that does not indicate that Student’s behavior impeded his/her learning or the learning of others is the December 2018 IEP. However, a review of the record establishes that Student was sleeping for significant amounts of instruction time during sixth grade when this IEP was written and that would indicate that Student’s behavior did impede his/her learning. Because Student’s learning was impeded by his/her behavior, the District was required to consider and include appropriate services and supports including positive behavioral interventions according to Oregon administrative rules and guidance from the U.S. DOE.

In this case, the District created a BP at some point while Student was at Sam Case Elementary which included language about food exposure and food rewards. The District also developed a BP for Student on October 20, 2017 which mentioned food and Student’s PWS condition but made no mention of food exposure and food rewards. Ms. Pickett unilaterally updated Student’s October 17, 2017 BP on September 21, 2019. Unfortunately, in their haste to update the BP, the District failed to conduct an FBA as required by the above administrative rules. The District failed to seek Parent’s consent and simply modified the BP before informing Mother of the modification on September 23, 2019.

By the date the BP was modified, Student had already exhibited incident of feces smearing and had harmed another student after a conflict over a food reward. While Ms. Pickett may have characterized the modification of the 2017 BP as just an update for NMS, by that time Student had already been attending NMS for one year and was exhibiting behavior that impeded his/her learning and the learning of others. The behaviors Student exhibited in September were related to his/her sensory needs and anxiety behaviors. The September 21, 2019 BP is inappropriate because it does not make clear what behavior the plan is trying to assist Student in decreasing, whether it is a behavior that Student can even decrease or not. The record

demonstrates that the District was uncertain what the function of the Student's behavior was at the time the BP was modified. By January 2020, the District's interventions were clearly ineffective and Student's behavior continued to result in Student being removed from educational opportunities. The District failed to develop a BP that properly addressed Student's behaviors. The September 2019 BP also lacked sufficient detail so that every staff member would know what to do when a problematic behavior occurred, and/or why they were to intervene in a specific way.

The District completed an FBA on December 20, 2019 which was presented to the IEP team on January 9, 2020. Regardless of what information was gleaned from the inadequate FBA, no BP was developed after the FBA was presented. Student's inappropriate behavior escalated over the winter 2020. Student spent eight days in the emergency department of the local hospital and returned to school at the beginning of March 2020. When he/she was released to return to school, Mother notified the District that Student had a new focus on self-harm. The District never took action to address this new focus before the District closed schools on March 13, 2020 due to the Covid-19 pandemic.

Based upon the evidence in this record, District denied Student a FAPE when it failed to meet his/her unique needs starting in the fall of 2019 in the area of Behavior, as evidenced in part by the fact that the District never offered, considered, or developed a BIP to address during the period at issue.

The issue remains whether the above procedural violations with the IEPs at issue were also substantive violations and/or whether the procedural inadequacies caused a deprivation of educational benefit. The IDEA and Oregon's administrative rules require that the student's educational program be designed to suit the student's demonstrated needs. Under the IDEA, a school district provides FAPE to a student if the offered program, including placement, "(1) addresses the child's unique needs, (2) provides adequate support services so the child can take advantage of the educational opportunities, and (3) is in accord with the [IEP]." *Capistrano Unified Sch. Dist. v. Wartenberg ex rel. Wartenberg*, 59 F.3d 884, 893 (9th Cir. 1995), citing *Rowley*, 458 U.S. at 188-189.

In this case, I am persuaded that the deficiencies found in the December 2018, December 2019 and January 2020 IEPs were both substantive and procedural. The District failed to meet the Oregon administrative rules which set out the procedural requirements that a District must follow in creating an IEP. As addressed above, the PLAAFP sections, the AG sections, and the supplemental aids, supports and services sections all failed to meet the procedural requirements in some way. Those failures when examined within the whole of each IEP resulted in IEPs that failed to meet the appropriately ambitious requirement necessary for every educational program, were inadequate to afford Student FAPE, and caused a deprivation of educational benefits. As such, the December 2018, December 2019 and January 2020 IEPs was not reasonably calculated to enable Student to make appropriate progress in light of his/her circumstances.

c. Failing to provide ESY during the summers of 2018 and 2019.

In the Complaint, Parent alleged that the District failed to provide ESY services during the summers of 2018 and 2019. For the reasons below, I find that the Parent has not established that the District was required to provide ESY services during the summers of 2018 and 2019.

OAR 581-015-2065 identifies the ESY service requires and the criteria for determining the need for ESY services and provides, in relevant part:

- (1) School districts must ensure that extended school year services are available as necessary to provide a free appropriate public education to a child with a disability.
 - (2) Extended school year services must be provided only if the child's IEP team determines, on an individual basis, that the services are necessary for the provision of free appropriate public education to the child.
 - (3) A school district may not:
 - (a) Limit extended school year services to particular categories of disability; or
 - (b) Unilaterally limit the type, amount, or duration of those services.
 - (4) The purpose of extended school year services is the maintenance of the child's learning skills or behavior, not the teaching of new skills or behaviors.
 - (5) School districts must develop criteria for determining the need for extended school year services. Criteria must include regression and recoupment time based on documented evidence or, if no documented evidence, on predictions according to the professional judgment of the team.
 - (6) For the purposes of section (5) of this rule:
 - (a) "Regression" means significant loss of skills or behaviors in any area specified on the IEP as a result of an interruption in education services;
 - (b) "Recoupment" means the recovery of skills or behaviors specified on the IEP to a level demonstrated before the interruption of education services.
- * * * * *

The evidence at hearing established that Student was not provided with ESY services for either the summer of 2018 or the summer of 2019. Prior to the summer of 2018, the District held two IEP team meetings, the annual meeting on January 5, 2018 and another meeting on April 3, 2018. While those meetings are outside of the statute of limitations, the summer of 2018 when the ESY would have been provided is within the period at issue.

