

**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 HOOD RIVER)	OAH Case No. 2019-ABC-02585
COUNTY SCHOOL DISTRICT)	Agency Case No. DP 19-105

HISTORY OF THE CASE

On March 20, 2019, Parents filed a Request for a Due Process Hearing (Complaint) with the Oregon Department of Education on behalf of JF (Student) alleging the Hood River County School District (HRCSD or the District) violated federal and state statutes, federal regulations, and state administrative rules during the 2016/2017, 2017/2018, and 2018/2019 school years¹ (the period in issue) resulting in the denial of a free appropriate public education (FAPE) to Student.

On March 21, 2019, the Oregon Department of Education (ODE) referred the case to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to conduct the due process hearing and issue a Final Order in this case.

On April 29, 2019, Senior ALJ Allen presided over a telephonic prehearing conference. Father appeared with Counsel Diane Wiscarson of Wiscarson Law. Richard Cohn-Lee, attorney at law, of the Hungerford Law Firm, LLP appeared and represented the District. The parties agreed to the issue statements for hearing as stated in the Complaint. The parties also agreed to an in-person hearing on November 18 through 22 and December 2 through 6, 2019, in Hood River, Oregon. At the request of both parties, the Final Order due date was extended to March 2, 2020.

Senior ALJ Allen convened an in-person hearing on as scheduled in Hood River, Oregon. Due to pace of testimony, the proceeding was later extended to include January 24, 28, and 29, 2020 and February 10 through 12, and 19, 2020. Ms. Wiscarson and Taylar Vajda, attorney at law, appeared and represented Parents and Student. Joel Hungerford, attorney at law, with the Hungerford Law Firm, LLP appeared and represented the District. Anne Carlross, Director of Special Education for the District, appeared as the District representative throughout the entirety

¹ In this order, the terms “school year” and “academic year” are used interchangeably to refer to the regular school attendance calendar ranging from about early September through mid-June of the following calendar year.

of the proceeding. The following individuals appeared and testified on behalf of the District:²

- William Newton, Principal at Westside Elementary;³
- Sandra Ferrick, Learning Specialist for the District;⁴
- Haidee Copeland, Ph.D., Autism Consultant and Behavioral Specialist for the District;⁵
- Jean Chance, Speech-Language Pathologist for the District;⁶
- Katherine Rae, Instructional Assistant with the District;⁷
- Amalia Shaner, general education teacher with the District;⁸
- Anne Cole, Program Coordinator for the Hood River Early Intervention/Early Childhood Special Education program;⁹
- Jeanne Welch, Physical Therapist for the District;¹⁰
- Paul Crouch, Occupational Therapist for the District;¹¹ and
- Anne Carloss, Special Education Director for the District;¹²

² On its initial witness list submitted November 6, 2019, the District indicated that each expert witness on the list was designated by the addition of an asterisk (*) following the witness's name. However, All names on the District's list were followed by an asterisk indicating the District's intent to qualify each witness as an expert in one or more areas. This order identifies which designations have been accepted and which were rejected by the ALJ.

³ The District's designation of this witness as an expert in elementary school administration was accepted over Parents' objection.

⁴ Ms. Ferrick was designated as an expert in elementary special education. Parents did not object and the ALJ accepted the designation based on the education and experience of the witness.

⁵ At the hearing, Dr. Copeland was designated as an expert in special education and educational autism. The Parents did not object and the designation was accepted for hearing purposes.

⁶ Ms. Chance was designated as an expert in speech language pathology without opposition from Parents. The ALJ accepted the designation based on the education and experience of the witness.

⁷ The District's designation of this witness as an expert was denied based on Parents' objection.

⁸ The ALJ denied the District's expert designation of this witness based on Parents' objection.

⁹ At hearing, the District designated Ms. Cole as an expert in speech language pathology, age birth to five years, based on experience and education listed on her resume (Ex. D109 at 21-23). Parents did not object to this designation and the ALJ accepted the expert designation.

¹⁰ Despite designating this individual as an expert on its initial witness list, at hearing the District withdrew the expert designation based on challenges by Parents' counsel and inquiries from the ALJ.

¹¹ Despite designating Mr. Crouch as an expert on its initial witness list, the District elected to proceed without qualifying this individual as an expert in any stated field.

¹² At hearing, the District and Parents stipulated to Ms. Carloss' designation as an expert in special education administration. The ALJ accepted the parties' stipulation.

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

- MF, father of Student (Father);
- SF, mother of Student (Mother);
- Heather Whitecotton, school bus driver for the District;
- Jeffrey Carrell, Family Care Coordinator for Mid-Columbia Center for Learning;
- Nicholas Santillano, Board Certified Behavior Analyst (BCBA);
- Kali Dominguez, Registered Behavior Technician (RBT); and
- Carla-Marie Meyers, Licensed Behavior Analyst (LBA) and BCBA. Ms. Meyers was designated as an expert in the areas of expertise listed on her curriculum vitae over the District's objections.¹³ (Ex. S265 at 1.)

Subsequent to the hearing, counsel for the District requested an extension of the briefing schedule for closing arguments and the Final Order, due to issues arising from confinement orders in Oregon designed to address the Covid-19 global pandemic. Parents did not oppose this extension and the judge granted the District's request extending the briefing schedule to April 17, 2020 and the Final Order due date to May 18, 2020. The parties submitted written closing arguments on April 17, 2020. The record closed on that date.

ISSUES¹⁴

1. Whether the District failed to issue appropriate Individualized Family Service Plan (IFSP) progress reports with sufficient information, failed to provide proper documentation to Parents within a timely manner, and denied Parents the opportunity to meaningfully participate in the development of Student's IFSP, resulting in a denial of FAPE, during the 2016-2017 academic year.

2. Whether the District failed to issue appropriate IFSP progress reports, failed to provide proper documentation to Parent within a timely manner, failed to complete and provide Parents with Student's then-current IFSP and Individualized Education Program (IEP), and

¹³ As relevant to these proceedings, those areas include expertise in ABA (Applied Behavior Analysis), FBAs (Functional Behavioral Assessments) and BSPs (Behavioral Support Plans), IEEs (Independent Educational Evaluations), and administration of various diagnostic assessments for school age children including: Verbal Behavior Milestones and Placement Program (VBMAPP); Vineland 3; Social Responsiveness Scale 2 (SRS 2); and the Promoting the Emergence of Advanced Knowledge (PEAK) assessment.

¹⁴ In the Complaint and Post-Hearing Brief, Parents identify the alleged violations as either procedural or substantive. Those identifications have been removed from the issue statements in this order. While this order attempts to preserve the structure and substance of the issue statements to track Parents' Complaint, for readability purposes, the Opinion section of this order addresses the violations by academic year, rather than in the order presented in Parents' Complaint or Post-Hearing Brief. Nonetheless, the Order section reverts to the issue statements in the order they were presented in the Complaint in an attempt to correlate the conclusion in the Opinion section to the issues as presented and provide clarity.

denied Parent the opportunity to meaningfully participate in the development of Student's IFSPs and IEP, resulting in a denial of FAPE, during the 2017-2018 academic year.

3. Whether the District failed to issue appropriate IEP progress reports, failed to convene IEP meetings when appropriate, failed to provide proper documentation to Parent within a timely matter, failed to notify Parents properly of restraints and seclusions used on Student, failed to hold a debriefing meeting with Parents after restraining and secluding Student, unilaterally made changes to Student's educational program without an IEP meeting, failed to have required attendees at one or more IEP meetings, withheld information from and/or provided false information to Parents, and denied Parents the opportunity to meaningfully participate in the development of Student's IEP, resulting in denial of FAPE during the 2018-2019 academic year.

4. Whether the District failed to properly evaluate Student in all areas of suspected disability during the 2016-2017, 2017-2018, and/or the 2018-2019 academic years.

5. Whether the District failed to properly identify Student as a student with a disability in all areas of suspected disability during the 2016-2017 and/or 2017-2018 academic years.

6. Whether the District failed to implement Student's IFSP and/or IEP resulting in a denial of FAPE during the 2016-17, 2017-2018, and/or 2018-2019 academic years.

