

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

IN THE MATTER OF:THE)	FINAL ORDER
EDUCATION OF)	
)	
STUDENT AND CANBY SCHOOL)	OAH Case No. 2021-ABC-05007
DISTRICT 86)	Agency Case No. DP 21-112

HISTORY OF THE CASE

On November 8, 2021, Parents, on behalf of Student, filed a Request for Due Process Hearing (Complaint) with the Oregon Department of Education (ODE) under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 USC §§ 1400 *et seq.*¹ In the Complaint, Parent alleged procedural and substantive violations of the IDEA, regarding the evaluation, educational placement, and the provision of a free appropriate public education (FAPE) to their child, and violations of Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA) for the period between March 27, 2020 and December 18, 2020 (the period in issue).

On November 22, 2021, ODE referred the case to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Jessica E. Toth to conduct the due process hearing and issue a Final Order in the case. ALJ Toth presided over a telephone prehearing conference on December 9, 2021. Attorneys Christine Furrer² and Kimberly Sherman represented Parents and Student. Attorney Joel Hungerford represented Canby School District 86 (District). Parents participated in the conference. During the prehearing conference, the ALJ granted Parents' request to waive the 45-day hearing timeline. The ALJ established a prehearing motion timeline and identified July 8, 2022 as the date certain for issuance of the final order. The hearing was scheduled for April 25, 2022 through May 6, 2022.

With permission of the ALJ, Parent filed a First Amended Complaint (Amended Complaint) on December 20, 2021. The Amended Complaint contained no claims under Section 504. Additional prehearing conferences were held on March 14, 2022 and April 19, 2022, with both parties participating and represented by counsel.

¹ In 2004, Congress reauthorized and amended the Individuals with Disabilities Education Act (IDEA) as the Individual with Disabilities Education Improvement Act of 2004 (IDEIA of 2004). Pub L 108-446, 118 Stat 2647 (2004). The Act as amended, applies to the period in issue in this Order but will be referred to as IDEA for readability and convenience.

² Following the hearing, Ms. Furrer changed her last name to Bacon. References in this order use the former name, to maintain consistency with all filings in this matter, as well as the written transcript of the hearing.

Upon request by Parents' counsel and with no objection from District's counsel, the ALJ shifted the start of the hearing to April 26, 2022, to allow the parties an additional day for preparation. ALJ Toth convened the hearing on April 26, 2022 through May 6, 2022, via video conference. Ms. Furrer and Dr. Sherman represented the Student/Parents, accompanied by Parents. Mr. Hungerford represented the District, accompanied by Kathy Sullivan, Special Education Director for the District. The District provided a court reporter for the hearing. Naegeli Reporting prepared written transcripts of the hearing sessions. At Parents' request, the hearing was held open to the public.

The District presented its case first. In addition to Parents, the following witnesses testified:

- Dr. Karen Apgar³, school psychologist
- John Aungier⁴, special education teacher
- Nicole Bennett, mental health nurse practitioner
- Matthew (Matty) Bryant⁵, Heritage principal
- Kimberly (Kym) Carmichael, LifeWorks clinical supervisor
- Jeanne Gering, special education teacher
- Stuart Gustafson, mental health therapist
- Jamis Leeper, Heritage medical director
- Emily McLaughlin, school psychologist
- Marny Moore, counselor
- Kathleen Mulqueeney, special education teacher
- Conrad Nebeker, teacher and academic advisor
- Martha Plante, LifeWorks program director
- Betty Rivinus⁶, teacher and outside placement case manager
- Rebecca Schweigert, family therapist and case manager
- Amanda Stepanovich, counselor/mental health associate
- Kathy Sullivan⁷, District Director of Student Services

At the close of the hearing, the ALJ held the record open for receipt of the final hearing transcript and the parties' written closing arguments. On June 9, 2022, the ALJ granted the

³ Dr. Apgar appeared as an expert in the areas of school psychology and data collection for educational purposes.

⁴ Mr. Aungier appeared as an expert in teaching academics and behaviors goals to students with behavioral challenges.

⁵ Over the District's objection, Mr. Bryant appeared as an expert in implementing curriculum policies and procedures relating to a residential program for children with behavioral challenges, supervising teachers in that setting, communicating with parents of children placed in that setting, and coordinating IEPs or individual service plans implemented in that setting.

⁶ Ms. Rivinus appeared as an expert in special education instruction and liaising between the school district and outside placements.

⁷ Ms. Sullivan appeared as an expert in therapeutic supports provided to students in a day treatment setting and/or residential program.

parties' joint request to extend the deadline for filing of closing briefs to June 24, 2022. Following that, on June 22, 2022, the ALJ granted the District's unopposed motion to extend the filing date of closing briefs to July 1, 2022, and identified July 29, 2022 as the date certain upon which OAH would issue a final order. Naegeli Reporting provided the completed transcript on June 1, 2022. The parties filed written post-hearing briefs on July 1, 2022. The District filed its reply to Parents' post-hearing brief on July 8, 2022, and the hearing record closed on that date.

LIST OF ACRONYMS

The following terms appear in their abbreviated form throughout this Order:

ADHD: attention-deficit/hyperactivity disorder
ADOS-2: Autism Diagnostic Observation Schedule, Second Edition
ADTP: adolescent day treatment program
ASD: autism spectrum disorder
CDL: comprehensive distance learning
FAPE: free appropriate public education
IDEA: Individuals with Disabilities Education Improvement Act of 2004
IEP: Individualized Education Plan
LIPI: limited in-person instruction
OHI: Other Health Impairment
ODE: Oregon Department of Education
PLP: present level of performance
PSW: personal support worker
SDI: specially designed instruction
STO: short-term objective
WJ IV: Woodcock-Johnson Test of Achievement, Fourth Edition

ISSUES

1. Whether, during the period in issue, District failed to collect meaningful behavioral data, which denied Student a FAPE because goals were not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.
2. Whether, during the period in issue, District denied Student a FAPE when it failed to adjust current goals and/or create new goals and objectives and related services to address Student's off-screen behaviors of concern.
3. Whether, during the period in issue, District failed to provide Behavioral, Communication and Social Skills SDI and failed to account for missed SDI during periods that Student was off-screen, and thus absent from SDI.
4. Whether, during the period in issue, District failed to provide related services and supports to Parents in the home-school environment.
5. Whether, during the period in issue, District violated the procedural requirements of

the IDEA by failing to seriously consider Parents' reports of Student's escalating negative behaviors.

6. Whether, as of December 28, 2020, Parent's unilateral placement of Student at a private residential setting was and is a justified and appropriate placement in terms of Student's academic and behavioral needs.

EVIDENTIARY RULINGS

Exhibits D1 through D152, offered by the District, were admitted into the record without objection. Exhibits S2, S4 through S6, S12 through S15, S17 through S22, S24 through S28, S30, S32 through S35, and S38 were admitted into the record without objection. Exhibits S1, S3, S9 through S11, S16, S31, S36, and S37, were admitted into the record over the District's objection.

Parents offered Exhibit S29 fewer than five days prior to the start of hearing, and the District exercised its right to prohibit pages 160 through 306 and 311 through 344 from being admitted into the record. Pages 1 through 159 and 307 through 310 of Exhibit S29 were not prohibited by the District and the ALJ admitted them into the record. Exhibits S23 and S39 were excluded from the record as irrelevant. Parents offered no Exhibits S7, S8, S40, or S41 into the record, and thus those exhibit numbers are omitted from the list of exhibits.

The District requested that the ALJ take judicial notice of the Utah State Board of Education educator licensing database, an online tool. Parents objected to notice being taken. The ALJ took the request and objection under advisement at the time of the hearing. Upon further review, the ALJ declined to take judicial notice of the educator licensing database on the basis that it lacked relevance to the issues for hearing.

FINDINGS OF FACT

1. Student was born on August 16, 2005 and was first made eligible to receive special education and related services in 2012. (Exs. D3 at 1; S4 at 19.)
2. During the period relevant to the Amended Complaint, Student was eligible to receive special education and related services in Oregon under the eligibility categories of autism spectrum disorder (ASD) and Other Health Impairment (OHI). (Ex. D3 at 1.)
3. Student resided with Parents within the boundaries of the District until December 27, 2020. On December 28, 2020, Student moved to residential placement in the state of Utah, while Parents continued to reside within the District's boundaries. (Tr. Vol. 6 at 1140:10-11; Ex. S34 at 1.)
4. Student has clinical diagnoses of ASD, attention deficit hyperactivity disorder (ADHD), and unspecified anxiety disorder. (Ex. D122 at 1; Ex. S4 at 154-156.)
5. Student exhibits needs in the area of communication. (Ex. D3 at 3.) Student

struggles with entering and following conversations, staying on topic, and demonstrating reciprocity in conversation with others. (Ex. D10 at 11.)

6. Student presents with a much younger emotional maturity than Student's actual chronological age. (Ex. D10 at 11.) For example, when Student was 14 or 15, Student's preferred playmates were in the five to eight year old range. (Tr. Vol. 7 at 1189: 8-19.)

7. Student exhibits strengths in the areas of work ethic, computer skills, mathematical reasoning and reading fluency. Student particularly enjoys art, music, sports, pop culture, math and science. (Ex. D3 at 4.) Father observes that Student is a very caring and loving person who feels things deeply and expresses those feelings to others, whether positive or negative. (Tr. Vol. 7 at 1181: 24-25; 1182: 1-2.)

8. Student is interested in studying and working in the fields of real estate or architecture. (Ex. D3 at 4.)

9. In February 2018, the District administered the Woodcock-Johnson Test of Achievement, Fourth Edition (WJ IV) to Student. Student demonstrated academic achievement skills in the low-average to average range in all areas other than math. (Ex. D10 at 9.)

Behavior Needs Identified

10. Student exhibits significant needs in the area of behavior, and self-regulation in particular. Student exhibits a high degree of impulsivity, is very physical with others and surroundings, and engages in undesirable behavior as a means of gaining attention. (Tr. Vol. 7 at 1181: 19-22.)