The April 3, 2018 IEP made no changes to the January 5, 2018 IEP in either of the two ESY sections of the IEP form. In the January 2018 IEP, the District included a conclusory statement that Student was able to relearn skills and information quickly and that he/she did not need to be retaught. The meeting notes provide no evidence that it gathered regression or recoupment data prior to the summer of 2018. The District also did not provide evidence that of any predictions from the professional judgement of the team that Student would regress during the summer of 2018.

The December 2018 annual IEP contained no narrative information about data gathered, regression observed, or skills re-taught. The IEP contained a page of the IEP form with check boxes indicating that the IEP team decided that Student did not need ESY because Student did

not experience regression or have a prolonged recoupment period. The meeting notes indicated that the team reviewed each element in the IEP form including ESY and based their determination on last year's data. The notes do not provide specifics of what the review entailed.

The above rules require ESY only when it is necessary to provide a student with FAPE through the maintenance of the child's learned skills or behavior. Parent bears the burden of proof to establish that ESY was necessary. Parent has established that Student was performing more advanced math in the spring of 2019 than in the fall of 2019. However, Student's work on math worksheets is insufficient to establish more likely than not that Student needed ESY services versus different teaching methods or additional SDI in math. It is not evident from this record why the scope of what Student was working on changed. The question about whether these work sheets were to enable Student to recoup his/her math skills or whether Student regressed so much that he/she was unable to work at the same level after the summer break is simply not clear from this record.

Parent established that the District acknowledged that Student regressed behaviorally after the 2019 Thanksgiving holiday and that the District did not assess Student for regression and recoupment over the 2019 Christmas holiday. However, the 2020 summer occurred after Parent filed the current due process complaint and this is not within the period at issue. I therefore do not have authority to address any alleged failure to provide ESY during the summer of 2020.

There was insufficient evidence presented at hearing to establish that Student needed ESY in the summer of 2018 or the summer of 2019 in order to be provided with FAPE.

d. Changing Student's placement to a placement that was not LRE or appropriate.

In the Complaint, Parent alleged that District predetermined Student's placement when it decided to remove Student from general education classes and place him/her into an inappropriate placement, the SLC in January 2020.

OAR 581-015-2240 sets out the requirement for the LRE 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.

OAR 581-015-2250 identifies the requirements for the placement of a child and provides:

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; and
 - (e) Is as close as possible to the child's home;
- (2) The alternative placements under OAR 581-015-2245 are available to the extent necessary to implement the IEP for each child with a disability;
- (3) Unless the child's IEP requires some other arrangement, the child is educated in the school that he or she would attend if not disabled;
- (4) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs; and
- (5) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

Under the IDEA, parents have the right to fully participate in the development of their child's IEP, including decisions regarding placement. Predetermination occurs when a districts determine vital issue in the IEP prior to a meeting of the IEP team. Predetermination is a procedural violation of the IDEA that deprives parents of the opportunity to meaningfully participate in the development of their child's IEP. School districts must ensure that parents are provided an opportunity to participate in each IEP team meeting. 34 C.F.R. §300.322; OARs 581-015-2190(1), and 581-015-2205(1)(b). In addition, a disabled student's placement must be based on his or her IEP. 34 C.F.R. §300.116(b)(2); OAR 581-015-2250(1)(a) through (c). Predetermination of a disabled student's placement can deny him or her a FAPE. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004). According to the Ninth Circuit, "[p]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." *H.B. v. Las Virgenes Unified School Dist.*, 48 IDELR 31, at 166 (9th Cir. 2007). Similarly, where a school district independently developed a proposed IEP that would place the disabled child in a pre-existing and predetermined program without considering any other options, the court found the school district failed to provide parents a meaningful opportunity to participate in the IEP process. The court reasoned that school districts are required to conduct a meaningful IEP meeting rather than simply holding a *pro forma* meeting. *Target Range*, 960 F2d 1479, 1485 (9th Cir 1992).

Predetermination. In this case, Parent alleged that the District predetermined Student's placement when it failed to consider Parent's suggestion that Student would benefit from attending a private residential school called Latham Center. Parents note that District administrators appeared to discount the Latham Center in an email exchange

regarding placement and that the center is not mentioned in the notes of the two January IEP meetings.