7. Whether the District predetermined Student's academic placement and failed to provide him/her with an appropriate placement in the least restrictive environment during the 2018-2019 academic year resulting in a denial of FAPE.

8. Whether Parents are entitled to any relief identified in the due process complaint.

EVIDENTIARY RULING

Exhibits D1 through D110, offered by the District, were admitted into the record without objection.

Exhibits S1 through S69, S71 through S83, S85 through S183,¹⁵ S185 through S213, S215 and S216, S222 and S223, S227 through S236, S239 through S249, S261, S262, and S265 were admitted into the record without objection.

Exhibits S70, S84, S214, S217 through S221, S224 through S226, S237, S258, S260, S263 and S264 were admitted into the record over the District's objections. Exhibits S184, S238, and S259 were withdrawn by Parents based on the District's objections. Exhibits S250 through 257 were excluded from the record as irrelevant to this proceeding because each document pertains to matters occurring after the filing of the Complaint.

¹⁵ At hearing, Parents withdrew page 4 of Exhibit S52, pages 3-4 of Exhibit S168, and page 2 of Exhibit S214.

FINDINGS OF FACT

*Background and Head Start 2016-2017 and 2017-2018 school years.*¹⁶

1. Student was born on September 16, 2012. (Ex. D1.) During all relevant times during the period in issue, Student and Parents have resided within the geographic boundaries of the District. (Complaint at 2.)

2. On or about March 18, 2014, Student's pediatrician referred him/her to the HRCSD Early Intervention/Early Childhood Special Education Services (EI/ECSE or Head Start) program for screening due to perceived language delays and possible hearing deficit. (Ex. D1.)

3. Anne Cole (Cole), a Speech-Language Pathologist (SLP) and EI/ECSE Program Coordinator for the District, began working with Student when he/she was approximately 18 months old. Ms. Cole continued to work with Student until he/she transitioned to kindergarten. (Tr. Vol. IX, 1941:8-1942:7-10.)

4. On or about April 15, 2014, Ms. Cole and Cassie Whitmire, Developmental Specialist, conducted a screening of Student and found that his/her developmental skills were within the expected range for a child of his/her age. (Ex. D2 at 1.) The screening report recommended that Student be screened again around September 2014. (*Id.* at 2.)

5. On or about September 9, 2014, Ms. Cole and Ms. Whitmire conducted a second screening of Student and again determined that his/her developmental skills were within the expected range for a child of his/her age. The screening noted that Student appeared to be developing a concerning gait (walking on the edge of one of his/her feet) and indicated that the issue should be examined closer. (Ex D3 at 1 and 2.)

6. On September 16, 2015 the District's EI/ECSE staff referred Student for an evaluation based again on suspected communication delays. (Ex. D4 at 2.) As part of the evaluation process, Parents completed a developmental history questionnaire and expressed the following concerns with Student's development: speech, eye contact, interaction with others, coordination, possessiveness, gait issues, and repetitive word use. Parents also signed a consent for evaluation on that date. (Ex. D5 at 1 and 5.)

7. On October 7, 2015, The District found Student eligible for special education and related services under the category of Developmental Delay (DD). That determination was based on assessments conducted by the District including: the Battelle Developmental Inventory, Second Edition (BDI-II); the Preschool Language Scale, Fifth Edition (PLS-IV); the Peabody Developmental Motor Scales, Second Edition (PDMS-II); and the Vineland Adaptive Behavior Scales-II. (Ex. D9 at 1.)

8. As a result of the assessments and observations by District staff, Student was

¹⁶ Findings included in this order but outside the period in issue are included for historical background only and were not considered in establishing any alleged violation.

found to have developmental delays of at least one and one-half standard deviations in the following developmental areas: Communication; Physical; Social/Emotional; and Cognitive. (Ex. D9 at 1.)

9. The District developed an Individualized Family Service Plan (IFSP) for Student on October 7, 2015. The IFSP identified annual goals (AGs) in the areas of cognitive, social/emotional, adaptive, gross motor, and expressive communication. In addition, within each specified AG, the IFSP included short-term objectives (Ex. D8 at 7-8.)

10. Student began receiving EI/ECSE services following the development of the IFSP on October 7, 2015, when Student was three years of age. Student and attended the District's Head Start program for the 2015-2016 and 2016-2017 school years. (Tr. Vol. XII at 2603:23 and 2604:20.)

11. On April 20, 2016, the District issued a Prior Notice About Evaluation/Consent for Evaluation proposing further evaluation of Student based on Head Start staff observations and concerns that, despite receiving ECSE services for approximately five months, Student's sensory needs appeared to be increasing rather than decreasing. (Ex. D14 at 1.)

12. Paul Crouch, Occupation Therapist (OT) for the District, conducted a sensory processing evaluation of Student on May 24, 2016 and noted the following in his report:

[Student] is a very friendly [child] who presents with significant sensory processing challenges. [Student] presents with poor body space awareness and will consistently engage in activities throughout the day such as jumping, falling, climbing, and chewing to increase [his/her] body space awareness. [Student] tends to grasp objects too tightly and exert too much pressure which also indicates body space awareness challenges. This means [Student] has trouble with registering sensory information from the environment through [his/her] body, so [he/she] uses more force and requires much more movement input than others. [Student] is *sensitive to visual stimuli and become distracted when there are a lot of things to look at*. [He/she] also presents with very sensitive hearing. [Student] often stops what [he/she] is doing and listens to planes, cars, lawnmowers, etc. [Student] tries to keep [his/her] nervous system calm when [he/she] is overloaded by chewing and hiding [his/her] eyes. *[Student] does much better when daily activities are predictable.*

(Ex. D15 at 2, emphasis added.)

13. On September 28, 2016, Student's IFSP team met to update Student's IFSP to serve him/her throughout the 2016-2017 school year. (See, Ex. D25.) Father attended the meeting on behalf of Parents. (*Id.* at 4.) Student's IFSP identified ECSE services Student was to receive and outlined Student's AGs [Annual Goals] and STOs [Short Term Objectives]. (*Id.* at 5-7.)

14. Student's IFSP contained two AGs for cognitive skills. The first goal stated,

“[Student] will name colors.” (Ex. D25 at 7.) Student’s STOs for that goal required:

- a. at least 4 colors with verbal model
- b. at least 6 colors with verbal model
- c. at least 6 colors without verbal model [.]

(*Id.*) The criteria listed for that goal read, “4/5 trials on each of 3 consecutive data days[.]” (Ex. D25 at 7.) The IFSP further indicated that Student would be evaluated on the cognitive skills goal through “teacher and/or parent observation [.]” (*Id.*)

15. For Student’s second cognitive skills AG, the IFSP stated “[Student] will recite at least 2 lines, of at least 4 words, from a familiar book or song [.]” (Ex D. 25 at 7.) Student’s STOs for that goal required:

- a. with verbal model, for at least 1 line from 1 familiar song or book
- b. with verbal model, for at least 2 lines from 2 familiar songs or books
- c. spontaneously during 3 different songs or books [.]

(*Id.*) Similar to the prior goal, the criteria listed for the second cognitive skills goal read, “4/5 trials on each of 3 consecutive data days[.]” (Ex. D25 at 7.) The IFSP again indicated that Student would be evaluated on this goal through “teacher and/or parent observation [.]” (*Id.*)

16. For Student’s AG in the area of adaptive skills, the IFSP indicated “Student will participate safely in classroom routines.” (Ex. D25 at 7.) The STO’s stated in the IFSP for that goal were listed as:

1. Hang coat and backpack up with independently [*sic*] or with one verbal cue.
2. Transition to circle and participate with 3 re-directions or less, in a 10 minute period.
3. Sit appropriately with peers at lunch, for a 20 minute lunch period, using sensory input assistance as needed.
4. Show safe play behaviors during free play and recess.

(*Id.*) The criteria in the IFSP for Student’s adaptive skills AG read, “[s]uccess 4 of 5 opportunities, over two weeks at school.” (Ex. D25 at 7.) According to the IFSP, Student’s progress on that AG would be measured through “[teacher]/therapist observation and data collection.” (*Id.*)

17. The IFSP also identified three separate AGs for Student in the area of social/emotional skills. The first AG in that area stated, “[Student] will address teachers and peers by name[.]” (Ex. D25 at 7.) For that goal, the IFSP identified the following STOs:

- a. with verbal model
- b. with prompt ‘What is my/her/his name?’
- c. independently[.]