11. When overwhelmed, Student may physically posture and become verbally aggressive toward others. Kathy Sullivan, District Director of Student Services, regards this behavior as abusive. (Tr. Vol. 2 at 280: 12-18.)

12. Student displays deficits in detecting or interpreting social cues. (Tr. Vol. 7 at 1182: 1-2; 1185: 12-16.) Student also struggles with maintaining appropriate topics and taking turns in conversation with others. (Ex. D3 at 15.) Overall, Student exhibits deficits in social interaction. (Tr. Vol. 1 at 136: 14-19.) Student is highly motivated to make friends but is negatively impacted by emotional dysregulation. (Ex. D10 at 11.)

13. Student has a history of engaging in masking behavior, presenting one demeanor in one setting – typically the school setting – and another, less appropriate demeanor, in the home environment. (Tr. Vol. 7 at 1182: 14-23.)

14. Student requires consistency and routine in order to remain emotionally regulated. These things provide Student with a sense of stability – a feeling of control. If Student discovers a toy is not in its designated box, Student will exhibit angst that reaches beyond what one would consider a normal degree of frustration. (Tr. Vol. 7 at 1186: 8-24.)

15. The District conducted a Functional Behavior Analysis (FBA) of Student in April 2018. That assessment identified a variety of behavior needs, including Student's tendencies to make inappropriate comments and sounds, and behaving unsafely with body and classroom materials. (Ex. S4 at 79.)

Period Prior to March 27, 2020

16. On April 20, 2019, Student's Individualized Education Program (IEP) team determined that a day treatment setting constituted the appropriate educational placement for Student for the 2019-2020 school year. The District identified LifeWorks NW adolescent day treatment program (LifeWorks) as the specific placement appropriate to meet Student's needs. (Ex. S11 at 54.)

17. LifeWorks is a mental health program with an educational component offered by the Northwest Regional Educational Service District (ESD). The therapeutic program at LifeWorks employs the Collaborative Problem Solving model, which emphasizes cognitive behavioral therapy. (Tr. Vol. 6 at 1065: 2-8.)

18. LifeWorks requires family engagement, which in Student's case consisted of family therapy. Parents participated in family therapy through LifeWorks. (Tr. Vol. 2 at 304: 14-19.)

19. Student began attending LifeWorks on or about September 4, 2019, as an eighth grader. (Ex. D25.)

20. LifeWorks provided both educational and therapeutic services to Student. LifeWorks referred to time spent outside of the classroom, in the mental health treatment environment, as the "milieu." (Tr. Vol. 2 at 317: 19-21.) The "social setting" was also part of the milieu at LifeWorks. (Tr. Vol. 5 at 857: 7-11.)

21. Three milieu counselors on-site at LifeWorks provided direct supervision of students throughout the day, including during lunch, in the hallways during breaks between classes, and as needed when a student required an unscheduled break. (Tr. Vol. 5 at 859: 15 – 25; 860: 1.)

22. Student's program at LifeWorks included both therapeutic goals, to be worked on in the milieu setting, as well as IEP goals, to be worked on in the classroom setting. The therapeutic goals were substantially similar to the IEP goals addressing behavior, communication and social skills. (Tr. Vol. 3 at 543: 3-25; 544: 1-14, citing Exs. S17 and D3.)

23. LifeWorks developed therapeutic goals and worked on them with Student to support Student in accessing the IEP goals. (Tr. Vol. 2 at 302: 4-14.)

24. To track progress toward the IEP goals, classroom teachers collected data in the classroom setting. The milieu counselor collected data on student behavior, observed in the milieu setting, to measure progress toward therapeutic goals. For Student, Amanda Stepanovich,

Student's individual counselor, collected Student's behavior data in the milieu setting, and Student's teachers were responsible for data collection in the classroom setting. Quarterly reports of Student's progress toward achievement of treatment goals summarized data collected in the milieu setting. (Tr. Vol. 5 at 899: 25; 900: 1-8.)

25. Examination of data and progress toward IEP goals drives educational placement recommendations by the District's IEP teams. (Tr. Vol. 1 at 124: 20-23.) However, any placement decision is ultimately based on the student's individual needs and circumstances. (Tr. Vol. 1 at 126: 23-25.)

26. In 2019, prior to the COVID-19 pandemic, clinical supervisor Kym Carmichael observed that Student's typical behaviors at LifeWorks included making noises walking down the hall, banging on the walls, making impulsive comments, and, when emotionally dysregulated, yelling about wanting to go home. (Tr. Vol. 5 at 861: 21-25; 862: 1-8.)

27. Student sometimes became so emotionally dysregulated that managing Student's behavior necessitated spending the entire school day at LifeWorks in a break room, supported by staff. (Tr. Vol. 5 at 873: 3-6.)

28. The District held an annual IEP meeting for Student on October 16, 2019. (Ex. D3.)

29. The October 2019 IEP contained two annual goals in the area of behavior/self-management, one annual goal in the area of communication/self-management, one annual social skills goal, one annual math goal, one annual reading goal, and one annual written language goal. (Ex. D3 at 22-28.)

30. The IEP provided Student specially designed instruction (SDI) in the amount of 150 minutes per week of Writing, 150 minutes per week of Reading, 300 minutes per week of Math, 150 minutes per week of Social Skills, 150 minutes per week of Behavior, and 160 minutes monthly of SDI in the area of communication. (Ex. D3 at 29.)

31. The October 2019 IEP offered 480 minutes of direct adult supervision per day. (Ex. D3 at 30.)

32. The October 2019 IEP offered 120 minutes per month of "Family Training/Counseling/Consultation." (Ex. D10 at 29.)

33. The October 2019 IEP included several narrative paragraphs of input provided by Parents and Student. (Ex. D3 at 5, 6.)

34. During the October 16, 2019 IEP meeting, the IEP team agreed to continue Student's placement at LifeWorks. (Ex. D3 at 34.) At the time, Parents expressed their belief that the placement was appropriate for Student and was meeting Student's unique needs. (Ex. D4.) Parents continued to hold that belief through March 12, 2020, while LifeWorks offered its program in person. (Tr. Vol. 8 at 1489: 15-19.)

35. The IEP team developed no additional IEPs for Student between the October 16, 2019 annual IEP and the next annual IEP, which was developed on October 9, 2020. (Ex. D10.)

36. On March 12, 2020, near the beginning of the COVID-19 pandemic, Oregon public schools temporarily closed, with instruction halted. In accordance with an executive order of the governor, the District provided no instruction to any student between March 12, 2020 and March 27, 2020. (Ex. D66.)

Period in Issue

Spring Term of 2019-2020 School Year

37. School resumed via a virtual model on March 30, 2020. At that time, Student's operative IEP was the October 16, 2019 IEP. (Ex. D3.)

38. From March 30, 2020 through December 18, 2020, the District conducted school through the virtual model, which ODE referred to as "distance learning." (Ex. D23.) While schools operated under the distance learning model, districts were absolved from state testing requirements. (Tr. Vol. 1 at 119: 7-12.) The District suspended its Smarter Balance state assessments during the period in issue. (Ex. D10 at 10.)

39. On April 21, 2020, a few weeks after distance learning commenced, the District notified Parents that Student would receive "teacher-led/directed learning" for a total of 600 minutes weekly in place of the 900 minutes weekly of SDI in Student's IEP. (Ex. D6.) No IEP meeting was held to adjust the amount of SDI offered to Student. (See Ex. D10.)

40. Parents originally created a school workspace in Student's bedroom. However, it quickly became apparent that Student required constant monitoring while online, because Student engaged in online activity during class that distracted both Student and peers from attending to the instruction presented by the teacher. Once they discovered this, Parents moved Student to the kitchen table where one parent could be seated opposite Student. Eventually, in November 2020, Parents set up an extra monitor so that they could see everything Student engaged in on-screen. (Tr. Vol. 7 at 1206: 19-25; 1207: 1-12.)

41. Student tended to search the internet for horror-related content, which Parents believed was inappropriate and potentially unsafe. (Tr. Vol. 1209: 5-23.) Prior to when schools entered distance learning, necessitating online activity, Parents would not have left Student alone in a room with access to the internet, due to a lack of confidence that Student would be able to make safe choices about internet usage. (Tr. Vol. 7 at 1208: 17-24.)

42. Throughout Student's distance learning period, Parents or Student's personal support worker (PSW), Rose, were present while Student participated in school. (Tr. Vol. 7 at 1210: 17-25.) Rose's services were not funded by the District. (Tr. Vol. 2 at 356: 17-20.)

43. While school occurred through distance learning, the District did not provide

Parents with any training regarding implementing Student's IEP goals or therapeutic goals at home. Father, due to not being a teacher himself and having his own full-time job during school hours, expressed to Ms. Stepanovich that he believed Parents could not provide the support Student required for goal achievement. (Tr. Vol. 7 at 1264: 5-23.)

44. From March 30, 2020 through the remainder of the 2019-2020 school year, LifeWorks ceased collecting behavior data regarding Student. The challenges of shifting to a distance learning model on such short notice made data collection unfeasible. (Tr. Vol. 5 at 901: 7-15; Ex. D23a.)

45. The distance learning program at Lifeworks from March 30, 2020 through December 2020 occurred from 9:00 a.m. to 1:00 p.m. daily. LifeWorks staff was available to provide additional support between the hours of 8:00 a.m. and 4:00 p.m. (Tr. Vol. 5 at 867: 8-25; 868: 1-13.)

46. During the period in issue, Student became emotionally dysregulated in reaction to various incidents, such as being told 'no,' schedule changes, or being asked to do a non-preferred task. Student also exhibited dysregulation after a difficult interaction with a family member at home or with someone in the virtual school environment. (Tr. Vol. 5 at 889: 5-16.)

47. Throughout the period in issue, when District staff delivered instruction directly, they utilized a video conferencing platform. Students controlled their own cameras and microphones while connected to the video platform. On numerous occasions during these video conference sessions, Student would turn off the camera, the microphone, or both. Sometimes this behavior occurred for a brief moment, and other times for a more extended period. When Student turned off the camera, school staff could not determine whether Student remained close enough to the computer to receive any instruction. (Tr. Vol. 3 at 430: 15-18.)