Mother sent information about Latham Center to the District on December 7, 2019. On January 21, 2020, Mother again provided detailed information about Latham Center and specifically asked the IEP team to consider placing Student at Latham Center. On January 21, 2020, Ms. Gould forwarded to Ms. Van Liew Mother's request for Student to be placed at the Latham Center. In her January 21, 2020 email to Ms. Van Liew, Ms. Gould stated that the IEP team was having a meeting the next day and that she believed the plan was to pull Student into more SLC classes.

An earlier IEP meeting occurred on January 9, 2020. The District notes from that IEP meeting make no mention of Latham Center but do state that Student's placement was determined based on Student's current IEP and additional factors. The January 22, 2020, IEP meeting notes also fail to mention Latham Center but state that the team was keeping Student in the SLC all day and would reconsider adding the resource room during the second semester. There was no testimony elicited from any of the witnesses about any discussion or lack of discussion about Latham Center in either of the January 2020 IEP meetings.

While the District notes, in this context provide few details regarding the discussion there is evidence that some discussion occurred around Student's placement at each of the meetings. The January 22, 2020 notes indicated that the team was attempting a full day placement in the SLC and would reconsider at the next semester. Furthermore, Parent did not present evidence to suggest that Mother was presented with a full day in the SLC as the only option that the District would consider. Based upon this record, the record in this matter fails to establish that the District predetermined where the IEP team would place Student.

Appropriate Placement. Under *Rowley*, a school district's proposed placement is appropriate if it is reasonably calculated to provide educational benefits to the child. *See also Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987) (noting that the IDEA does not guarantee the placement the parent prefers, or a placement that is the absolute best for the child, but rather a placement that is reasonably calculated to provide the child with educational benefits).

Under the IDEA, a school district provides FAPE to a student if the offered program, including placement, "(1) addresses the child's unique needs, (2) provides adequate support services so the child can take advantage of the educational opportunities, and (3) is in accord with the [IEP]." *Capistrano Unified Sch. Dist. v. Wartenberg ex rel. Wartenberg*, 59 F.3d 884, 893 (9th Cir. 1995), citing *Rowley*, 458 U.S. at 188-189. In collaboration with the parents, a school district must make a threshold determination as to what special education and related services a disabled student needs and then must determine whether those needs can be met within the matrix of a general education classroom *with the provision of supplementary aids and services.* *Oberti v. Bd. of Educ.*, 801 F.Supp. 1392, 1401 (D.N.J. 1992), *aff'd*, 995 F.2d 1204 (3^d Cir. 1993). The 9th Circuit has developed a four factor test when making a decision about a

student's least restrictive environment: 1) the educational benefits of placement full-time in a regular class; 2) the nonacademic benefit of such placement; 3) the effect [the child has] on the teacher and children in the regular class; and 4) the costs of mainstreaming [the student]. *Sacramento City Unified Sch. Dist. Bd. of Educ. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir.1994).

In the closing brief, Parent did not argue that Student's fifth grade placement (from May 21, 2018 on) or Student's sixth grade placement were inappropriate. Instead, Parent focused her argument on Student's 7th grade and future high school placement as being not LRE. This section of the order will focus on Student's 7th grade placement as Student's high school placement is not within the scope of this hearing.

Four different IEPs address Student's seventh grade placement but, as a practical matter, Student's placement changed after Student's disrobing incident on January 14, 2020. Starting on January 15, 2020, Student was placed into the SLC full-time. From September 2019 to January 14, 2020, Student's IEP placement was 40 to 79% of the day in general education. During that time, Student attended general education classes of art, science, social studies, homeroom, and lunch. Student attended special education classes in the SLC with Ms. Picket and resource room with Mr. Clair.

As discussed previously, the District's decisions cannot be judged in hindsight and instead must be evaluated according to the snapshot rule. In applying the snapshot rule to its placement decision, District's actions must be examined to determine if they were reasonable considering the facts known by the District when the placement decision was made. *See Adams*, 195 F.3d at 1149. When Student's placement in a variety of special education and general education classes was decided in December of 2018, it appears that Student's placement was LRE and appropriate. Due to Student's conditions, he/she would not have benefited academically or otherwise from full-time placement in general education classes. At that time the District was not yet aware that Student's PWS condition would become more severe. The mix of general education, special education, and socialization provided Student with educational benefits during his/her sixth grade year based upon his/her individual AGs.

Student's behavior changed drastically starting in September 2019. From September 2019 to December 2, 2019, Student had several incidents involving feces. Student also locked himself/herself in a restroom, stole an item, stole food, stole candy, and hit another student. Numerous instances of Student being overwhelmed at school were also documented. There were several incidents of food exposure at the school. By the time the IEP team met to discuss Student's placement on December 2, 2019, it was clear that Student was exhibiting extreme and dangerous behavior. However, there is no mention of a discussion around placement in the notes of the December 2, 2019 IEP meeting. That IEP meeting appears to have been focused on the FBA that Ms. Lilley was conducting. The IEP was modified to include a new provision requiring the District to provide support from an adult trained in Student's BP and PWS interventions along with preferential seating. Continuing Student's placement in the same mix of 40 to 79% of the day in general education along with the new support of a trained adult, does appear to have been a placement that was reasonably calculated to provide educational benefit to Student.