(*Id.*) The criteria listed for that goal read, “at least one opportunity on each of 3 consecutive data days[.]” (Ex. D25 at 7.) The IFSP further indicated that Student would be evaluated on the first social/emotional skills goal through “teacher and/or parent observation [.]” (*Id.*)

18. For Student’s second social/emotional skills AG, the IFSP stated “[Student] needs to play cooperatively with a peer[.]” (Ex D25 at 7.) Student’s STOs for that goal required:

- a. with verbal model and engagement with an adult
- b. with verbal models for engagement with a peer
- c. independently[.]

(*Id.* at 7-8.) The criteria listed for that goal again stated, “at least one opportunity on each of 3 consecutive data days[.]” (Ex. D25 at 7.) The IFSP also identified that Student would be evaluated on the second social/emotional skills goal through “teacher and/or parent observation [.]” (*Id.*)

19. Student’s third social/emotional skills AG read, “[Student] will share toys when asked.” (Ex D25 at 8.) Student’s STOs for that goal required:

- a. upon request to share with an adult
- b. with prompt to share with a peer
- c. by independently offering a toy to a peer

(*Id.*) The criteria listed for Student’s third social/emotional goal again stated, “at least one opportunity on each of 3 consecutive data days[.]” (Ex. D25 at 8.) Similarly, the IFSP identified that Student would be evaluated on the third social/emotional skills goal through “teacher and/or parent observation [.]” (*Id.*)

20. For Student’s AG in the area of gross motor skills, the IFSP indicated “In Preschool, [Student] is working on engaging in music-motor activities with [his/her] classmates such as riding trikes, moving to music, ball games, obstacle courses, duck-duck[-]goose, and red-light green-light.” (Ex. D25 at 8.) The STO’s stated in the IFSP for that goal were listed as:

1. During Inside Circle, [Student] will perform 75% of the body motions to 5 or more songs.
2. During Inside Circle, [Student] will perform catching and 10 actions using beanbag, scarf, wands, or balls.
3. During Outside Circle, [Student] will participate for 5-10 minute in games such as trike riding, soccer, tag, duck-duck[-]goose, or red-light green-light looking up, around for safe sense of space with peers.

(*Id.*) The IFSP identified the measured criteria for this AG as “[a]ble to do during preschool routines, consistently once weekly for 1 month.” (Ex. D25 at 8.) The evaluation procedures for the gross motor skills AG were identified as, “review progress every 6 months.” (*Id.*)

21. Finally, Student’s IFSP identified one AG in the area of expressive

communication skills which read in pertinent part:

[Student] will participate in classroom and social routines by producing 4+ word utterances to communicate, demonstrate understand [*sic*] a variety of spatial and descriptive words, play turn-taking games using appropriate eye contact, and ask for assistance. * * *.

(Ex. D25 at 8.) In addition, the IFSP identified the STO's for Student expressive communication AG as:

1. Produces 3-5 word sentences spontaneously to make requests and comments, label, and gain attention.
 2. Asks for assistance using words and eye contact.
 3. Demonstrates understanding of a [*sic*] 5 spatial words and 8 different descriptive words.
 4. Take turns with an adults [*sic*] and peers when engaged in a social game routine using appropriate eye contact.
 5. Use words to request toys and turns from friends and adults using appropriate eye contact.
- Respond to [his/her] name during classroom routines.

(*Id.*) The IFSP listed the criteria for Student's expressive communication AG as follows, "when [he/she] is able to demonstrate 4 of 6 skills at least 80% of the time over a 2 week period[.]" (Ex. D25 at 8.) The evaluation procedures for the expressive communication AG were identified as "data collection." (*Id.*)

22. The IFPS also indicates "[Student's] father did not express any concerns, but information was provided for him about family therapy options, and about the use of a "first,then" [*sic*] board. (Ex. D25 at 9.)

23. Additionally, the IFSP listed placement options considered by the team. Of the options considered, the team selected preschool as the most appropriate placement. The team identified the benefit of this placement as "[typical peer models[.]" (Ex. D25 at 11.) The IFSP also noted as a possible harmful effect of this placement "[c]lass size might be overwhelming for [Student]." (*Id.*)

24. In or about October 2016, Laura Starrett, M.D., referred Student for an Autism evaluation based on concerns with his/her communication, behavior, social skills, and motor skills. After evaluation, Student was diagnosed with Autism Spectrum Disorder (ASD) by the Autism Clinic, at Doernbecher Children's Hospital (Doernbecher) in Portland, on or about October 20, 2016. As a component of ASD, Student can sometimes become emotionally dysregulated. (Tr. Vol. XII at 2595:5-13; Ex. S27 generally.)

25. Doernbecher drafted an assessment report on October 20, 2016. In that report, the evaluators noted that, at that time, Student was attending the District's Head Start program four days per week and receiving speech services as well as occupational and physical therapy within

the Head Start environment. (Ex. S27 at 1.) In addition, the report indicated Student had a classroom aide to assist him/her at school. The report also indicated that, “[Student’s] family reported [his/her] *school services have helped increase [his/her] language, social skills, and self-care skills.*” (*Id.* at 2, emphasis added.)

26. The October 20, 2016 report provided information regarding Student’s sensory processing. That information indicated that Student displays a greater than normal need to touch toys, services, or textures. In addition, Student was found to touch people and objects more than his/her same aged peers. Moreover, the report indicated Student tends to pursue movement to the point that it interferes with his/her daily routines. According to the report, Student becomes excited during movement tasks and engages in movement or climbing tasks that are unsafe for him/her. According to the evaluators, each of these findings was indicative of student’s increased need for increased sensory input. (Ex. S27 at 4.)

27. In addition, the report indicated Student can be bothered by bright light and occasionally shows emotional or even aggressive responses to being touched. Further, the evaluators found that Student struggles to complete tasks when music television is on in the background and that he/she is distracted when there is a significant amount of noise in the immediate environment. According to the evaluators, this is indicative of students of low tolerance for unanticipated sensory input and unpredictable environments. (Ex. S27 at 4.)

28. Also, the report indicated that Student likely misses sensory cues that other children his/her age would typically pick up on. The evaluators opined that this might result in Student not noticing when his/her name is called by teachers or peers. The evaluators noted that Student loses his/her balance unexpectedly when walking on uneven surfaces, and may bump into objects or people because he/she fails to notice they are in his/her way. (Ex. S27 at 4.)

29. With regard to student’s social affect, the report indicates Student was able to communicate using single words and 2 to 3 word phrases but was limited in his/her ability to engage in reciprocal conversation. According to the evaluators, Student pointed to objects and to him/herself, but did not coordinate with eye gaze. The evaluators also noticed that Student used poorly modulated eye contact and did not direct facial expressions toward others. The evaluators noted that Student’s social overtures were restricted to personal demands. (Ex. S27 at 5.)

30. The October 2016 evaluation report indicated student requires substantial support for deficits in social communication and for restricted and repetitive behaviors. The team also found Student experienced language impairment in both mixed receptive and expressive language as well as global developmental delay. (Ex.S27 at 6.)

31. In the Team Recommendations section of the report, it was recommended that Student continue the current preschool program including all supports for which he was then eligible. Those recommendations indicated Student would likely benefit from direct intervention and one-on-one assistance with academic tasks and to keep him/her involved with classmates. The team indicated that support should be made available to Student on the playground and during lunch time. (Ex. S27 at 6.)

32. In addition, the team at Doernbecher indicated Student would benefit from high levels of direct intervention (20 to 25 hours per week) incorporating the principles of applied behavior analysis (ABA). The team advised the support should be made available across environments including at home in the community and at school. (Ex. S27 at 6.) According to the team recommendations, ABA “*can significantly increase the functional abilities of children with ASD, for example in the areas of language development, play, behavioral difficulties, attention maintenance, transitions, and the ability to benefit from educational opportunities.*” (Ex. S27 at 6, emphasis added.)