48. Student's behavior of turning off the camera or microphone negatively impacted Student's ability to learn because Student would fail to work on the assigned task while the camera or microphone were off. (Tr. Vol. 7 at 1268: 19-25; 1269: 1-4.)

49. The District did not track when or for what duration Student turned off the camera during class sessions. (Tr. Vol. 3 at 579: 11-24.)

50. Mr. Aungier believed that when Student turned the camera off during class sessions, Student was unable to engage in instruction. (Tr. Vol. 3 at 422: 24-25; 423: 1-19.)

51. On some occasions between March 30, 2020 and June 2020, Student would log off of virtual instruction before class was over, without permission of the teacher. (Tr. Vol. 2 at 323: 25; 324: 1-12.) When denied permission to log off early from the meeting, Student would be disruptive to the class. (Tr. Vol. 2 at 325: 3-14.)

52. The District did not modify Student's IEP goals to address the behavior of turning off the camera during class. (Tr. Vol. 3 at 423: 16-19.)

53. When Student became emotionally dysregulated during a virtual class session, a “breakout room” was available which enabled Student to be in a video conference with a single staff member, where they could talk until Student felt prepared to rejoin the class. (Tr. Vol. 3 at 421: 20-25; 422: 1-20.)

54. When Student became dysregulated, getting Student to successfully transition into a breakout room often required parental support. (Tr. Vol. 2 at 388: 16-19; at 389: 24-25; at 390: 1-2.) Student was not receptive to moving to a breakout room, sometimes refusing to move. (Tr. Vol. 2 at 320: 14-20.)

55. Student also required parental support in order to attend class and engage in distance learning, to some degree. (Tr. Vol. 2 at 388: 16-21.)

56. Parents needed to make an appearance on-screen before the end of Student’s classes, so that Student’s teachers could confirm that Student had completed assigned work and had permission to leave the class at that point. (Ex. S29 at 97.)

57. During distance learning, Student exhibited what John Aungier, Student’s case manager, considered “major behavior incidents,” including making “racial comments,” being disruptive during class meetings, writing on the video conference screen, muting the microphone, repeating sounds, interrupting others who were speaking, yelling at a household member observable in the background of Student’s screen, and hurting the family dog. (Tr. Vol. 2 at 381: 16-25; 382: 1-3.)

58. Mr. Aungier did not see a marked difference between Student’s behavior on-screen as compared with Student’s behavior when school previously occurred in-person. (Tr. Vol. 2 at 332: 4-6.)

59. Jeanne Gering, who taught Student’s English and Math classes once distance learning commenced, was unable to determine whether Student exhibited more distraction in the virtual learning setting, because she was not physically present in the home environment to be able to see what Student was doing during class. (Tr. Vol. 3 at 499: 8-18.)

60. Once LifeWorks shifted into a distance learning model, Ms. Carmichael, found it challenging to address Student’s behavior needs because it was not possible to prevent Student from leaving a virtual meeting, “and we couldn’t jump through the screen and follow [Student] in help support [*sic*].” At those times, with no school or therapeutic staff present, Parents and the family’s PSW had to supply the needed support to Student. (Tr. Vol. 5 at 879: 12-25; 880: 1-3.)

61. Ms. Stepanovich had not received training in how to provide behavioral interventions over video conference, and believed that no amount of schooling could have adequately prepared her to do so. (Tr. Vol. 7 at 1380: 10-13.)

62. LifeWorks counselor Marny Moore found it more difficult to work with students in the distance learning format than in person, because without being physically present in a student’s environment, it was difficult to ascertain exactly what issues were occurring. (Tr. Vol.

8 at 1539: 7-25; 1540: 1.) One disadvantage to distance learning was the lack of ability to take a physical activity break, such as going on a walk, playing a game, or going to the gym with a student, which were a significant aspect of the therapeutic service provided to students by LifeWorks counselors. (Tr. Vol. 8 at 1544: 5-10.)

63. On April 17, 2020, LifeWorks staff emailed Parents to discuss how to address times when Student logged off from a class session before it ended. (Ex. S29 at 54.)

64. In a quarterly staff meeting held at LifeWorks, staff informed Betty Rivinus, the District's outside placement case manager, that Parents had expressed concerns about Student's off-screen behavior. (Tr. Vol. 4 at 644: 22-25; 645: 1-5.)

65. Similarly, Student's family therapist, Rebecca Schweigert, was aware that Parents expressed concerns over Student's off-screen behaviors occurring during the school day. (Tr. Vol. 5 at 944: 5-14.) At some point prior to October 9, 2020, Ms. Schweigert became aware that Student engaged in the off-screen behaviors of swearing at and making threats toward family members, and physically antagonizing the family dog. (Tr. Vol. 5 at 948: 20-25; 949: 1-18.) Furthermore, Parents informed Ms. Schweigert that Student engaged in "masking" behavior on-screen, presenting a more emotionally regulated demeanor while on-screen than during off-screen periods. (Tr. Vol. 5 at 950: 11-20.)

66. At the start of the distance learning period, Student engaged in negative off-screen behavior during school for approximately 25 percent of the school day. By the start of the 2020-2021 school year, Student engaged in those off-screen behaviors approximately 50 percent of the school day. (Tr. Vol. 7 at 1287: 21-25; 1288: 1-11.)

67. Ms. Schwiegert implemented Student's family therapy service, in the virtual setting, during the period in issue. Additionally, Ms. Schweigert visited the family at home during the summer of 2020. (Tr. Vol. 5 at 943: 10-17.)

68. The District sent prior written notice regarding discontinuation of Student's social skills goal as of May 6, 2020. The reason given for discontinuing the goal was that "[t]here is no opportunity to facilitate one on one conversation with peers in current learning environment/group chats," due to the nature of schooling being provided through a virtual model. The prior written notice also noted that it would "not be possible to monitor and work towards [the social skills goal] during virtual learning in larger groups." (Ex. D7.)

69. On June 8, 2020, LifeWorks communicated with Student in response to an email from Parent regarding Student mistreating the family dog. (Ex. S29 at 104, 105.)

70. In June 2020, after distance learning had been in effect for a few months, the District instructed staff to base that term's progress reports on anecdotal observations rather than measurable data. (Tr. Vol. 3 at 559: 12-17.)

June through August 2020

71. Student did not attend a full school program during the summer break period from June 6, 2020 until September 2, 2020, but did participate in some morning and afternoon check-ins with LifeWorks staff during the summer. (Tr. Vol. 7 at 1326: 7-19.) Student also participated in half of the LifeWorks summer enrichment session, as well. (Ex. D29 at 1.) IEP goals were not addressed or reported on during the summer session, outside of the regular school year. (Ex. D10 at 10.)

72. In July 2020, Parents began looking for possible in-person educational placements for Student. Student's behavior was becoming unmanageable, and Parents recognized they lacked the ability to provide for Student both academically and behaviorally with no in-person schooling. (Tr. Vol. 7 at 1272: 1-13.)

Fall Term of 2020-2021 School Year

73. As of the start of the 2020-2021 school year on September 14, 2020, the term "Comprehensive Distance Learning" (CDL), a particular model of distance learning, described the program implemented by public schools throughout the state. CDL included both "synchronous" and "asynchronous" learning time. Synchronous learning referred to time when a teacher directly communicated with students, typically through lessons delivered via video conference. Asynchronous learning included time when students worked on assignments or viewed content not being delivered live in that moment, such as a prerecorded video. LifeWorks operated under the CDL model, including both synchronous and asynchronous components. (Tr. Vol. 2 at 222: 11-16; Ex. D52.)

74. Within the CDL model, in order to be considered present in terms of attendance for a given class period or an entire school day, a student merely needed to be present for any portion of a class meeting, communicate with a classroom teacher at some point during the day, or submit class work at some point during the day. (Ex. D10 at 7; Tr. Vol. 3 at 508: 1-25; 509: 1-11.)

75. The instructional day during CDL was shorter than it was when school had been held in person. (Tr. Vol. 2 at 221: 16-25.)

76. By the beginning of the 2020-2021 school year, Mr. Aungier observed that Student "would protest more about schoolwork," and seemed "to be burning out a little bit with online learning," in contrast to how Student behaved when school occurred in person. (Tr. Vol. 2 at 333: 3-5.) According to Mr. Aungier, "protest" appeared in the form of "* * * trying to get out of assignments. Trying to leave classes early. Chatting more. Trying to negotiate more. Can I only do these four problems and then be done type of behavior." (Tr. Vol. 2 at 333: 9-13.)

77. Student's ability to self-advocate in class declined during the 2020-2021 school year. (Tr. Vol. 3 at 406: 1-5.) Additionally, Student's ability to self-regulate behavior declined somewhat beginning in about October 2020. (Tr. Vol. 3 at 406: 21-24.)

October 9, 2020 Annual IEP

Meeting discussion of Student's PLPs

78. The District held an IEP meeting virtually on October 9, 2020. Parents attended the IEP meeting. The October 9, 2020 IEP included numerous references to how [Student's] annual goal progress resulted at least in part from family support in working on the goals:

Regarding behavior/self-management goal 1: 6/11/20: During distance learning [Student] was successful *with support from [Student's] family* * * * (Ex. D10 at 12)

Regarding behavior/self-management goal 2: 6/11/20: Taking regularly scheduled breaks and sticking to a predictable schedule were important to [Student's] success, *as well as support from family* and staff. (Ex. D10 at 13.)

(Emphasis added.)

79. The Present Levels of Performance (PLP) portion of the IEP noted, “[Student] responds well when given the opportunity to work with a trusted adult in a one on one setting.” (Ex. D10 at 4.)

80. The October 2020 IEP did not report measurable data toward goal progress for the final quarter of the IEP year. Rather, any progress made during those months was reported in the form of “a narrative of what was seen online.” (Ex. D10 at 7.)