However, Student was not provided the promised trained adult support and Student's behavior escalated further. The IEP team met twice in January 2020 but failed to change the placement statement on Student's IEPs to reflect the fact that Student was pulled into special education classes 100% of the time beginning on January 15, 2020. Regardless of why the placement on the IEP itself was not changed, to reflect the new placement, the appropriateness District's placement of Student in the SLC 100% of the time must be examined.

The District argued that Mother agreed with the placement at that time. However, that is not supported by the evidence. Rather, Parent first advocated for a school-wide TFS environment at NMS and later requested a residential placement at the Latham Center. By the time the January IEP meetings occurred, the District had received Dr. McTighe's suggestions about how to meet the needs of Student as a child with PWS. The District also received a letter from an advocate with the PWS association advocating for TFS in the school environment and a similar letter from Student's primary care physician.

It is clear from the evidence that by January 2020, Student's PWS condition had moved to the severe end of the continuum. Student needed to be provided a TFS environment at school in order to decrease his/her anxiety sufficiently for him/her to learn. The District chose to provide its version of food security by removing Student's access to any classroom besides the SLC. The District could have chosen to provide a TFS environment at NMS and, according to Dr. McTighe, at least one public school district has done so. The District has argued that it is easier to provide TFS in a small environment. While that may be true, the District is required to provide Student's education in the LRE. OAR 581-015-2240(2) which allows students to be removed entirely from the general education environment only in cases where "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." In this case, the evidence established that education could be provided to Student in the general education environment with the aid of a TFS environment at NMS.

This tribunal has no doubt that the District had the information it needed to address Student's inappropriate behaviors from its educational program at the Olalla Center in 2016, from the letters it received from the PWS Association, and others familiar with Student and his/her educational needs. The District chose not to provide TFS as had been recommended when its own efforts to address the behaviors through a full-time program in the SLC and a trained adult support proved ineffective. The District failed to provide Student with an appropriate placement after January 15, 2020.

e. Failing to implement portions of Student's IEP.

Under the IDEA, the District was responsible for ensuring that Student, as a child with a disability, was educated with children who were not disabled, and that removal from the regular educational environment occurred only if the nature or severity of Student's disability was such that education in the general education classroom with the use of supplementary aids and services could not be achieved satisfactorily. It is not enough for the District to merely include a provision for supplementary aids and services in the IEP. District personnel must also implement the IEP by using those supports to assist Student in accessing his/her education.

In this matter, Parent asserted that the District failed to implement supports necessary for Student to continue to be educated in the LRE. The Ninth Circuit Court of Appeal addressed the standard for determining when a school district's failure to implement one or more portions of a disabled child's IEP amounts to a denial of FAPE in *Van Duyn ex rel. v. Baker School Dist.*, 481 F.3d 770 (9th Cir. 2007). In that case, the court held that only a material failure to implement a disabled child's IEP violates the IDEA. The court clarified that "[a] material failure occurs when the services a school provides to a disabled child fall significantly short of the services required by the child's IEP. Minor discrepancies between the services provided and the service called for by the IEP do not give rise to an IDEA violation." *Id.* at 780.

Leading up to the IEP meeting on December 2, 2019, Student exhibited multiple incidents of inappropriate behavior including three incidents involving feces, aggression towards others, and multiple thefts of food or other items. Starting in the December 2, 2019 IEP and continuing through the rest of the period at issue, the IEP team decided that Student needed to be provided with the support of an adult trained in his/her BP and in PWS interventions. However, the evidence failed to establish that the District trained Student's aide or teachers in positive PWS interventions or that the District in any way provided training to address Student's own unique behaviors.

The failure to have a properly trained adult supporting Student affected Student's entire educational day as the adult was to be provided at all times. In addition, this failure to implement had a significant impact on Student's education as the number of incidents of inappropriate behavior increased and Student began exhibiting more aggressive behavior. Student was eventually removed from general education classes and placed in the SLC full-time. By failing to provide the promised trained adult support, the services that Student was provided with fell significantly short of the services required by the Student's IEP, denied Student meaningful educational benefits, and were a denial of FAPE.

- f. Failing to issue required PWNs, failing to amend the IEP to accurately reflect Student's placement, failing to convene necessary IEP meetings, and/or failing to provide data to Parent to evaluate Student's educational program.**

To determine if a procedural error resulted in a denial of FAPE, an inquiry must be made into whether a school district has met the rigorous procedural requirements of the IDEA and/or any analogous state statutes or rules that may impose a greater duty. *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994). If a school district cannot demonstrate that it has complied with the procedures mandated by the IDEA and state laws, the question of whether the school district's proposed program meets the substantive benefit test need not be addressed. *W.B. v. Board of Trustees of Target Range Sch.*, 960 F.2d 1479 at 1485 (9th Cir. 1992). Nonetheless, courts have routinely recognized that not every procedural violation is sufficient to rise to a denial of a FAPE. *Amanda J.*, 267 F.3d at 892. *See also L.M v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008) (Finding harmless procedural errors do not constitute a denial of FAPE.).