33. The team’s recommendations also indicated Student would benefit from learning play skills to use with other children. The team stated that such skills should first be taught with an adult before transitioning Student to using those skills with familiar children. The team also indicated Student would benefit from frequent structured social activities in and outside of the school environment. Moreover, the team indicated that physical exercise can promote positive social interactions and may help Student manage the symptoms associated with ASD including aggressive behaviors and disruptiveness. (Ex. S27 at 7.)

34. As part of the October 20, 2016 ASD evaluation, Student also participated in a psychological assessment conducted by Lark Huang-Storms, Ph.D. In the resulting psychological report, Dr. Huang-Storms noted that, at the time of evaluation, Student wore prescription eye glasses for farsightedness, experienced amblyopia (“lazy eye”) in his/her left eye that required therapeutic patching, and previously experienced tibial torsion in his/her right leg. Dr. Huang-Storms noted that the twisting in Student’s leg had resolved by the time of evaluation. (Ex. S28 at 2.)

35. Dr. Huang-Storms also noted that Student wore his/her prescription eye glasses during the entirety of the assessment without any indication of visual impairment that would impact his/her performance in, or the results of, the evaluation. (Ex. S28 at 4.)

36. The psychological report indicates that, on that date, Student transitioned well to the testing area with the examiner but without Parents. Instead, Parents observed the testing session through a two-way mirror. (Ex. S28, at 4.)

37. The report showed that, during testing, Student displayed challenging behaviors such as moving around the room frequently, throwing blocks, moving and stacking chairs in the room, and pushing a table away from him/her. (Ex. S28 at 4.)

38. The psychological report indicated that Student quickly lost interest in some tests and preferred being active while in the testing room. In addition, Dr. Huang-Storms indicated that Student scored in the “Extremely Low” range for Functional Pre-Academics. (Ex. S28 at 5.) Student also scored in the low range for the Communication, Leisure, Social, Community Use, Health and Safety, and Self-Care testing domains, indicating that Student’s adaptive skills were significantly below his/her expected age level. (*Id* at 5-6.)

39. According to behavioral checklists completed by Father and Student’s EI/ECSE teacher, Dr. Huang-Storms found that, at both home and school, Student had significant

difficulty controlling his/her behavioral and emotional responses compared to other children of the same age. In addition, Dr. Huang-Storms found that both evaluators (Father and teacher) rated Student as having significant attention difficulties compared to other children his/her age. (Ex. S28 at 7.)

40. In November 2016, Student's IFSP team met with Parents to review the results of Student's ASD evaluation from Doernbecher. After reviewing the report and diagnosis contained therein, the team suspected Student might be eligible for special education services under the eligibility category of ASD. Nonetheless, the District elected not to conduct additional evaluations of Student at that time. (Tr. Vol. IX at 1946:7-1947:21.)

41. According to Ms. Cole, the District elected to wait on the evaluation "because [Student] had just gone through a lot of evaluation [*sic*]" and "[he/she] also had some medical things going on with [him/her] and we thought it was in [his/her] best interest * * * to wait until all [his/her] medical issues were resolved." (Tr. Vol. IX at 1947:18-1948:14.)

42. At hearing, Ms. Cole was asked to elaborate on the medical issues she recalled that would have interfered with the District's ability to conduct the necessary evaluations. In response, Ms. Cole testified:

[Student] had some vision problem, and [he/she] wore a patch for a long time on [his/her] eye. So [he/she] wore that at school. That affected some of [his/her] interactions with [his/her] teachers and [his/her] peers.

And then after, [Student] had [his/her] hips needed surgery, and [he/she] underwent surgery for that, and [he/she] ended up in a cast and a brace, and [he/she] was having a hard time accessing [his/her] environment * * *. So we wanted to wait, and the parents were part of this, we wanted to wait until everything was resolved for [him/her].¹⁷

(Tr. Vol. IX at 1948:15-1949:5.)

43. When the District learned of Student's ASD diagnosis, Ms. Cole and Denali Miedema, EI/ECSE Specialist for the District and Student's service coordinator at Head Start, advised Father that things would change for Student with an ASD evaluation and "not necessarily for the better." District staff told Parents an ASD eligibility would change the manner/services for Student and advised Parents to put off evaluating Student for ASD until he/she was ready to enter kindergarten. (Tr. Vol. XIV at 2984:16-2985:22.)

44. The District did not send a Prior Written Notice (PWN) to Parents during the 2016-2017 school year regarding the District's decision not to conduct an ASD evaluation or identifying the reasons for that decision. (Tr. Vol. X at 1998:4-10.)

¹⁷ Student underwent his/her first surgery to correct an abnormality in his/her left hip socket in June 2017, at least seven months after the District learned of Student's ASD diagnosis. (Tr. Vol XIV at 2985:23-2986:19.)

45. On or about January 12, 2017, Mr. Crouch developed a Sensory Diet Home Program for Student.¹⁸ That document provided strategies to be used with Student to address challenges presented by Student's sensory processing deficiencies instated in part:

Concepts to remember: Deep Touch Pressure is coming. Light rapid touch is alerting. Think, DEEP PRESSURE!! Sometimes kids with sensory processing challenges need to have a place, like a hideout, to calm down. Heavy Work is organizing to the nervous system. Using visuals is VERY IMPORTANT for [Student] to keep calm, reduce stress and understand the structure of the day and instructions that [he/she] is expected to follow.

(Ex. S31; capitalization in original.) In addition, Mr. Crouch's sensory diet included strategies to reduce Student's climbing habits, increase safety, and improve his/her cooperation with routines. Those strategies included:

- Provide opportunities throughout the day for [Student] to get deep pressure and heavy work. This will help [him/her] not to seek out unsafe input in climbing and falling off of inappropriate things.
- Ideas for Heavy Work: Carry water jugs outside to water plants, carry laundry, carry groceries, move furniture. Make the room "bigger" by pushing against the walls, tug of war, play wrestling, wheelbarrow walking.
- Ideas for deep pressure: Squish games under pillows on the couch or bed, burrito wrap in yoga mat, big hugs. [Student] likes yoga at school. * * *.
- Slow back-and-forth swimming tends to be calming. You can do this in a blanket, or hang stretchy fabric from a hook in the ceiling so that [he/she] can climb in on [his/her] own.
- Preferred tactile activity can be organizing to the nervous system. Such as playing with playdough, legos [*sic*], beans and rice, shaving cream, etc.

(*Id.*)

46. In addition, Mr. Crouch provided some suggested strategies to assist Student with self-regulation of his/her emotions and behavior which stated, in part:

Provide Hide Out where [Student] can go when he is too excited. * * * This is not a time out place, but a safe place [he/she] can calm [him/herself]. * * * [Student] is trying to provide ways to organize [his/her] nervous system through climbing, falling, etc. This increases [his/her] body sense awareness.

(Ex. S31.)

47. On January 26, 2017, the District issued a Child Progress Report for Student's gross motor skills AG. The progress report summarized Student's progress toward the AG as

¹⁸ Throughout the hearing, the terms "sensory diet" and "sensory menu" were used interchangeably by the parties to refer to the items and protocols for addressing Student's processing challenges developed by the District's OT.

follows:

[Student] walks, runs, climbs, crawls through tunnels, throws balls, climb stairs with railings and may alternate [his/her] feet going up. [Student] continues to need prompts, cues, visuals and skills broken into smaller parts to mimic movements in adult lead music-motor games. Walking better with heels down when wearing heavier snow boots, sensory vest trail [sic] did not work per OT.

(Ex. D27.) In addition, the progress report contained short statements for each of student's STOs which read:

1. Not yet, [Student] is learning to sit up without bumping into other [sic] or laying down, [he/she] has a teether or to help [him/her] concentrate. [He/she] performs 0-20% of emotions and requires teacher assistance-prompts to initiate. [He/she] was sitting on teacher's lap, now sitting next to teacher or aid.
2. Inconsistent-[Student] does much better given a visual item such as a stuffy [sic] scarf or beanbag to improve focus and participation, and mimic teacher movements.
3. Starting. Outside [Student] often moves about observing others, going into the playhouse and playing nearby others. [He/she] needs teacher support to engage in play with others.