81. For the earlier portions of the IEP year, in Student's behavior/self-management goal one, the October 2020 IEP reported that Student met the first objective at 40.8 percent by January 31, 2020, and 47 percent by April 10, 2020. However, for the second objective attached to that goal, Student declined from 36 percent progress as of January 31, 2020 to 33 percent progress as of April 10, 2020. Similarly, for the third objective attached to that goal, Student declined in performance from 54 percent as of January 31, 2020 down to 51.8 percent progress as of April 10, 2020. (Ex. D10 at 12.)

82. The October 2020 IEP did not report on whether Student achieved any of the prior year's goals. (Ex. D10.)

83. On October 9, 2020, Parents provided a written statement to the District of new concerns regarding Student's behavior when not onscreen. The District incorporated this statement of concerns into Student's October 9, 2020 annual IEP. Specifically, Parents noted, “[Student's] “off screen” behavior has escalated where verbal aggression, abuse, and protests are more frequent and [Student's] tolerance to everyday demands/anxiety has lessened.” (Ex. D14 at 1; *see also* Ex. D10.)

84. In the statement, Parents also expressed, “We are deeply concerned about continued lagging adaptive behavior skills, increasing anxiety-fueled behaviors (protest, demand, controlling).” (Ex. D14 at 2.) Parents further stated, “We are concerned that [Student] is not currently getting social experiences as one-on-one with peers and virtual meetings don't address

[Student's] needs.” (Ex. D10 at 4.)

85. During the October 2020 IEP meeting, Mother expressed that Student's off-screen behaviors were creating a great deal of stress in the home and having a negative impact on Student's sibling. Mother stated her belief that distance learning would not ever work well for Student. (Tr. Vol. 3 at 573: 21-25; 574: 1-4; Ex. D10 at 4.)

Goals Contained in October 2020 IEP

86. The October 9, 2020 IEP repeated verbatim the same math, written language, and reading comprehension goals contained in the October 16, 2019 IEP. (Ex. D10 at 20, 23 and 24; *see also* Ex. D3 at 23, 26 and 27.)

87. Likewise, the October 9, 2020 IEP repeated verbatim the same two behavior/self-management goals Student had for the entire year prior. (Ex. D10 at 19 and 21; *see also* Ex. D3 at 22 and 24.)

88. The communication/self-management goal included in the 2020 IEP repeated verbatim the goal in that area from the October 2019 IEP. (Ex. D10 at 25; *see also* Ex. D3 at 28.)

89. The October 2020 IEP included one new goal with the designation, “During Comprehensive Distance Learning,” in the area of social skills. (Ex. D10 at 26.)

Related Services Offered in October 2020 IEP

90. In the October 9, 2020 IEP, the District offered Student less SDI in the areas of Social Skills and Communication during CDL than for the prospective time when school would reopen for in-person instruction. The IEP offered Student 20 minutes per week of SDI in Social Skills while schools operated under CDL, but then 90 minutes per week to take effect once schools fully reopened. The IEP offered Student 50 minutes per week of SDI in Communication while schools operated under CDL, but then 120 minutes per week to take effect once schools fully reopened. (Ex. D10 at 28.)

91. The October 9, 2020 IEP offered related service in the area of “Family Training/Counseling/Consultation” only through October 15, 2020. (Ex. D10 at 29.)

92. During the October 2020 IEP meeting, Mr. Aungier reported working on developing a data tracking form for Parents to utilize in the home regarding Student's off-screen behavior during the day. (Tr. Vol. 4 at 657: 1-10.) Mr. Aungier's goal was to give Student some perspective on how others in the home viewed the behavior, in terms of its intensity. (Tr. Vol. 3 at 581: 23-25; 582: 1-5.) Mr. Aungier also intended the home data tracking form to be a means of sharing with other IEP team members what the family observed in the home. (Tr. Vol. 3 at 582: 6-12.)

93. Also at the October 9, 2020 IEP meeting, the District reminded Parents of the

option to contact LifeWorks staff by phone at any time during the school day if they needed support in addressing off-screen behaviors. (Tr. Vol. 4 at 659: 4-21.)

Placement Considerations in October 2020 IEP

94. In the parent statement that was incorporated into the IEP, Parents expressed their belief about Student's placement, stating, "For [Student], we believe that a day treatment placement is best delivered in a day treatment setting, and not at home," and "We believe that [Student] is best served in an intensive treatment setting, delivered in-person, among [Student's] peers, and by trained providers rather than by [Student's] parents." (Ex. D14 at 2.)

95. Finally, in their written statement of concerns, Parents indicated a desire to discuss alternate placement options with the District. (Ex. D14 at 2.) Parents inquired about the status of the District offering limited in-person instruction (LIPI), but the District did not provide a direct response. (Ex. D11 at 1.)

96. At the time of the October 9, 2020 IEP meeting, the District did not have the option to provide in-person instruction or other support to any student. (Tr. Vol. 4 at 674: 23-25; 675: 1-3.) Ms. Rivinus likewise was not aware of any outside provider with whom the District could have contracted to provide in-person service. (Tr. Vol. 4 at 675: 22-25; 676: 1-5.)

97. The IEP team did not consider residential placement during the October 9, 2020 IEP meeting. (Ex. D10 at 34.)

98. Notes from the October 2020 IEP meeting stated, "To do – Connect [Parent] with other mother to discuss residential programs." (Ex. D11 at 2.)

Events following October 9, 2020 IEP Meeting

99. At some point between October 9, 2020 and December 18, 2020, LifeWorks offered additional counseling sessions to Student to address off-screen behaviors. (Ex. D17.)

100. Continuing to believe that Student required in-person instruction, Parents sought available placement options. After a lengthy search, Parents identified The Heritage Community's Spark Academy (Heritage), located in Provo, Utah, as a potentially appropriate residential placement for Student. (Tr. Vol. 7 at 1276: 8-17.)

101. Heritage works with individuals with ASD or neurodiversity. (Tr. Vol. 6 at 996: 15-17.) Heritage implements various components, including group therapy sessions with peers two times per week, as well as individual therapy weekly. (Tr. Vol. 6 at 1006: 20-23; 1007: 9-10.)

102. Heritage provides a high school program accredited by the state of Utah. (Tr. Vol. 8 at 1433: 19-23.)

103. Heritage includes on its campus a building in which worship services for various

religions, such as Judaism, Catholicism, or Mormonism, are occasionally held on weekends for students who elect to attend those services. (Tr. Vol. 6 at 1130: 3-23.) Tr. Vol. 9 at 1666: 3-25; 1667: 1-18.) Student occasionally attended the Christian service held once monthly at Heritage. (Tr. Vol. 9 at 1848: 1-11.)

104. On November 6, 2020, the District produced a report of Student's progress toward the October 2020 IEP annual goals. For the behavior/self-management goal addressing Student following program routines and expectations, and participating in the program, the progress notes specified that the data measured was taken from times when Student was observed by staff while "on screen and unmuted." (Ex. D27 at 1.)

105. On November 18, 2020, Mr. Aungier sent Parents a data collection tool Parents could use to track off-screen behaviors. (Ex. S29 at 307.)

106. By December 2020, Student was turning off the camera during class multiple times per class period. (Tr. Vol. 7 at 1246: 7-14.)

107. Student engaged in masking behavior throughout the distance learning period, and the behavior increased as time went on. In March, Student exhibited masking behavior on-screen a couple of times per week. By December, Student engaged in that behavior multiple times per day. (Tr. Vol. 7 at 1261: 14-18.)

108. On one occasion, Student became very angry at Father during the school day. Student exhibited tears of rage, screaming at and threatening Father while the computer camera and microphone were turned off. When LifeWorks staff requested that Student join the video conference, Student immediately adopted a calm demeanor, turned the camera and microphone back on, and reported to the meeting participants that the day had gone well. When Father interjected to dispute that characterization, LifeWorks staff recognized that Student had in fact experienced difficulty, and proceeded to speak with Student about the day for ten minutes. Then believing that Student was emotionally regulated, LifeWorks staff dismissed Student for the school day. Student exited the video conference and resumed screaming at Father for another 30 minutes. (Tr. Vol 7 at 1257: 6-25; 1258 – 1261: 1-2.)

109. On December 4, 2020, Parents sent an email to District staff Kathy Sullivan, Betty Rivinus, John Aungier, and LifeWorks staff Kym Carmichael, notifying them that Parents believed that Student's placement at LifeWorks was not meeting Student's needs while it was being implemented through the distance learning model. Parents further informed the District that they intended to transfer Student to Heritage as of January 1, 2021. (Ex. D147 at 1.)

110. LifeWorks produced a quarterly report of Student's progress toward therapeutic goals for the period between March 11, 2020 and December 9, 2020. The report showed that during the period from September 16, 2020 through October 16, 2020, Student met the behavior objective of utilizing appropriate coping skills 68 percent of the time in the milieu and 69 percent of the time in the classroom. In the next review period, from October 17, 2020 through November 13, 2020, Student met that same objective only 50 percent of the time in the milieu and 59 percent of the time in the classroom. During the period between November 14, 2020 and

December 9, 2020, Student met that objective 64 percent of the time in the milieu and 62.5 percent of the time in the classroom. (Ex. D28 at 1.)

111. The December 9, 2020 quarterly report noted that while Student met the behavior short-term objective (STO) of taking self-regulation breaks at 93 percent in the milieu between September 16, 2020 and October 16, 2020, by December 9, 2020 Student's progress declined to 67 percent in the milieu and 71.43 percent in the classroom. (Ex. D28 at 1.)

112. The quarterly report included observations of Student's challenges in following virtual learning expectations in each review period. (Ex. D28 at 3.)

113. On December 18, 2020, the District held another IEP meeting, specifically to address the question of residential placement. Parents requested that the District apply the funds it would have spent on Student's enrollment at LifeWorks to the cost of tuition at Heritage. (Tr. Vol. 8 at 1469: 1-19.)

114. The District responded that it did not agree to change Student's IEP placement to Heritage, on the basis that the placement at LifeWorks met Student's identified educational needs. (Ex. D16 at 3.)

115. In making its decision that Student's educational needs were being met in the placement at LifeWorks with virtual instruction, the District considered progress notes produced on November 6, 2020. (Tr. Vol. 2 at 277: 1-3.)