To provide clarity regarding this distinction, the court in *Amanda J.* reiterated the test for procedural compliance, which identifies three categories or types of potentially fatal procedural violations that may result in a denial of a FAPE. 267 F.3d at 892. The first category of potentially fatal procedural errors includes those that cause a student to suffer a loss of educational opportunity. The second type encompasses those where the parents' right to participate in the IEP process is seriously infringed. The final category of potentially fatal procedural errors that may result in a denial of a FAPE are those that caused a "deprivation of educational benefit." *Id.*, internal citations omitted.

Procedural errors rise to the level of a denial of FAPE where, absent such errors, there is a "strong likelihood" that alternative educational possibilities for the student "would have been better considered." *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 657 (9th Cir. 2005). Such alternative educational opportunities might include additional SDI or related services, or an alternate placement in the educational environment. "Thus, an IEP team's failure to properly consider an alternative educational plan can result in a lost educational opportunity even if the student cannot definitively demonstrate that [the student's] placement would have been different but for the procedural error." *Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1047 (9th Cir. 2013).

Prior Written Notice. In the closing arguments, Parent asserted that the District failed to provide PWN on six occasions. The District conceded that it failed at least once to issue a PWN but asserted that any error was harmless.

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

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

Mother requested a one to one aide for Student on December 4, 2019, December 7, 2019, and again on January 3, 2020. The District denied Mother's December 4th and 7th request for a one to one aide, which would have changed the provisions of FAPE to Student, through an email on December 11, 2019. No PWN was produced at hearing regarding these requests and denial. Mother again requested a one to one aide on January 3, 2020, At the January 9, 2020 IEP team meeting, the IEP team discussed Student's need for adult support at all transitions, general education classes, and in the lunchroom. The IEP was subsequently amended to include the change. No PWN was produced at hearing addressing this request or the District's decision to grant part of the request.

On January 3, 2020, Mother also requested that the District consider placing Student at Latham Center, to provide Student with a 12 month program to support Student during the summer, to provide Student with a food secured environment, and to provide PWS training by Dr. McTighe to all staff. The denial of placement at Latham Center was a refusal to change

Student's educational placement. The requests for ESY services and a TFS environment also would have changed the provisions of FAPE. At the January 9 and 22, 2020 IEP team meetings, the IEP team discussed Student's placement and food security was mentioned. No PWN was produced at hearing regarding any of these requests.

The District changed Student's placement on January 15, 2020 when it removed Student from most of his/her participation in general education classes for significant portions of the day, to being placed in the SLC full-time. No PWN was produced at hearing regarding this change.

Parent's closing brief alleged that Mother also made a request for a one to one aide in an email dated September 6, 2019. (Ex. S117.) However, no such request appeared in the email presented at the hearing. Parent also alleged that two requests were made prior to May 21, 2018. Those requests are not addressed in this order as they are outside of the period at issue.

The PWN rule is unequivocal in its requirement that a school district issue prior notice to parents of a disabled student any time it either proposes to initiate a change or refuses to do so with regard to the student's identification, evaluation, educational placement, or the provision of FAPE. Based upon this record, the District failed to comply with the procedural requirements of the PWN rule. The repeated failure to send Parent notices over a short period of time denied Parent the right to meaningfully participate in Student's educational program because she could not have known at what point to press the issues of ESY services, a TFS environment, or private placement further and at what point the IEP team was still considering her requests. There is a clear likelihood that other educational possibilities for Student would have been better considered if these PWN had been issued.

Failure to amend IEP. In the Complaint, Parent asserted that when Student was placed in the SLC all day on January 15, 2020 the District failed to change Student's placement in his/her IEP. Oregon administrative rules require that a student's IEP provide an explanation of the extent to which a child will not participate with children without disabilities participate with children without disabilities in the educational setting. OAR 581-015-2200(f). Student's IEP was modified on January 22, 2020 after Student exhibited inappropriate behavior and was removed from general education classes and placed in the SLC full-time. However, the placement section of the IEP was not modified. The placement page from the January 9 and 22, 2020 IEPs indicate that the IEP team selected the identical option of 40 to 79% in general education classes as they had in the December 2018 and 2019 IEPs. While the error is obvious, it was also harmless. Parent was present for the IEP team discussion and appeared to participate in the decision on January 15, 2020 to place Student in the SLC full-time. There was no evidence that this procedural error impeded Student's right to FAPE or deprived him/her of educational benefits.

Failure to convene sufficient IEP meetings. In the complaint Parent asserted that the District failed to convene an IEP meeting on at least 11 instances in the fall of 2019 and winter of 2020 when it was obvious that the behavioral supports it was providing Student were inadequate. OAR 581-015-2190(1) provides that Districts must provide parents with an opportunity to participate in meetings with respect to the identification, evaluation, IEP and educational placement of the child, and the provision of a free appropriate public education to the child.