(*Id.*) The January 2017 progress report was signed by Jeanne Welch, Physical Therapist (PT) for the District. (*Id.*)

48. On March 17, 2017, the District issued another progress report for Student's gross motor AG. Similar to the prior report, that document contained a summary that stated:

[Student] walks, runs, climbs, crawls through tunnels, throws balls, climb stairs with railings alternates [his/her] feet going up, and pedals a tricycle. Visual and verbal prompts increase [Student's] participation. [Student] loves to move quickly and tends to toe walk. [He/she] did not like the sensory vest.

(Ex. D28 at 1.) The March 17, 2017 progress report reiterated information reported on Student's January 2017 progress report and included updated information as follows:

1. With light physical/verbal prompts, [Student] is able to perform 50% of the body motions to 3/5 songs.
2. Visual supports (scarfs, beanbags, stuffies [sic], ribbons, etc.) Increase [Student's] participation and performance of ten different motor actions (up, down, behind, in-front, wiggle, wave, tap, turn, catch, roll, jump, etc.).
3. Met- [Student] engages with [his/her] classmates during outside playtime for 5-10+ minutes. [He/she] pedals a trike around the path and engages physically with others using body language to communicate play and build relationships.

(Ex. D28 at 1.) The progress report was again signed by Ms. Welch. (*Id.*)

49. On April 4 and 5, 2017, the District issued progress reports for Student's cognitive, social/emotional, and adaptive AGs, signed by Ms. Miedema, (dated April 5, 2017) and expressive communication AGs signed by Ms. Cole (dated April 4, 2017). (Ex. D29; Tr. Vol. X at 2019:4-15.)

50. The April 5, 2017 progress reports for Student's cognitive, social/emotional, and adaptive goals contained a summary that read:

[Student] has made a lot of progress this year and following classroom routines and participating appropriately in school activities. [He/she] is an energetic, creative child, who loves to explore [his/her] environment, likes to find ways to help out in the classroom (often by carrying things), and enjoys being read to. [Student] will continue working on learning to share and play cooperatively with [his/her] peers, and on using [his/her] words to express [his/her] wants and needs, although [he/she] seems to make daily progress in this area.

(Ex. D29 at 1.) The April 5, 2017 progress report also indicated Student had met the criteria for his/her cognitive skills AG stating, "[Student] is able to name the most colors when asked." (*Id.*) For Student's second cognitive goal (requiring Student to recite at least two lines of 4 words or more from a familiar song or book), the progress report contained the following information:

[Student] will sing along to "Row, row, row your boat" in small groups. During circle time [he/she] seems to enjoy the songs but does not always sing along with them. *Continue goal*, encouraging singing with [him/her] at home and at school.

(Ex. D29 at1, emphasis added.) In the next column titled, "Is the progress sufficient to meet this goal? If not what changes are planned?" the District reported "Yes." (*Id.*) The District did not include any information regarding whether Student was able to meet any of the three STOs for the cognitive skills goal or any information indicating how many trials, out of five, Student was able to perform the stated goal on three consecutive days, as outlined in the criteria for the goal in Student IFSP. (Ex. D29 generally.)

51. For Student's first AG pertaining to social/emotional skills (aimed at getting Student to address teachers and peers by name), the report contained the following narrative:

Goal met per criteria. [Student] knows all of [his/her] peers names and uses them frequently. When [he/she] gets [his/her] diaper changed by Cynthia [he/she] will ask a friend to keep [his/her] toys safe, and [he/she] is doing great at making eye contact with friends and get [*sic*] their attention by tapping them on their shoulder and saying their name. In fact, not only is [he/she] using names but [he/she's] recognizing other friends' names! [He/she] is also addressing most of [his/her] teachers and service providers by name.

(Ex. D29 at2.)

52. For Student's second/emotional skills AG ([Student] needs to play cooperatively with a peer), the April 5, 2017 progress report indicated Student's progress was sufficient to meet this goal and included the following progress narrative:

[Student] has been seeking out peers, initially much of [his/her] interaction was aimed towards a certain peer and a handful of girls who [he/she] would hug without permission. Recently [he/she] has been playing trains/cars with two other peers. [He/she] still from time to time grabs toys without asking for permission. In a small group, it is easier for [Student] to remember to take turns with [his/her] peers. Continue goal.

(Ex. D29 at 2.)

53. For student's final AG in the area of social/emotional skills ([Student] will share toys when asked), April 5, 2017 progress report again indicated that Student's progress towards this goal was sufficient to meet the stated criteria. The progress narrative stated, "[Student] shares well within a small group of peers but has a bit more trouble when [he/she] is playing on [his/her] own and really into what [he/she] is working on. Continue goal." (Ex. D29 at 2.)

54. The April 4, 2017 progress report for Student's adaptive skills AG reported progress as of March 24, 2017 and indicated student's progress as of that time was sufficient to meet the goal according to the stated criteria. Nonetheless the progress narratives correlated to each STO in student's IFSP for this AG indicated that Student would need to continue working on all but one of the STOs and read:

1. Continue goal. [Student] is doing well with this routine and only needs to complete with no verbal cues.
2. Continue goal. [Student] has made excellent progress with transitioning to circle and staying in circle. Depending on the day [he/she] will suck [his/her] thumb in order to focus in circle. OT will offer [Student] many more choices of appropriate chewys [*sic*] to use.
3. Goal met.
4. Continue goal. [Student] needs reminders to move safely around the classroom, especially with running.

(Ex. D29 at3.)

55. Finally, the District's progress report for Student's expressive communication skills AG also indicated Student's progress was sufficient to meet this goal according to the stated criteria (when [he/she] is able to demonstrate 4 of 6 skills at least 80% of the time over a 2 week period). (Ex. D29 at4.) In that report, Ms. Cole included a progress summary for each of the six enumerated STOs which read:

1. [Student] is producing more 3-5 word sentences to communicate. During playtime at school, [he/she] often needs models and/or prompts to make requests and gain attention. [He/she] is very successful when models are given. If

- [he/she] stays with an activity for an extended period of time, [he/she] begins to use the sentences independently.
2. [Student] is a very independent [boy/girl] likes to do as much for [him/herself] as possible. [He/she] will occasionally ask for help. [He/she] needs reminders to use eye contact.
 3. [Student] is increasing [his/her] understanding of spatial and descriptive words. [He/she] is demonstrating understanding of the following spatial words during structured activities: in, on top, out of, under. [He/she] is demonstrating understanding of the following descriptive words: fast, slow, up, down, soft, hard, bumpy.
 4. [Student] is increasing [his/her] turn-taking skills and peer social games with models and prompts. [He/she] is beginning to use the phrases “my turn”, “your turn” independently in structured activities.
 5. During play activities, [Student] continues to need models and prompts to request toys from friends. [He/she] is trying to use more eye contact when talking with [his/her] friends.
 6. [Student] is responding to [his/her] name consistently when [he/she] is interested in the activities/routines/request. Responding to [his/her] name decreases when [he/she] is interested or wants to avoid an activity/routine. Continue all goals to strengthen skills.

(Ex. D29 at 4.)

56. At hearing, Ms. Cole testified that, while no percentages were reported on the April 4, 2017 progress report for Student’s expressive communication AG, Parents “should infer that he/she is not yet spontaneously producing (three to five word sentences).” (Tr. Vol. X at 2020:21-2021:4.) In addition, Ms. Cole acknowledged that she failed to indicate on Student’s progress report a percentage of opportunities for which Student was able to successfully perform tasks identified for the expressive communication goal and stated, “[t]here is no percentage. It says occasionally, which means that he/she is not doing it 80 percent of the time.” (Tr. Vol X at 2022:5-9.)

57. For the progress reported for each of the STOs for Student’s expressive communication AG, Ms. Cole testified similarly that progress was written in positive descriptive terms meant to convey that Student was doing the objectives occasionally but was not reported in percentage(s) of time or opportunities Student was demonstrating ability to perform the goal or objectives. (Tr. Vol. X at 2022:5-2023:24.) According to Ms. Cole, Parents would need to infer much of Student’s current level of performance toward this AG by deciphering the narrative descriptions. (See Tr. Vol. X at 2024:21-2025:2, 2028:12-14, and 2029:11-14.)