116. The November 6, 2020 progress notes reflected only progress observed by school staff during times when Student's camera and microphone were turned on. The progress notes did not factor in anything that occurred when the camera or microphone were off. (Ex. D27 at 1.) District staff were trained to report only on data that staff could observe directly. (Tr. Vol. 3 at 579: 11-24.)

117. Ms. Carmichael and LifeWorks program director Martha Plante instructed Ms. Stepanovich not to include Parents' data about off-screen behaviors in the reporting of Student's progress toward therapeutic goals. (Tr. Vol. 7 at 1380: 3-6; 1381: 4-13.)

118. Mr. Aungier, as Student's case manager, was responsible for gathering data collected by himself and other staff and utilizing it to report on Student's progress toward IEP goals. (Tr. Vol. 3 at 561: 20-25; 562: 1-25; 563: 1-24.)

119. At the time of the December 2020 IEP meeting, Mr. Aungier believed that Student benefitted more from in-person instruction, but was still able to get "some benefit" from distance learning. (Tr. Vol. 3 at 591: 4-9.)

120. Also on December 18, 2020, the District issued prior written notice to Parents refusing to change Student's educational placement. (Ex. D17.)

121. Parents believed that if LifeWorks had offered in-person schooling between

March and December 2020, the in-person program would have provided FAPE for Student. (Vol. 8 at 1505: 22-25; 1506: 1.)

122. Student left LifeWorks after December 18, 2020, when the program began its winter break. (Tr. Vol 9 at 1847: 23-25.)

Period Between December 18, 2020 and April 4, 2021

123. No residential programs specifically designed for students who have a medical diagnosis of, or special education eligibility under, ASD, exist in the state of Oregon. (Tr. Vol. 2 at 201: 15.)

124. Student arrived at Heritage on December 28, 2020. (Tr. Vol. 6 at 1140:10-11; S34 at 1.) Parents incurred incidental costs of \$446.34 during the process of transporting Student to Heritage. (Ex. S35 at 4.)

125. At Heritage, Student participated in individual, group and family therapy. (Tr. Vol. 6 at 1006: 20-25; 1007: 1-15.) Due to quarantining periods caused by COVID-19 exposure, on 10 or 12 occasions Student participated in therapy virtually, as opposed to the primary format of therapies being delivered in person. (Tr. Vol. 6 at 1151: 18-25; 1152: 1-4.)

126. Student earned credits toward a regular high school diploma during enrollment at Heritage. (Tr. Vol. 8 at 1433: 24-25; 1434: 1-2.)

127. Student has not had an IEP in effect at Heritage. The treatment team at Heritage meets twice per month to discuss Student's needs and progress, both therapeutically and academically, and develops academic and behavior goals for Student. (Tr. Vol. 8 at 1412: 21-25 through 1417: 3.)

128. For the period from December 28, 2020 through January 31, 2021, Parents incurred tuition costs of \$16,965.00 for Student's program at Heritage. (Ex. S34 at 2.) From January 1, 2021 through January 15, 2021, the family's health insurer, Providence, approved coverage for Student's residential treatment at Heritage. (Ex. D73.) Providence covered \$8,043.12 in costs. (Ex. S34 at 5.) After January 15, 2021, Providence denied continued coverage for Student's residential treatment at Heritage. (Ex. D74.)

129. For the period from February 1, 2021 through February 28, 2021, Parents incurred costs of \$11,172.00 for the Heritage program. (Ex. S34 at 3.)

130. For the period from March 1, 2021 through March 30, 2021, Parents incurred costs of \$12,369.00 for the Heritage program. (Ex. S34 at 4.)

131. For the period from April 1, 2021 through April 4, 2021, Heritage billed Parents at \$399.00 per day for tuition.⁸ (Ex. S34 at 6.)

⁸ After excluding the \$8,043.12 funded by Parents' medical insurer, documentation in the record shows tuition costs incurred at Heritage in the amount of \$34,058.88 between December 28, 2020 and April 4,

132. On March 9, 2021, the District notified families that in-person instruction for student in grades six through 12 would resume on April 5, 2021. (Ex. D63 at 1.)

133. On March 12, 2021, the governor issued an executive order stating that all public schools in Oregon were required to resume in-person instruction for grades six through 12 no later than the week beginning with April 19, 2021. (Ex. D69 at 5.)

134. Student struggled significantly with emotional dysregulation for the first six months at Heritage. (Tr. Vol. 6 at 1013: 1-8.)

Period From April 5, 2021 to the Present

135. On April 5, 2021, LifeWorks resumed in-person instruction four days per week for any student who opted to attend. (Tr. Vol. 6 at 1076: 12-25; 1077: 1-15.)

136. Even after in-person public instruction resumed in Oregon, and return to in-person attendance at LifeWorks became available as of April 5, 2021, Parents continued Student's placement at Heritage. While Student lived and went to school at Heritage, Parents observed significant progress in Student's abilities to self-regulate behavior and manage conflict. (Tr. Vol. 8 at 1486: 19-20.) They maintained the placement at Heritage because they "want the best for [Student]." (Tr. Vol. 8 at 1486: 23-25.)

137. Heritage did not believe that Student required continued residential placement for academic needs. (Tr. Vol 6 at 1145: 3-5.)

138. An executive order of the governor issued on June 25, 2021 specified that all public schools in Oregon would operate full-time, in person, every school day during the 2021-2022 school year. (Ex. D70.)

139. The District continued to fund an available placement for Student at LifeWorks through the remainder of the 2021-2022 school year. (Ex. D75; Tr. Vol. 1 at 89:3-17.)

140. As of the date of hearing, Student continued to reside at Heritage and participate in the program there. (Tr. Vol. 6 at 1065: 19-20.)

CONCLUSIONS OF LAW

1. During the period in issue, District failed to collect meaningful behavioral data, which denied Student a FAPE because annual goals were not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

2021. Combined with incidental costs related to transport in the amount of \$446.34, Parents demonstrated necessary expenses of \$34,505.22 stemming from Student's transport to and placement at Heritage between December 28, 2020 and April 4, 2021.

2. During the period in issue, District denied Student a FAPE when it failed to adjust current annual goals and/or create new annual goals and objectives and related services to address Student's off-screen behaviors of concern during school hours.

3. During the portion of the period in issue as of October 9, 2020, District did not fail to provide Behavioral, Communication and Social Skills SDI and fail to account for missed SDI during periods that Student was off-screen, and thus absent from instruction and SDI.

4. During the period in issue, the District did not fail to provide related services and supports to Parents in the home-school environment.

5. During the period in issue, District did not violate the procedural requirements of the IDEA by failing to seriously consider Parents' reports of Student's escalating behaviors.

6. Between December 28, 2020 and April 4, 2021, Parent's unilateral placement of Student at Heritage was justified and appropriate. As of April 5, 2021, Parent's unilateral placement of Student at a private residential setting was no longer a justified and appropriate placement.

OPINION

Burden of Proof

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this case, Parents sought relief and bear the burden of persuasion. The standard of proof applicable to an administrative hearing is 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) (in administrative actions, the standard of proof that generally applies in agency proceedings, including license-related proceedings, is the preponderance standard); *see also Cook v. Employment Div.*, 47 Or App 437 (1980). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1987).

Federal and state requirements for use of funds under IDEA

Student is eligible to receive special education and related services under the IDEA. Parent alleges that District failed, under the specific allegations set out below, to meet its legal obligation to provide special education and related services as required under IDEA to Student.

States may access federal funding to provide education to children with disabilities, but the states must provide that education in accordance with federal law. *See* 20 USC §1411 *et. seq.* States receiving funds must have in effect certain policies and procedures. *See* 20 USC §1412 *et*

seq. To receive these funds, a state must provide that a “free and appropriate education is available to all children with disabilities[.]” 20 USC §1412(a)(1)(A).

Congress, in amending IDEA in 2004 stated the following:

The purposes of this chapter are—

(1)

(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected [.]

20 USC § 1400(d).

The Supreme Court set out the requirements of a “free appropriate public education” in the seminal case of *Board of Educ. Of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982). Regarding the “appropriate” aspect of FAPE, 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.” *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1002 (2017). 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 USC §1401(a)(18); *Amanda J. v. Clark County School Dist.*, 267 F3d 877, 890 (9th Cir. 2001).

Pursuant to the requirements of the IDEA, under 34 CFR part 300 *et. seq.*, the United States Department of Education promulgated regulations for state use of funds used to carry out the provisions of the Act. OAR chapter 581 division 015, promulgated under ORS chapter 343 mirrors, for the most part, the requirements set out in the federal regulations. The majority of the opinion below cites to the relevant OAR as the implementing rules for Oregon with which school districts are required to comply.

Following identification and evaluation requirements, the cornerstone for educating a student under the IDEA occurs through developing a procedurally and substantively sufficient IEP which provides an offer of FAPE. The IDEA requires that “at the beginning of the school year, each local educational agency * * * shall have in effect, for each child with a disability in the agency’s jurisdiction, an individualized education program[.]” 20 USC § 1414(d)(2)(A); 34 CFR §300.323(a). OAR 581-015-2220 mirrors the federal requirement, requiring that:

(1) General:

- (a) At the beginning of each school year, a school district must have in effect an IEP for each child with a disability within the district's jurisdiction.
- (b) School districts must provide special education and related services to a child with a disability in accordance with an IEP.

In relevant part, OAR 581-018-2200 provides:

- (1) The individualized education program (IEP) must include:
 - (a) A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum.
 - (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[.]

The IEP team is also directed to develop, review, and revise a student's IEP in consideration of the special factors set out in OAR 581-015-2205. OAR 581-015-2205, entitled "IEP Team Considerations and Special Factors[.]" requires that:

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

(a) The strengths of the child;

(b) The concerns of the parents for enhancing the education of their child;

(c) The results of the initial or most recent evaluation of the child; and

(d) The academic, developmental, and functional needs of the child.

(2) In developing, reviewing and revising the child's IEP, the IEP team must consider the following special factors:

(a) The communication needs of the child; and

(b) Whether the child needs assistive technology devices and services.

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

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

* * * * *

(4) If, in considering these special factors, the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) for the child to receive free appropriate public education, the IEP team must include a statement to that effect in the child's IEP.