In the fall of 2019 and winter of 2020, Student repeatedly exhibited inappropriate behaviors as discussed repeatedly throughout this order. The District held three IEP meetings in the fall of 2019 and winter of 2020 and District staff worked to create an FBA during that period. The record also establishes that the District communicated with Mother frequently and attempted on several occasions to modify what supports they were providing Student in response to his/her behaviors. While the District's attempts to address Student's behavior were unsuccessful that does not equate with a need for additional IEP meetings. In the closing brief, Parent failed to identify how the three IEP team meetings were insufficient in number to attempt to address Student's behavior and educational program. Based upon this record, I am not persuaded that the District failed to provide sufficient IEP meetings for Parent.

Data/Progress reports. In the Complaint, Parent alleged that the data in the progress reports was not presented in a manner that allowed her to measure Student's progress towards his/her AGs. During the period at issue, the District issued progress reports for Student several times each year. Failing to provide progress information sufficient to allow Parent to measure progress and enforce Student's IEP would deprive her of the meaningful opportunity to participate in the IEP process.

The District issued progress reports in June 2018 to address Student's progress on his/her January 2018 IEP AGs. Two sections of the June 2018 progress reports are provided in the same language used in the January 2018 AGs. Both the writing and reading progress reports provide measureable data that Parent would be able to use to determine that Student was actually making progress and or how much progress was left to be made on the AG after half of the year had passed. The math and behavior sections of the June 2018 progress reports did not use language that was similar enough to the IEP's AGs for a parent to measure if Student was actually making progress.

The District issued progress reports in February, March, May, and June 2019 to address Student's progress on his/her December 2018 IEP AGs. When the February progress report is examined against the writing AG, the language is somewhat similar, referring to Student's ability to write a paragraph with support. However it does not specify what portions of paragraphs that Student is unable to write independently. The remaining three progress reports do not contain any measureable data and instead indicate that Student enjoys writing and continues to require support. When the progress reports are compared to the math AG, the reports again fail to convey measureable data about what multiplication Student facts was mastering or other math concepts listed in the AG he/she had worked on. When the progress reports are compared to the reading AG, the February progress report contains Student's score on a test but does not use language that corresponds to the AG or would be measure in terms of the AG if one is not an educator. The March progress report provides data that is more in line with the AG and provided some details that a parent could use to ask questions and participate in an IEP meeting. The May and June progress reports contain no measureable data with which a parent could determine if their child was making progress on meeting their AG.

The December 2018 IEP behavior AG talked about what Student was to do when he/she reached a level two escalation in four of five instances per week. The District provided two

progress reports regarding this AG. One in February 2018 and one in June 2018. Neither progress report provide measureable data regarding whether Student was able to meet the AG nor if Student was able to exhibit the new behavior at all.

The District issued a progress report on January 31, 2020 to address Student's progress on his/her December 2019 IEP and January 2020 IEP AGs. The December 2019 and January 2020 IEP contained the same AGs as the December 2018 IEP. The January progress report for writing contained no measureable data about Student's ability to meet the AG or why it was repeated from the prior year. The reading AG was also identical to the December 2018 IEP AG. The January progress report did provide details about Student's comprehension at a fourth grade level but contained test data that did not appear to relate to Student's AG in an understandable manner. Student's behavior AG also remained the same as the December 2018 IEP AG. The January progress report again used narrative information that did not provide measureable data regarding Student's progress on this AG. Student's math AG was changed from the December 2018 IEP AG. The January progress report indicates that Student had not worked on the math AG very much but provided no measureable data on how Student was progressing on meeting the AG in the short amount of time that Student spent on it.

Except for the June 2018 IEP writing and reading progress reports, the District's progress reports contained only vague and narrative information but no measureable data relating to Student's progress towards his/her AGs. The lack of measureable data in those progress reports made it difficult, if not impossible, for Parent to monitor Student's then-current ability to achieve his/her AGs, or to suggest changes to Student's educational program or the AGs. This deprivation was clearly evident in Student's apparent lack of progress or even regression in writing, math, and behavior. While it appears that Student made progress in reading it is unclear how much progress Student made or if he/she was struggling in one area over another. Due to these deficiencies, Parent was unable to meaningfully participate in the formulation of or amendment to Student's IEPs that was reasonably calculated to enable Student to make progress appropriate in light of his/her unique circumstances.

2. Whether the District denied Student FAPE under Section 504 by acting with deliberate indifference toward his/her need for SDI, services, and accommodations.

In the closing brief, Parent asserted that the District violated Section 504 by acting with deliberate indifference when it was aware that Student needed PWS specific supports and services and failed to provide them.

To prevail on a Section 504 claim, a party must show that the school district acted "intentionally or with deliberate indifference." *Mark H. v. Lemahieu*, 513 F3d 922, 938 (9th Cir. 2008); *Duvall v. County of Kitsap*, 260 F3d 1124, 1139 (9th Cir 2001). Deliberate indifference requires both knowledge that harm to a federally protected rights is substantially likely, and failure to act upon that likelihood. *City of Canton v. Harris*, 489 US 378, 389 (1988) (deliberate indifference requires some form of notice and the opportunity to conform to statutory dictates). Simply establishing a denial of FAPE under the IDEA is not sufficient to prevail in a Section 504 claim. *Mark H. v Hamamoto*, 620 F3d 1090, 1096 (9th Cir. 2010); *see also Sellers v. School*

Board, 141 F3d 524, 529 (4th Cir. 1998) (something more than a mere failure to provide a FAPE must be shown, either bad faith or gross misjudgment must be shown to support a Section 504 claim).