58. In June 2017, Student underwent surgery to correct a structural abnormality in his/her left hip. Because Student was born without a left hip socket, his/her left leg began developing shorter than the right, causing gait issues for Student. The surgery involved grafting bone onto Student’s left hip to create a socket for his/her femur in order to equalize Student’s leg length. As a result, Student was immobilized by a cast on his/her left leg and hip until approximately September 2017. (Tr. Vol. XIV at 2985:23-2930:19.)

59. On September 5, 2017, the District issued a Notice of IFSP Team Meeting indicating the team would meet on September 20, 2017 for the necessary annual review of Student's IFSP (Ex. D30.)

60. On September 18, 2017,¹⁹ Ms. Welch on behalf of the District issued a progress report for Student's gross motor skills AG. Ms. Welch included a summary of Student's progress that read:

Prior to surgery this summer, [Student] was able to walk, run, pedal a tricycle, and participate in outside and circle time for 5/10 minutes with peers. After surgery, [he/she] is not yet walking or running. [He/she] is crab crawling on the floor and kneeling with minimum weight on [his/her] left leg. [S]ee doctors restrictions."

(Ex. D31.) In addition, Ms. Welch included the narrative summaries for Student's STOs from January 26, 2017 as well as updated narratives for each of the STOs dated September 18, 2017. Ms. Welch's progress report indicates Student's progress was sufficient to meet the goal for the reporting period. (*Id.*)

61. For the three STOs for Student's gross motor skills AG Ms. Welch included the following narratives:

1. Continue/MET- [Student] is working towards consistency with circle time routines and may need to adapt motions due to mobility needs. Partial participation 25-50%.
2. Continue/MET- visual supports (scarfs, beanbags, stuffies [*sic*], ribbons, etc.) Increase [student's] participation and performance of ten different motor actions (up, down, behind, in-front, wiggle, wave, tap, turn, catch, roll, jump, etc.).
3. Discontinue/MET-prior to surgery, [Student] was able to pedal a trike around the path and engage for 5-10 minutes in tag or adult encouraged game.

(Ex. D31.)

62. Also on September 18, 2017, Mr. Crouch issued a progress report on behalf of the District for student's adaptive skills AG. In that report, Mr. Crouch indicated Student's progress was sufficient to meet the goal according to the stated criteria. In addition Mr. Crouch reported Student's progress on each of the four STOs identifying that during the reporting period Student successfully achieved each STO. (Ex. D32.)

63. In addition, on September 19, 2017 Ms. Cole issued a progress report related to student's expressive communication AG. Ms. Cole included a summary of student's progress which read:

¹⁹ The progress report bears a date of 9/17/17 in the top right corner of the document. Nonetheless, progress is reported as of 9/18/17. In addition, Ms. Welch included a handwritten date immediately following her signature which read 9/18/17. (Ex. D31.)

“[Student] has made nice progress on [his/her] communication goals. [His/her] language skills have increased significantly and [He/she] is using many words/sentences to communicate. It is been exciting to watch [his/her] progress this past year. [Student] is a fun [boy/girl] and I really enjoy working with [him/her].

(Ex. D33.) According to the progress report, Student’s progress was not sufficient to meet his/her expressive communication goal for the year. The report indicated the goal should be continued on Student’s next IFSP but identified no changes for his/her expressive communication goal. (*Id.*) Ms. Cole included the following narratives related to student’s progress for each of the six identified STOs in the expressive communication AG:

1. [Student] is producing 3- 5 word sentences to communicate with 100% accuracy with cues. [He/she] is able to do this independently, but it is inconsistent. Continue goal to increase independence especially with peers during play activities.
2. [Student] is asking for assistance (help) and using eye contact with 100% accuracy with cues. [He/she] is beginning to ask for assistance spontaneously, but often needs reminders to use eye contact. Continue goal to strengthen skill.
3. Goal met. [Student] demonstrates understanding of a variety of spatial and descriptive words.
4. [Student] is using turn taking skills with one peer while playing on a board game [/] social game with an adult present. [He/she] is becoming independent while playing structured games. Continue goal to strengthen skill.
5. During play activities, [Student] is using words with cues and/or models to make requests from peers. Using appropriate eye contact is harder for [him/her].
6. [Student] is responding to [his/her] name consistently when [he/she] is interested in the activity/routine/request. Responding to [his/her] name decreases when [he/she] isn’t interested or wants to avoid an activity/routine. Continue all goals to strengthen skills.

(Ex. D33.)

64. On September 20, 2017, the District issued progress reports for Student’s cognitive skills and social/emotional skills AGs. Unlike the remaining progress reports issued in September 2017, these progress reports contained no general summary of Student’s overall progress for the reported goals. (Ex. D34 at 1-3.)

65. The September 20, 2017 progress reports for Student’s cognitive skills reiterated progress reported on April 5, 2017 and contained a brief updated progress statement for each goal. For Student’s first cognitive AG ([Student] will name colors) the District reported “[g]oal met per criteria” (Ex. D34 at 1.) and indicated Student’s progress was sufficient to meet the goal according to the criteria stated. There was no other information regarding Student’s ability to achieve any of the three identified STOs or the frequency with which Student could accomplish this goal. (*Id.*)

66. For Student's second cognitive skills goal ([Student] will recite at least 2 lines, of at least 4 words, from a familiar book or song), the District reported "[Student] does not participate consistently in songs at circle time." (Ex. D34 at 1.) The report also indicated that Student's progress was insufficient to meet this goal and stated the planned changes as, "participating in circle time routines will be part of [Student's] participation goal under [his/her] next IFSP cycle [.]" (*Id.*)

67. For Student's first social/emotional skills AG (requiring Student to address teachers and peers by name), the District indicated Student had met the goal per the listed criteria and stated his/her progress was sufficient to meet the goal. (Ex. D34 at 1-2.)

68. For Student's second social/emotional AG ([Student] needs to play cooperatively with a peer), the District reported as of September 20, 2017, "most of the time, [Student] prefers to play independently rather than with peers." (Ex. D34 at 2.) The District indicated Student's progress was not sufficient to meet this goal and proposed continuing this goal to Student's next IFSP cycle. (*Id.*)

69. The District did not report any progress for Student's third social/emotional AG (requiring Student to share toys when asked), and instead included a different goal statement which read, "[Student] will actively engage in daily routines in [his/her] preschool programs" (Ex. D34 at 3.) Below the statement the report identified eight separate STOs for this new goal:

1. Participating in writing and art activities by cutting across paper and cutting out shapes, utilizing appropriate grasp on a writing tool, copying shapes, and printing [his/her] name.
2. Engaging in cooperative play with 2 to 3 peers in structured and unstructured activities[.]
3. Taking turns and sharing classroom materials with peers and adults during a variety of activities[.]
4. Producing 3-5 word sentences spontaneously to make a request, comment, label, and gain attention, ask for assistance using appropriate eye contact.
5. Engaging in music-motor activities, following finger plays and hand motions[.]
6. Using words to request toys and classroom materials from a peer[.]
7. Responding to peers and adults when they say [his/her] name, ask questions, or try to interact[.]
8. Counting up to 15 items during classroom activities [.]

(Ex. D34 at 3.) The criteria listed for the goal stated, "when [Student] is able to demonstrate the skills at least 80% of the time over a 2 week period [.]" (*Id.*) There was no current progress listed for the goal on a September 20, 2017 progress report. (*Id.*) According to Student's IFSP, the alternate third goal was new to Student's IFSP effective September 20, 2017. (Ex. D36 at 7; see also Ex. D25 at 7-8.)

70. On September 20, 2017, Student's IFSP team met for Student's annual IFSP review. Parents participated in the meeting along with Ms. Cole, Ms. Miedema, Mr. Crouch, and Ms. Welch. (Ex. D36 at 4.)

71. The IFSP EI/ECSE page(s) presented to Parents at the September 20, 2017 meeting contained significant alterations from Student's prior IFSP including:

- An increase the frequency of Direct Service Coordination by Ms. Miedema from two times per year to four;
- Consultation support for Student's cognitive, adaptive, social, gross motor, and expressive communication skills was reduced from 90 minutes per month to 60 minutes per month;
- Direct support for cognitive, adaptive, social, gross motor, and expressive communication skills was reduced, from four hours per week to one hour per month;
- Direct physical therapy (PT) services for Student were increased from 15 minutes per month to 30 minutes per month;
- PT Consultation services for Student were reduced from 30 minutes per month to 15 minutes per month;
- Direct Developmental Disability (DD) services for Student, through Mid-Columbia Center of Living (MCCL), were added;

(Ex. D36 at 1-2, compare D25 at 1-2.)