Issue One: Whether, during the period in issue, District's failure to collect meaningful behavioral data denied Student a FAPE because goals were not reasonably calculated to

enable Student to make progress appropriate in the light of Student's circumstances.

Parents allege that the District denied Student a FAPE by failing to collect data regarding Student's off-screen behaviors, resulting in Student's goals not being reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. This contention has merit.

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 USC §§ 1412 and 1414; see also OARs 581-015-2080, 581-015-2100-2110, and 581-015-2200. A student's IEP drives the student's education, particularly with regard to the student's unique needs resulting from his or her disability. Therefore, a student's IEP must contain measureable annual goals. *Id.* § 1414(d)(1)(A)(i)(I)(cc). In developing those goals, the IEP team must consider the strengths of the student, concerns of the parents, evaluation results, and the academic, developmental, and functional needs of the student. *Id.* § 1414(d)(3)(A).

Here, the District repeatedly emphasized the fact that circumstances caused by the pandemic prevented the District from collecting data during times when Student was off-screen. Multiple District witnesses explained how they are trained to collect only data personally observed by them. The executive order temporarily prohibiting in-person public instruction prevented District staff from being in the same physical space with Student. Not only could staff not work with students on site at LifeWorks, they also were not permitted to work directly with students in the home or any other physical setting. Staff therefore could not observe Student unless Student appeared on the computer screen during video conferencing. The record established that Student frequently turned off the camera during video conferencing sessions. Whenever that occurred, the District had no means of observing Student.

By Parents' estimate, Student engaged in off-screen behaviors during the school day approximately 25 percent of the time in the spring of 2020, and up to 50 percent of the time during the 2020-2021 school year while participating in distance learning at LifeWorks. Because the District did not collect data on the frequency or duration of the off-screen time, no evidence was presented to the contrary. This means that, when the IEP team met to develop annual goals for Student in October 2020, more likely than not, the team lacked information about a significant portion of Student's performance during the school day.

Consequently, the October 2020 IEP contained goals which did not address the full scope of Student's unique needs in the educational setting, and therefore cannot be found to have offered a FAPE to Student. In order to ensure that both Student's 2019 annual goals and 2020 annual goals were reasonably calculated to meet Student's unique needs, the District had a duty first to measure Student's progress toward the 2019 goals, and next to develop goals in the 2020 IEP reasonably calculated to meet Student's unique needs. Goals are typically measured through data collection and reporting or through assessments. The District ceased conducting state assessments during the period in issue. The District conducted no special education evaluations of Student during the period in issue.

With no assessments or evaluations being conducted, the only meaningful way the District could have measured Student's goal progress was through collection and analysis of data. This did not occur. The evidence demonstrates that, more likely than not, the District thus denied Student a FAPE as a result of failing to collect data regarding off-screen behavior during the school day, which prevented IEP goals from being meaningfully calculated to enable Student to make appropriate progress.

Issue Two: Whether, during the period in issue, District denied Student a FAPE when it failed to adjust current goals and/or create new goals and objectives and related services to address Student's off-screen behaviors of concern during school hours.

Parents allege that the District denied Student a FAPE by failing to modify Student's IEP goals, create new goals, or offer new related services after learning that Student exhibited new behaviors once school was delivered via the distance learning model. This contention has merit.

The fact that the District became aware of Student's off-screen behaviors as early as April 2020 demonstrates that the District failed to address new behaviors of concern by holding an IEP meeting in the spring term of 2020. Once the District became aware in April of 2020 that Student's needs in the educational setting had changed, it had a duty to address those needs through an IEP meeting and to determine whether modification of existing goals, development of new goals, or an offer of additional related services, was warranted. This is particularly true because Student's case manager and teacher, Mr. Aungier, recognized that Student was not accessing instruction during times when Student engaged in the behavior of turning off the camera. Rather than examining Student's IEP goals for needed adjustments, the District refrained from scheduling an IEP meeting until the annual IEP was due in October 2020.

Student's attendance and participation during distance learning are not compelling evidence of Student's overall progress toward IEP goals. The record established that during the period in issue, the most minimal of school-related activity was deemed sufficient in terms of counting a student as present in school for the day. The record likewise established that Student's participation in classes occurred largely because Parents ensured that participation. The fact that Student met the low standard for attendance and participated in classes, owing to Parents' involvement, does not prove that Student therefore benefitted from the educational program. And while students and teachers undoubtedly faced tremendous challenges once school shifted to distance learning, FAPE remained the legal standard under which Student's educational program must be analyzed.

Within weeks of when distance learning commenced, in April 2020, Parents notified the District that Student exhibited off-screen negative behaviors. The District likewise possessed direct knowledge that Student engaged in the behaviors of turning off the camera or microphone during class time, preventing staff from determining whether Student accessed the educational program during those instances. This new information about potential behaviors impeding learning triggered a duty on the part of the District to address whether the IEP goals needed to be modified or supplemented. By refraining from holding an IEP meeting until the annual IEP was due, the District failed until October 9, 2020 to address the question of whether Student's needs

dictated modification of existing goals or creation of new goals.

The District responds that Student made meaningful academic progress and thus any off-screen behaviors did not negatively impact Student's learning. This defense, though, does not explain why all of Student's 2019 annual goals carried over into the 2020 IEP. The IEP team's act of continuing each of those goals indicates that, more likely than not, Student had not made adequate yearly progress on the goals, necessitating another year of working on them.

Once the IEP finally occurred in October 2020, the District added two annual goals to address Student's behaviors in the distance learning environment. But prior to that time, the District failed to address the needs occurring during Student's off-camera portion of the school day. And even as of October 9, 2020, the District perpetuated the denial of FAPE by simply continuing the prior year's goals, without modifying or updating them to account for the impact of Student's off-screen behaviors on goal progress.

Issue Three: Whether, during the period in issue, District failed to provide Behavioral, Communication, and Social Skills SDI and failed to account for missed SDI during periods that Student was off-screen, and thus absent from instruction and SDI.

Parents allege that the District denied Student a FAPE by failing to provide required SDI during the period in issue. As discussed in greater detail below, Parents did not prove a denial of FAPE under Issue Three.

OAR 581-015-2000 contains definitions of terms relevant to provision of FAPE in Oregon and states, in relevant part:

(36) "Special education" means specially designed instruction that is provided at no cost to parents to meet the unique needs of a child with a disability "Special education" includes instruction that:

(a) May be conducted in the classroom, the home, a hospital, an institution, a special school or another setting; and

(b) May involve physical education services, speech language services, transition services or other related services designated by rule to be services to meet the unique needs of a child with a disability.

(37) "Specially designed instruction" means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction:

(a) To address the unique needs of the child that result from the child's disability; and

(b) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that

apply to all children.

Provision of special education occurs through implementation of the IEP. A failure to implement an IEP will constitute a violation of a pupil's right to a FAPE only if the failure was material. There is no statutory requirement that a district must perfectly adhere to an IEP, and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a disabled pupil fall significantly short of the services required by the IEP. *Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 481 F.3d 770. A party challenging the implementation of an IEP must show more than a minor failure to implement all elements of that IEP, and instead, must demonstrate that the school district failed to implement substantial and significant provisions of the IEP. *Id.* However, the materiality test is not a requirement that prejudice must be shown. *Id.* at 822 (“[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail.”)

Parents did not meet their burden to prove that the District failed to provide SDI or failed to account for missed SDI in the portion of the period in issue when the October 2019 IEP was operative. Unquestionably, Student missed SDI for portions of that time. But the evidence demonstrates that Student missed that SDI time due to cutting off instruction by refusing to participate in class sessions. That scenario does not amount to a failure on the part of the District. The record was clear on the point that LifeWorks offered 20 hours per week of a distance learning program during the period in issue. When LifeWorks became aware that Student was not participating in a given class session, either because Student muted the microphone or camera and declined to respond to a teacher's prompt, or because Parents notified LifeWorks that Student was off-task and not participating in virtual instruction, LifeWorks made efforts to encourage and secure Student's participation by offering support services in the breakout room setting or by arranging a consultation with Parents and Student where everyone could talk about the issue, with the goal of persuading Student to increase class participation.

The evidence in the record did not establish that Student's off-task or off-screen time equated to Student not receiving the amount of SDI guaranteed through the October 2019 IEP. Put another way, the record does not show that the District failed to implement Student's SDI minutes during the portion of the week when Student actively participated in distance learning. Distance learning comprised approximately 20 hours per week. The October 2019 IEP guaranteed Student 150 minutes per week of social skills, 150 minutes per week of behavior, and 160 minutes per month of communication SDI. This equates to five hours and 40 minutes weekly of SDI in the three areas of need implicated in Parents' Issue Three. While it is undeniable that Student failed or refused to participate in some portion of distance learning every week, the evidence did not establish that Student did not receive that five hours and 40 minutes somewhere over the course of the week in any of the 20-hour weeks of distance learning.

Issue Four: Whether, during the period in issue, District failed to provide related services and supports to Parents in the home-school environment.

Parents argue that the District denied Student a FAPE by failing to train or otherwise guide Parents in supporting Student through challenges during distance learning or in data

collection. This contention is without merit.

34 CFR § 300.34(c)(8) provides:

- (i) *Parent training and counseling* means assisting parents in understanding the special needs of their child;
- (ii) Providing parents with information about child development; and
- (iii) Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

First, at no point did the District direct Parents to collect data or do anything else related to implementation or evaluation of Student's educational program. To do so would have been unsupported by the law requiring that an appropriate education be provided to Student free of cost, because it would effectively have put Parents in the position of acting as District employees without compensating them for that labor. Regarding Mr. Aungier's action of creating a data collection form for Parents, he did so in response to Parents' concerns about tracking off-screen behavior. The intention behind the data tracking form was to provide Parents and Mr. Aungier with an informal tool to further communicate with Student and the District about Student's off-screen behaviors. Student's IEP indicated no expectation by the District that Parents would implement data collection. Therefore the District had no obligation to provide Parents with training in the area of data collection.