As the District pointed out in its closing brief, District staff took action once Student's behavior problems intensified in the fall of 2019. In November 2019, Student's IEP team planned to have Student evaluated through an FBA to determine if food exposure was a contributing factor in Student's escalating behaviors. On December 2, 2019, the IEP team met to create Student's annual IEP. The IEP team added a new support to the IEP to address Student's inappropriate behavior, an adult trained in both Student's behavior plan and in PWS positive behavior interventions. The IEP team met on January 9, 2020 and the completed FBA was presented. In addition, an expert in PWS presented information about Student's needs. The IEP team met again on January 20, 2020. While the District's efforts to provide FAPE during that time were inadequate as discussed above, there is substantial evidence that the District was not merely sitting idly by as Student's behaviors escalated.

Parent argued that the District specifically agreed on December 2, 2019 to provide a one to one aide trained in PWS behavior interventions and that the District's failure to provide that agreed upon training was evidence of deliberate indifference. It is troubling that the District did not take action to obtain training for Student's aide until January 9, 2020 at the earliest after having agreed to provide a trained aide more than a month prior to that date. Admittedly, the training did not occur until August 2020. However, even if such training had been provided earlier, Student would not have been able to access the services of the aide after March 13, 2020 when school was closed due to the COVID-19 pandemic.

Parent also argued that between May 21, 2018 and January of 2020, Student experienced "microtraumas" from the repeated food exposures at NMS. Parents asserted that such micro traumas were also evidence that the District was deliberately indifferent. However, there was insufficient evidence presented at hearing that prior to the fall of 2019 the District was aware that repeated food exposure would substantially likely to harm Student's federally protected rights.

The evidence in this case shows that the District failed to act quickly once it agreed to train staff in PWS behavior interventions. However, the evidence does not show that the District failed to act. While the District's actions were inadequate there is no evidence that this was intentional. When the District's actions are examined using the circumstances known to the District in the fall of 2019 and winter of 2020, there is insufficient evidence to establish that District staff acted with deliberate indifference towards Student's needs as a disabled person.

Remedies Requested

As set forth throughout this order, the District engaged in a broad and extensive range of procedural errors that denied Student a FAPE during the period in issue. In addition, this order identifies multiple substantive violations of the IDEA that resulted in a denial of FAPE during the period in issue. Parent seeks multiple remedies for these violations including District funding of a residential placement, compensatory education, evaluations of Student in all areas of suspected disability, an IEP meeting with necessary experts to produce an appropriate IEP,

training for District staff, Section 504 damages, and, reimbursement for attorney's fees and costs associated with bringing this due process action. As a result of the District's failure to comply with the procedural and substantive requirements of the IDEA, Student has been denied educational opportunities and has been deprived of educational benefit for which he/she is entitled to compensation as addressed below.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. 20 U.S.C. § 1415(i)(1)(C)(iii); *see School Committee of the Town of Burlington, Massachusetts v. Dept. of Education*, 471 U.S. 359, 369 (1985). Hearing officers/administrative law judges in special education cases have similar broad equitable powers. *Forest Grove School Dist. v. T.A.*, 557 U.S. 230 (2009). In determining the equitable remedy, the hearing officer or ALJ may consider the school district's failure to update student's IEP, placements, and other documents, and their refusal to cooperate. *See Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1059-1060 (9th Cir. 2012) Under the IDEA, the court or ALJ shall "grant such relief as [it] determines is appropriate" if a public agency has denied a FAPE to the student. 20 U.S.C. §1415(i)(2)(B)(iii); *Hacienda La Puente*, 976 F.2d at 492. Equitable considerations are relevant in fashioning relief. *Sch. Comm. of the Town of Burlington v. Dept. of Educ.*, 471 U.S. 359, 374 (1985). The conduct of both parties must be reviewed to determine whether relief is appropriate. *See Target Range*, 960 F.2d at 1486.

In this case, Parent appears to have been forthcoming with information and participated in Student's IEP process to the greatest extent possible. Parent was persistent and diligent in expressing concerns regarding Student's behaviors, needs, lack of progress, placement, and open to discussion about any available options with the District. Parent has not concealed any information requested by the District. Nor has Parent refused special education or related services for Student during the period in issue. The District, by contrast, repeatedly ignored information on Student's PWS behaviors and supports, and failed to implement material supports from Student's IEP.

A. Residential Placement.

In the Complaint, Parent asked that the District be ordered to fund a residential placement at Latham Center as the appropriate placement. As discussed above, the District's placement offer was not appropriate to meet Student's needs.

A school district must provide a residential placement to a student with a disability if such a placement is necessary to provide the student with special education and related services. 34 C.F.R. § 300.104. The test for determining whether a residential treatment center placement provides FAPE is whether the placement is necessary to provide special education and related services to meet the student's educational needs. *See e.g. Ashland School District v. Parents of RJ* (D. Or. 2008) 585 F. Supp.2d 1208, 1231, *affirmed*, (9th Cir. 2009); *Ashland School District v. Parents of Student E. H.* 587 F. 3d 1175 (9th Cir. 2009). *County of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458, 1468 (9th Cir. 1996). The Court held that while every effort is to be made to place a student in the home school as the least restrictive environment, it must be a least restrictive environment which also meets the student's IEP goals.