72. In Student's September 2017 IFSP, the District altered the statement of how his/her disability affects participation in appropriate activities from "[Student] has some difficulty expressing [his/her] wants and needs" (Ex. D25 at 5.) to "[Student] has some difficulty expressing [his/her] wants and needs, and with sharing and taking turns with classmates." (Ex. D36 at 5.)

73. The present level information for Student's cognitive, adaptive, social/emotional, and fine motor skills in the September 28, 2016 IFSP was reproduced verbatim in the September 2017 IFSP despite mid-year progress reports indicating Student had made sufficient progress in the areas of cognitive, social/emotional, and adaptive skills to satisfy the goal criteria in the September 2016 IFSP. (Ex. D36 at 5.)

74. In the column next to Student's present levels for each development areas, titled "Needs to Learn" the IFSP simply stated, "See participation goal under social[.]" for the cognitive, adaptive, gross motor, fine motor, and receptive communication development areas. (Ex. D36 at 5.) For the social/emotional skills, the IFSP read, "[Student] will actively engage in daily routines in [his/her] preschool classroom." (*Id.*)

75. The September 2017 IFSP Goals and Objectives page reflects that the District removed AGs for Student in the areas of cognitive, adaptive, and gross motor skills. (Ex. D36 at 7, compare D25 at 7-8.) The IFSP also replaced Student's prior AGs and STOs in the social/emotional skills domain with the newly created AG and STOs from the September 20, 2017 progress report (*see* Ex. D34 at 3) and indicated Student's progress for the goal and all eight STOs would be evaluated through "[t]eacher/parent observations." (Ex. D36 at 7.)

76. During the 2017-2018 school year, Mr. Crouch was assigned to provide OT services and to work with Student on aspects of the social/emotional AG, specifically STOs 1, 2, 3, 5, and 8. (Tr. Vol. XI at 2271:23-2272:20.)

77. According to Mr. Crouch, the measurable criteria by which he evaluated Student's progress was "when student is able to demonstrate these skills [or STOs] at least 80 percent of the time over a two week period.) (Tr. Vol. XI at 2272:21-2273:1.)

78. As of September 20, 2017, the District did not have any baseline data indicating Student's then-present level for any of the STOs Mr. Crouch was assigned to work on with Student. While Mr. Crouch believed Student was capable of completing the identified STOs approximately 20 percent of the time, the District did not convey that information to Parents or include it in the IFSP. (Tr. Vol. XI at 2273:20-2275:4.)

79. Mother signed the IFSP for Parents on September 20, 2017. (Ex. D36 at 4.)

80. On February 07, 2018, the District provided Parents with a Prior Written Notice About Evaluation / Consent For Evaluation proposing to evaluate Student for eligibility under the category of ASD. As the reason stated for the proposed evaluation, the District stated:

[Student] will be entering kindergarten in the fall of 2018. He is currently eligible for special education services under Developmental Delay. [Student] is suspected of having characteristics of autism, therefore, an evaluation is needed to determine if [he/she] is eligible under Autism Spectrum Disorder for [his/her] special education services.

(Ex. D38 at 1.) Mother signed the document providing consent for evaluation the same day. (*Id.*)

81. On February 14, 2018, the District issued a Notice of IFSP Team Meeting notifying Parents of a meeting scheduled for February 22, 2018. The stated purpose of the meeting was to revise Student's IFSP by adding a behavior support plan (BSP).²⁰ (Ex. D40 at 1.)

82. On or about February 16, 2018, the District developed a Social Emotional Support Plan that it considered to be a BSP. Mother signed the plan on February 22, 2018. (Ex. D39 at 1.) In addition, on that date, Mother signed a written agreement allowing the District to amend Student's IFSP, without convening an IFSP meeting, by adding the February 16, 2018 BSP. (Ex. S49 at 1.)

83. On February 22, 2018, the District also issued a Prior Notice of Early Intervention or Early Childhood Special Education Action proposing to amend Student's IFSP with the addition of the February 16, 2018 plan. The District stated the reason for the proposed change as, "[Student] is exhibiting some behavior that is impacting [his/her] learning, and strategies to address [his/her] behavior need to be included in [his/her] IFSP." (Ex. D43.)

²⁰ In this order, the terms behavior plan, behavior support plan, and behavior intervention plan are used synonymously to refer to behavior intervention plans required identified in OAR 581-015-2181.

84. The February 22, 2018 plan identified Student's concerning behaviors as "hitting, kicking, throwing objects in classroom (usually at teacher), pushing other kids, screaming, and throwing/knocking furniture over." (Ex. D39 at 2.)

85. On February 22, 2018, the District issued an amended IFSP for Student revising the September 2017 IFSP. While the September 2017 IFSP contained 11 pages without the February 16, 2018 BSP, the February 2018 IFSP that the District provided to Parents contained only the first four pages, which were identical to the first four pages of the September 2018 IFSP.²¹ The BSP was not attached to the amended IFSP. (Ex. S51 at 1-4, compare Ex. D36 at 1-11.)

86. On March 5, 2018, District issued an IFSP progress report for Student's expressive communication and social/emotional AGs/STOs.²² (Ex. S52 at 1-4.) For Student's first expressive communication AG (produce /s/ in consonant blends in words), the stated criteria read, "9 of 10 opportunities." (*Id.* at 1.) Under the heading, "Progress made toward the goal (based on the criteria and evaluation)" the District reported, "[Student] is producing clear /s/ in isolation. He has not started working on this sound in words. Continue goal to strengthen." (*Id.*) In the next column, under the heading, "Is the progress sufficient to meet the goal? If not, what changes are planned?" the District reported, "Yes." (Ex. S52 at 1.)

87. For Student's second expressive communication AG (produce /k, g/ at the beginning and end of words), the stated criteria again read, "9 out of 10 opportunities." (Ex. S52 at 1.) For progress, the District reported:

[Student] is producing /k/ at the end of words 100% with a model. This skill is beginning to emerge with cues only for familiar words. [He/she] is producing /k/ at the beginning of a few words 'car, key, cow' with a model. [He/she] has not started working on the /g/ sound. Continue goal to strengthen.

(*Id.*) Again, in the column indicating whether Student's progress was sufficient to meet the goal, the District reported, "Yes." (Ex. D52 at 1.) The District did not propose any changes to this goal or its related STO's in the progress report. (*Id.*)

88. Finally, for Student's third expressive communication AG (produce /f/ at the beginning and end of words), the stated criteria read the same as the previous two goals. For progress, the District stated, "[Student] is beginning to produce /f/ at the beginning of words 100% with a model. Continue goal to strengthen." (Ex. S52 at 1.) The District again indicated

²¹ Similarly, the amended February 2017 IFSP offered into evidence by the District consisted of five pages. The first four are identical to those provided to Parents. The final page is an IFSP checklist not provided to Parents. Notably, the pages containing Student's present levels of performance, Student's IFSP goals and objectives, transition plan from ECSE, and placement pages were omitted from the amended IFSP. (See, Ex. D42 at 1-5.)

²² The first page of the progress report for the social/emotional goal was dated September 20, 2017. Nonetheless, the second page containing Student's purported progress was dated March 5, 2018. (Ex. S52 at 3-4.)

Student's progress was sufficient to meet the goal and proposed no changes to this AG or its corresponding STOs. (*Id.*)

89. For Student's social emotional AG, Mr. Crouch was responsible for reporting progress on STOs 1, 2, 3, 5, and 8. While Mr. Crouch wrote a narrative of Student's then-present levels indicating varying levels of progress for the STOs, he did not include any data related to the percentage of time Student was able to accomplish the enumerated objectives over a two week period. Mr. Crouch acknowledged that Parents would not know the baseline data for Student's AGs independent of District progress reports. Like the expressive communication progress report, the social/emotional progress report indicated Student's progress was sufficient to meet the goal but proposed continuing each STO. The progress report did not propose any changes to the AG/STOs to increase progress. (Ex. D52 at 3-4; Tr. Vol. XI at 2280:18-2281:13.)