Second, Student's October 2019 IEP offered, as a related service, 120 minutes monthly of family training/counseling/consultation. Parents presented no evidence to suggest that the District failed to provide that related service in some form during the period in issue. To the contrary, the record established that the District implemented family therapy for Parents and Student throughout Student's time at LifeWorks. Additionally, the staff at LifeWorks had frequent telephone, video conference, and email communication with Parents, about Student's unique needs, throughout the period in issue, which more likely than not constituted 'consultation' as was anticipated by the IEP team when offering the two hours per month of related service to the family.

Whether that 120 minutes monthly of related service was also offered in the October 2020 IEP is an unsettled question of fact, contrary to the District's contention in its post-hearing brief that the service was also offered for the following year (*see* District's closing brief at page 51.) The October 2020 IEP did not offer a year of related service in that area, but rather indicated an end date for the service of October 15, 2020. The record is silent about whether or not the service date listed in the October 2020 IEP can be attributed to a scrivener's error, or whether the District intended to cease the service as of October 15, 2020. Regardless, the evidence demonstrates that, throughout the period in issue and including dates after October 15, 2020, the District continued to provide frequent consultation with Parents. The record contains numerous email exchanges between Parents and the District after October 15, 2020. The District did not deny Student a FAPE by failing to provide related services and supports to Parents during the period in issue.

Issue Five: Whether, during the period in issue, District violated the procedural requirements of the IDEA when it failed to seriously consider Parents' reports of Student's escalating behaviors.

Parents' allege that the District's failure to utilize Parents' reports of Student's escalating behaviors significantly impeded Parents' opportunity to participate in the IEP process. Parents failed to prove a denial of FAPE under this allegation.

A school district has the duty first, to comply with the procedural requirements of the IDEA and, second, to develop an IEP that is reasonably calculated to enable Student to receive educational benefits. *Rowley*, at 207, 208. However, the Ninth Circuit has held that "only those *** procedural inadequacies that result in the loss of educational opportunity *** or seriously infringe on the parent[s]' opportunity to participate in the IEP formulation process *** clearly result in the denial of FAPE." *W.G. v. Bd. Of Trustees of Target Range School D.* 960 F.2d 1479, 1484 (9th Cir 1992). Minor errors by the school district will not amount to a denial of FAPE if they do not result in a loss of educational opportunity, interfere with the parent's ability to participate in the IEP process, or result in a deprivation of educational benefit. *Doug C. v. Haw. Dept of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013.) Furthermore, the IDEA does not and cannot guarantee any particular educational outcome. *Andrew F.*, 137 S. Ct. at 992 (2017.) Meaningful parent participation under the IDEA requires that the school district be receptive and responsive to parents' input. *R.L. v. Miami-Dade County School Board*, 757 F.3d 1173, 1188 (11th Cir. 2014).

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.* at 1047.

34 CFR §300.513 identifies the necessary criteria for a procedural violation to constitute a denial of a FAPE and provides, in pertinent part:

(a) *Decision of hearing officer on the provision of FAPE.*

(1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies—

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(iii) Caused a deprivation of educational benefit.

(3) Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under §§300.500 through 300.536.

(Emphasis in original.)

The record contains ample evidence disproving the claim that the District failed to seriously consider Parents' reports about Student's off-screen behaviors of concern. Parents attended and actively participated in both IEP meetings relevant to the period in issue. At each meeting, Parents presented a written statement of concerns which was incorporated into the IEP document. The fact that the District elected not to adjust Student's goals or services in light of the information received from Parents' did not amount to the District significantly impeding Parents' right to participate in the decision-making process. Rather, it represented the District's decision to offer certain goals, services, and placement *in spite of* Parents' data, beliefs and requests.

The record likewise contains ample evidence demonstrating that the District heard and was sympathetic to the input provided by Parents, throughout the period of distance learning. The District regularly communicated with Parents to address observations made by LifeWorks staff and inquire about Parents' observations in the home, when Student was inaccessible to LifeWorks staff. Furthermore, witness testimony consistently affirmed that the District did not doubt the reports made by Parent regarding Student's off-screen behaviors and needs.

The District enabled Parents to participate in the IEP process by incorporating all of their concerns into the IEP document. After doing so, the District then disagreed that Student's educational placement in a residential setting was appropriate. This decision resulted in a substantive denial of FAPE to Student in other ways, but it did not impede Parents' right to participate in the IEP process.

Issue Six: Whether, as of December 28, 2020, Parent's unilateral placement of Student at a private residential setting was and is a justified and appropriate placement in terms of Student's academic and behavioral needs.

Under Issue Six, Parents allege that Student's unilateral private placement was justified because the District failed to provide Student with an appropriate educational placement during the period in issue, when it delivered Student's LifeWorks program via the distance learning model rather than in-person, as originally contemplated by the IEP team when developing the October 2019 IEP. Further, Parents contend that the unilateral private placement proved appropriate to meet Student's needs. These contentions have merit.

20 U.S.C. §1412(a)(5)(A) sets forth the IDEA's requirement that disabled students be

educated in the least restrictive environment (LRE) appropriate for the student's needs and requires that school districts ensure:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Similarly, OAR 581-015-2240 provides state requirements in Oregon for compliance with the IDEA's LRE mandate and provides, in part:

School districts must ensure that:

(1) To the maximum extent appropriate, children with disabilities * * * 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 581-015-2245 outlines the requirements for alternative placements and supplementary aids and services and reads, in part:

School districts must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The continuum must:

(1) Include as alternative placements, instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions;

(2) Make provision for supplementary aids and services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement[.]

OAR 581-015-2250 identifies requirements for appropriate placements of children with disabilities and provides, in relevant part:

School districts must ensure that:

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

(a) Is determined by a group of persons, including the parents, and other persons

knowledgeable about the child, the meaning of the evaluation data, and the placement options;

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

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

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

Appropriateness of the Residential Placement

Looking specifically at residential private placements in the context of special education, residential placement is appropriate only when necessary to provide a student with FAPE. *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493 (9th Cir. 1996); *see also Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2nd 635 (9th Cir. 1990) "our analysis must focus on whether [the residential] placement may be considered necessary for educational purposes." Further, if "the placement is a response to medical, social, or emotional problems * * * quite apart from the learning process," then it would not be deemed necessary in terms of provision of FAPE. *Clovis* at 643.

Here, the District argues that Parents unilaterally placed Student at Heritage for reasons separate and apart from those stemming from Student's educational needs. The evidence supports a finding that non-educational reasons comprised *one aspect* of Parents' decision to place Student at Heritage. Student's behavior during non-school hours had become unmanageable and had taken a significant toll on all other members of the household. Student's sibling, in particular, experienced a great deal of stress in response to Student's difficult behaviors. The family dog endured poor treatment, physically, at Student's hands. Parents, in turn, experienced many months of stress in trying to maintain a peaceful home environment.

However, the evidence also supports a finding that Heritage was an appropriate educational placement based on a combination of two key factors: the District's inability to meet Student's unique needs within the significant constraints created by the COVID-19 pandemic, and the lack of any appropriate, less restrictive placement available for Student during the period in issue. Those factors in combination made it more likely than not that Student required residential placement in order to receive a FAPE during the period in issue.

Parents met their burden to prove that Heritage constituted an appropriate placement for Student. Heritage provided an intensive, therapeutic, in-person environment tailored for adolescent students with autism. The program included various forms of therapy to address Student's behavioral and social-emotional needs. Student earned credits toward high school graduation from Heritage's state-accredited school. Parents observed that Student exhibited gains in self-regulation and communication skills while participating in the Heritage program.

There is no doubt that the District made efforts to address Student's unique needs within the unprecedented and severe limitations imposed during the period when in-person instruction was prohibited. But that is not the overarching question in this case. Rather, the question is whether the efforts made by the District, and the supports and services provided, constituted a FAPE for Student.

Student required a great deal of adult support and supervision in order to access the offered educational program. Student exhibited consistent needs in that respect both before schools entered distance learning and once distance learning began. This area of need was a large part of what made LifeWorks an appropriate educational placement for Student when the program was delivered in-person. If Student experienced significant emotional dysregulation, for example, the LifeWorks staff and intensive therapeutic environment could support Student in a break room for the entire school day, if needed.

Once the program shifted to the distance learning format, the District was much more limited in its ability to provide intensive adult support. Student's counselor Ms. Moore noted that it was more difficult to provide support in that setting without being able to connect with students in person. Ms. Stepanovich stated that the District had not provided her with training to do her counseling work within the context of the pandemic and distance learning. She also remarked that no amount of training could have adequately prepared her for that task.

The role that Parents played in providing intensive adult support to Student, during the period in issue, must not be overlooked. The District never affirmatively required, or demanded, that Parents participate in the educational program during the period in issue. Nevertheless, in order for Student to experience any amount of educational success during that time, such parent participation was necessary. Student required intensive adult support prior to the period in issue, and it is unsurprising that those needs continued during the period in issue.

Throughout the period in issue, Parents provided tremendous support to Student during the school day, in an effort to enable Student to make educational progress. Parents created a learning environment in their home and then redesigned it numerous times in response to Student's needs. Parents ensured that Student connected to virtual class sessions and worked to

ensure consistent and full class participation. Parents addressed behaviors impeding learning throughout the school day. Parents engaged in a tremendous amount of communication with LifeWorks to report on Student's educational needs and seek suggestions for how to further support Student. It would not be a just result now to essentially penalize Parents for their contributions to Student's educational performance during the period in issue, conjuring the old adage that 'no good deed goes unpunished.'

During the hearing, the District repeatedly emphasized its position that Student's placement at LifeWorks remained the same – placement in an adolescent day treatment program – once schools moved to distance learning. This position ignores very real impacts of the distance learning period. The physical setting of the educational placement completely changed from being a separate campus designed to provide a therapeutic, in-person learning environment, to being, in Student's case, the family home. The state's requirements imposed on the program concerning student attendance, grading, and achievement testing were altered significantly for the distance learning period. The number of weekly instructional minutes differed between in-person schooling and distance learning. And perhaps most significantly for Student, implementation of Student's IEP differed between the pre-pandemic, in-person period and the period in issue.