The analysis for determining whether a residential treatment center placement is appropriate hinges on whether the placement is necessary for educational purposes. *Clovis Unified School District v. California Office of Administrative Hearings* 903 F.3d 635, 643 (9th Cir. 1990). In *Clovis*, the Ninth Circuit Court of Appeals identified three possible tests for determining when a school district is responsible for the cost of a residential placement: (1) when the placement is "supportive" of the child's education; (2) when medical, social or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement primarily aids the student to benefit from special education. *Id.* The remaining issue is whether Parent has met their burden to establish that residential placement at Latham Center is necessary to meet Student's *educational needs*.

In this case, the record established that Student was not making meaningful academic progress. *See, Andrew F.* 137 S. Ct. at 1001-1002. ("By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgement to bear on areas of disagreement.") Student's inappropriate behaviors escalated in the fall of 2019 and winter of 2020 due to the lack of a TFS school-wide environment. Student missed instructional time due to the lack of a TFS school environment even after Student was moved into the SLC full-time.

When the record is examined as a whole, it is clear that Student requires a TFS environment to obtain meaningful educational benefit at school. In its most recent IEP, the District refused to provide a TFS outside the SLC and planned to restrict Student's access during instructional time to approximately 16 to 17 disabled peers in the SLC none of whom were similarly disabled. The District also planned to limit Student's food consumption to eating alone with an adult who was not eating.

Dr. McTighe was a credible witness possessing knowledge of PWS, public education, and Student. Dr. McTighe provided a persuasive explanation about why providing TFS in only one school room would not be appropriate environment for Student to access his/her education. The District was provided this information by Dr. McTighe and chose not to act on it. The testimony of District witnesses established that the District was able, but not willing, to provide TFS on a school-wide basis. That is based upon the testimony from Mr. Belloni that he was willing to provide TFS on a school-wide basis only if ordered to do so by this tribunal; the testimony from Dr. Gray that she had spoken to Mr. Belloni frequently but had never discussed implementing TFS anywhere in the District; and statements from various District staff to Mother and Student that they were not going to change school just for Student.

Student's lack of meaningful progress in meeting his/her AGs supports the need for an educational placement that provides TFS. Latham Center would provide Student access to an education in a TFS environment for the entire campus. Latham Center would also provide Student access to a greater number of similarly disabled peers, which was specifically supported as necessary for Student by several experts. Student would be able to eat, learn, and attend extra-curricular events specifically designed for students who need TFS in order to reduce inappropriate behaviors due to food exposure related anxiety. Latham Center would provide education by certified special education teachers as would the District. Latham Center is also experienced in providing special education to meet student's IEPs and provide progress reports.

It was also established that Mother was providing TFS at home and residential placement was not requested due to Student's behavior at home. Parent has shown that Latham Center is necessary for educational purposes.

Based upon this record, Parent has established that a placement at Latham Center is reasonably calculated to enable Student to receive educational benefit and is an appropriate placement for Student.

Because this order provides for the residential placement requested it is unnecessary to address Parent's request for orders regarding comprehensive evaluations of Student, IEP meetings with necessary experts to produce an appropriate IEPs, and training for District staff. At hearing, the parties were specifically asked to address remedies in the closing briefs. In her closing brief, Parent addressed the remedies of residential placement, Section 504 damages, and attorney fees and costs. In addition, there were no details presented to establish what exactly instructional time Student missed and why he/she missed it. Thus it appears that Parent may have intended to withdraw her request for compensatory education. However, to the extent that Parent is still requesting compensatory education, Parent has not presented sufficient evidence to support the request.

B. Section 504 damages.

Parent requested Section 504 damages due to the District's conduct during the period at issue. Section 504 damages are denied due to Parent's failure to establish that the District acted with deliberate indifference as addressed above.

C. Attorney Fees and costs.

Parent also requested reimbursement for attorney fees and cost associated with enforcing their rights under the IDEA. 20 USC § 1415(i)(3)(B) permits an award of attorney's fees to parents or guardians that prevail in actions brought under the IDEA. Nonetheless, this tribunal lacks the authority to grant such an award to Parent. Rather, Parent must petition an appropriate court for such an award. As such, this order does not address the merits of Parents' attorney fee claim.

ORDER

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

The District is to pay the cost of enrolling the Student at the Latham Center, including non-medical care, room and board, for the period commencing on the first day of the winter 2021 semester until the District provides TFS²⁶ in school-wide setting along with an IEP which addresses all of the inadequacies identified in this order or the next annual IEP which appears to be September 2021.

Jill Marie Messecar

Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

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

ENTERED at Salem, Oregon this 22nd day of December 2020, with copies mailed to:

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

²⁶ TFS should be provided in the manner that term is used by the PWS Association and Dr. McTighe.