First, the District was unable to implement Student's social skills goal while school was delivered through distance learning. Therefore, that goal from Student's October 2019 IEP was no longer implemented as of at least May 6, 2020. Second, the District was unable or unwilling, without explanation, to implement the 70 minutes per week of social skills SDI and 70 minutes per week of communication SDI offered in the October 2020 while LifeWorks remained in distance learning. The fact that, during the period in issue, the District could not implement an annual goal and could not implement 140 minutes per week of SDI, when the IEP team identified both of those as needed for Student, established that the District was unable to meet Student's needs in the distance learning iteration of an adolescent day treatment program. In this way, as well as the ways proved by Parents, above, the District denied Student a FAPE during the period in issue.

The District's inability to fully implement Student's IEPs and unwillingness to consider a change of placement during the period in issue provided the justification for Parents to seek other placement options. The reality during the period in issue was that the continuum of placement options became severely curtailed due to the executive orders prohibiting in-person public instruction in Oregon. Unable to fully implement Student's IEP in the distance learning setting, and unable to offer any other in-state placement in which all aspects of Student's IEP could be implemented, the District had a duty to consider placements outside of Oregon. And because it would not have been feasible for Student to commute to a day treatment program out of state, it became appropriate to look further up the continuum at possible residential placements.

The District's contention that some Heritage teachers may not have been fully licensed by the state is unpersuasive. The private placement does not need to meet state educational standards in order for the placement to be proper. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 14 (1993). Likewise, the lack of an IEP in effect for Student at Heritage did not establish that Heritage was not an appropriate placement. Unilaterally placed students do not

need to be receiving services from the placement pursuant to an IEP in order to obtain an award of tuition reimbursement. *Id.* at 13.

The ALJ is further unpersuaded by the District's argument that the provision of a building and services to enable students to voluntarily participate in the exercise of religion, during non-school hours or on a particular religious holiday observed by a student, amounted to "sponsoring of religious activities" in violation of Article I, section 5 of the Oregon Constitution. (District's Closing Brief at 60.) That fact alone, without additional evidence, did not suffice to prove that more likely than not Heritage is a sectarian institution. Further, the District presented no evidence to demonstrate that Heritage uses any portion of tuition money to fund religious activity. As the proponent of that position, the District bore the burden of proof, and did not meet that burden in Student's case.

Remedies Requested

As set forth throughout this order, the District committed substantive violations that denied Student a FAPE during the period in issue. Parents seek reimbursement for Student's residential placement and related expenses between when Student arrived at Heritage on December 28, 2020 and the time of the hearing. Student has been denied educational opportunities and has been deprived of educational benefit, for which Student is entitled to some amount of 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 Comm. Of Burlington v. Department of Ed. Of Mass.*, 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). 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 Unified School District of Los Angeles v. Honig and B.C.*, 976 F.2d 487, 492 (9th Cir. 1992.) Equitable considerations are relevant in fashioning relief. *Burlington* at 374. The conduct of both parties must be reviewed to determine whether relief is appropriate. *See Target Range* at 1486.

Parents are entitled to private school tuition reimbursement where the child's district failed to offer the child FAPE and the parents' unilateral private placement is appropriate. 34 C.F.R. 300.148(c). *See also Florence County*; and *Burlington* at 369. However, reimbursement may be denied or limited if parents fail to provide notice of the student's private placement enrollment in a timely manner, fail to make the student available for an evaluation, or act unreasonably in the course of the IEP's development. 34 CFR 300.148(d) states that reimbursement can be reduced or denied:

- (1) If -
 - (i) At the most recent IEP team meeting that the parents attended prior to the child's withdrawal from public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the district (including

stating their concerns and their intent to enroll their child in a private school at public expense); or

(ii) at least 10 business days (including any holidays that occur on a business day) prior to the removal of the child from public school, the parents did not give written notice to the district of the same information;

- (2) If, prior to the parents' removal of the child from the public school, the district informed the parents, through the notice requirements described in 34 C.F.R. 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or
- (3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

See also OAR 581-015-2515(4).

In addition, OAR 581-015-2515 provides state guidance for reimbursement for private placement and provides, in part:

(1) If a private school child with a disability has available a free appropriate public education and the parents choose to place the child in a private school, the public agency is not required to pay for the cost of the child's education, including special education and related services, at the private school. However, the public agency must include that child in the population whose needs are addressed as parentally-placed private school children consistent with OAR 581-015-2475.

(2) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child and the question of financial responsibility are subject to the due process procedures under OAR 581-015-2340 through 581-015-2385.

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

In *Forest Grove School District v. T.A.*, 638 F.3d 1234 (9th Cir. 2011), the Ninth Circuit did not allow parents to recover tuition costs because of extenuating circumstances. The Ninth Circuit observed that although nothing in the IDEA requires that the private placement be the result of the student's disability, the evidence supported a finding that the private placement was motivated by factors unrelated to the student's disability. The Ninth Circuit then denied the request because the statements made on the private school application showed that the student's enrollment was unrelated to his disabilities. As addressed above, Parents met their burden to prove that the unilateral private placement was educationally-related.

Notice Requirement under 34 CFR 300.148

The District argues that Parent failed in two ways to adhere to the notice requirement codified under 34 CFR 300.148(d). First, the District argues that Parents had an obligation to notify the District of their intent to privately place Student prior to signing an enrollment contract with Heritage. Second, the District contends that Parents did not inform the District of their intent to enroll Student at the District's expense. Neither of these contentions have merit.

Regarding the first contention, concerning timing of the notice, Parents met the requirement under 34 CFR 300.148(d)(1) by notifying the District during the December 18, 2020 IEP meeting that Student was moving to Heritage. The December 18, 2020 IEP meeting represented the most recent IEP meeting prior to Student's move. Contrary to the District's contention, 34 CFR 300.148(1) does not further require that a parent provide that notice prior to entering into a contract agreement with the private placement.

Addressing the second contention, which alleged a deficiency in the content of the notice, Parents requested that the District apply any funds it would have spent on continued LifeWorks placement to Student's tuition fees at Heritage. This request more likely than not satisfied the requirement that Parents notify the District of their intent to privately place Student at District expense. That request, documented in the pages of the December 18, 2020 IEP, made it clear that Parents sought financial contribution from the District for Student's tuition costs at the unilateral private placement. Parents should not be denied reimbursement because their notification came in the form of a request, rather than a demand, or because they framed it as a reallocation of funds from LifeWorks to Heritage. The District received adequate notice of Parents' intent to privately place Student at District expense.

Limits of Reimbursement in Student's Case

Parents possessed valid justification for placing Student at Heritage during the period when neither LifeWorks nor any comparable, publicly funded placement in Oregon had the option to offer in-person instruction to any student. But once LifeWorks resumed in-person instruction as of April 5, 2021, no legal basis existed for Student's continued educational placement at Heritage. The evidence in the record firmly established that LifeWorks had been an appropriate educational placement for Student when the program was administered in-person, until March 13, 2020. Parents did not dispute the fact that they were satisfied with the in-person LifeWorks program and believed that it offered FAPE to Student. Parents also expressed the anguish they experienced over sending Student to a residential placement out of state and repeatedly emphasized that if any in-person day treatment program had been available locally at

the time, they would not have moved Student to Heritage or even have considered residential placement. Essentially, Parents acknowledged that, but for the prohibition on in-person instruction which caused unavailability of a day treatment setting in the state of Oregon, LifeWorks or an equivalent program would have represented an appropriate educational placement for Student.

The record indicates that, as of April 5, 2021, LifeWorks' in-person program would have constituted FAPE for Student. The District established that it maintained an open placement for Student at LifeWorks through the end of the 2020-2021 school year, demonstrating that, had Student returned from Utah, there would have been no delay in having Student resume participation in the LifeWorks day treatment program.

Parents' arguments for continuing Student's placement at Heritage past April 5, 2021 were not persuasive. First, the argument that the state's return to in-person public instruction was subject to change does not provide a basis for declining to have Student resume attendance at LifeWorks. LifeWorks offered FAPE to Student when it was offered in person, and the possibility that the program might at some point in the future be delivered via distance learning does not obligate the District to reimburse Parents' for continued unilateral private placement.

Second, Parents failed to establish by a preponderance of the evidence that Student's needs required continued stay at Heritage beyond April 5, 2021. No evidence suggested that Student would be unable to access the in-person program at LifeWorks at that point, or that Student would suffer some form of harm if moved back to LifeWorks as of April 5, 2021. To the contrary, all evidence demonstrated that Student's unique needs were appropriately addressed at LifeWorks when the program operated in-person. The fact that Student was in the midst of working through a new program at Heritage is insufficient to establish that Heritage comprised the least restrictive environment appropriate to meet Student's needs once in-person instruction at LifeWorks was readily available. The moment the LifeWorks program became available again, it constituted the least restrictive environment appropriate to meet Student's needs, and the District ceased to have an obligation to offer or fund anything different.

Therefore, Parents are entitled to reimbursement for tuition and expenses incurred between the time of Student's placement at Heritage on December 28, 2020 and April 4, 2021, after which an appropriate educational placement once again became available to Student in the form of the in-person program offered at LifeWorks. Parents' request for reimbursement for tuition and other expenses incurred for Student's attendance at Heritage as of April 5, 2021 is denied.

Parents also request reimbursement for attorney fees and costs 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 Parents. Rather, Parents' must petition the district court for such an award. 20 USC § 1415(i)(3)(A) (granting jurisdiction over attorney fee awards to "the district courts of the United States."). As such, this order does not address the merits of Parents' attorney fee claim.

ORDER

The District denied Student a FAPE during the period in issue and is hereby ordered to reimburse Student in the amount of \$34,505.22 for the cost of tuition and expenses associated with Student's placement at Heritage from December 28, 2020 through April 4, 2021.

Jessica E. Toth

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 29th day of July, 2022, with copies mailed to:

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

CERTIFICATE OF MAILING

On July 29, 2022, I mailed the foregoing FINAL ORDER issued on this date in OAH Case No. 2021-ABC-05007.

By: Certified Mail

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