90. On March 21, 2018, the District issued a Notice of IFSP Team Meeting scheduling a meeting for April 4, 2018. The stated purpose of the meeting was listed as, "[r]eview existing information about your child[.]" (Ex. D45 at 1.)

91. On March 22, 2018 and April 4, 2018, Haidee Copeland, Ph.D.,²³ conducted evaluations of Student and prepared an Autism Spectrum Disorder Evaluation Report. (Ex. D46; Tr. Vol III at 595:9-22.)

92. In preparing her report, Dr. Copeland obtained input from several of Student's providers including Ms. Welch and Mr. Crouch. The stated reasons for the evaluation referral read, "[Student] was referred to determine if [he/she] meets eligibility requirements established by the Oregon Department of Education to receive special education services as a student with Autism Spectrum Disorder." (Ex. D46 at 2.) Throughout her report, Dr. Copeland makes no reference to Student's October 2016 autism diagnosis. The only service provider contributing to the report to make reference to Student's diagnosis was Mr. Crouch. (*Id.* at 12.)

93. As part of her evaluation, Dr. Copeland assessed Student's skills in communication, social interaction, behavior patterns, sensory responses, social emotional skills, occupational therapy needs, and gross motor skills. (Ex. D46 at 1-17.)

94. Student's scores related to his/her adaptive behaviors indicated that he was below average, low, or extremely low in nearly all areas assessed. In the skill area of functional pre-academics both Student's parents and teachers rated [him /her] as "low." (Ex. D46 at 7.) Based on the scores, Dr. Copeland report indicates Student "would benefit from small group or one-on-one instruction in communication, functional academics, health and safety, leisure, self-care, self-direction and social skills activities." (*Id.*)

95. In addition, Student was assessed in the social/emotional domain through measurements of social skills and problem behaviors. According to Dr. Copeland's report, children who score below average or lower in social skills would benefit from interventions.

²³ Dr. Copeland holds a Ph.D. in Special Education obtained in 2011 and, at the time of hearing, served as the District's Autism Consultant and Behavior Specialist from August 2017 through the time of hearing. (Ex. D109 at 1.)

Conversely, in the area of problem behaviors children who score in the above average to well above average would benefit from interventions. (Ex. D46 at 7-8.)

96. With regard to problem behaviors, Student was rated by both parents and teachers as being above average in the subcategories of externalizing, hyperactivity, and autism spectrum. Parents also rated Student above average the subcategory of bullying. (Ex. D46 at 8.)

97. In assessing Student's potential impairments in communication, Dr. Copeland noted that Student "demonstrated difficulty in answering 'what' and 'where' questions, naming objects described, telling on object was used, * * *using possessives, answering questions about hypothetical events, and formulating meaningful, grammatically correct questions in response to a pictures [*sic*]." (Ex. D46 at 9.) Based on her findings, Dr. Copeland concluded that Student experienced "significant difficulties in using language to communicate." (*Id.*)

98. In assessing Student's speech capabilities, Dr. Copeland's report indicates that approximately 60 percent of Student's speech was understandable to her. Dr. Copeland report indicates that the expected intelligibility of speech among same age children is 100 percent. (Ex. D46 at 9.) Dr. Copeland's report notes that Mother indicated that Student can become increasingly frustrated and may yell when he/she is not understood. (*Id.*)

99. In summarizing Student's relative communication weaknesses, Dr. Copeland noted the following:

Expressing emotional discomfort and/or verbally protesting are difficult for [Student]. [He/she] can use words to express [him/herself], but sometimes will make grunting and or whining sounds instead. [He/she] will also yell and become physical when upset.

(Ex. D46 at 10.)

100. In evaluating Student's impairments in social communication, Dr. Copeland noted several strengths for Student including he/she enjoyed being in school and liked his/her peers and teachers. Dr. Copeland also noted that Student would seek comfort from familiar adults (teachers) as well as Parents. (Ex. D46 at 11.)

101. Among Student's weaknesses, Dr. Copeland noted that it can be "very hard for [him/her] to share and take turns." (Ex. D46 at 11.) Dr. Copeland also noted that making requests with peers and adults is difficult for Student as is initiating play with peers leading Student to play by him/herself most of the time. Dr. Copeland's report also indicated that Student needs verbal and visual guidance to follow classroom routines and/or group activities. Dr. Copeland opined that using visuals to follow a schedule and make choices is helpful for Student, such as the use of a visual timer to help him/her understand upcoming transitions or changes to his/her schedule or activities. (*Id.*)

102. In summarizing Student's sensory processing challenges, Mr. Crouch opined:

[Student] presents with sensory processing challenges in both the home environment and the school environment, but in somewhat different ways. [He/she] has more challenges with planning/ideas and socialization at school because the school environment is typically more challenging in these areas. * * * At home, [Student] is in the definite dysfunction and some problem range in all but the hearing category. * * * This is not unusual for some children. Home is where kids often relax after holding it together at school so it makes sense that the most challenging behaviors come out in the safety of the home.

* * * * *

[Student] presents with sensory processing challenges that are often associated with an educationally based Autism Spectrum Disorder, to include the areas of socialization, planning, and touch challenges.

(Ex. D46 at 14-15.)

103. In summarizing the impact on Student's developmental and educational performance, Dr. Copeland's report stated, in relevant part:

[Student] demonstrates characteristics in all four of the areas outlined in the sections of this report.

* * * * *

In the area of **communication**, the greatest concerns are: increasing [his/her] expressive language skills to include pronouns appropriately and answering a variety of wh-questions [*sic*]. [Student also need to increase [his/her] speech intelligibility.

In the area of **social communication**, the areas of greatest concerns are: increasing [his/her] joint attention skills, using eye contact when communicating, and using words for a variety of communication functions with friends and adults.

In the area of **restricted and repetitive patterns of behaviors**, *the greatest concerns are: tolerance to change in routine.*

In the area of **sensory**, the greatest concerns are: *ability to tolerate a wider range of sensory inputs* and to increase [his/her] skill in preempting and responding to situations which [he/she] finds sensorily challenging such as with socializing, extending play with peers *and tolerating unexpected touch.*

(Ex. D46 at 16; bold original, emphasis added.)

104. On April 4, 2018, Student's eligibility team, including Parents, met and reviewed Dr. Copeland's ASD report. The team consisted of Parents, Ms. Welch, Ms. Miedema, Ms. Cole, Dr. Copeland, and Mr. Crouch. (Ex. D49 at 2; Tr. Vol. III at 605:2-606:22.)

105. At the April 4, 2018 meeting, all members of Student's IFSP team agreed he/she was eligible for special education and related services under the category of ASD. (Ex. D49 at 2.) On that date, the District also issued a Prior Notice of Early Intervention or Early Childhood Special Education Action, which proposed to change Student's identification and IFSP to add ASD as his/her eligibility category. (Ex. D50 at 1.)

106. Despite concerns noted in her ASD evaluation report, at the time of the April 4, 2018 meeting, Dr. Copeland believed Student was prepared, both academically and socially, to enter kindergarten the following school year. Dr. Copeland came to that conclusion based on observations of Student over the course of the two month evaluation period identified in her April report. (Tr. Vol III at 596:24-597:23.)

107. Based on her observations and evaluations of Student, Dr. Copeland believed her/she was capable of attending a full day of school in a general education kindergarten classroom with adequate supports. At the time she developed this opinion of Student's ability, Dr. Copeland understood a general education kindergarten class in the District lasted approximately six and one-half hours per day with multiple transitions between activities. She also understood kindergarten presented a longer day with more transitions for Student than his/her Head Start program. (Tr. Vol. III at 600:4-601:19.)

108. During the 2016-2017 and 2017-2018 school years, Student experienced challenging behaviors, including aggression and dysregulation, but was never sent home early for those behaviors. (Tr. Vol. X at 1995:24-1996:14.)

109. Parents received the progress reports issued by the District during the 2016-2017 and 2017-2018 school years but found it difficult to understand whether Student was making progress toward the criteria listed for the AGs due to lack of any baseline data, conflicting information, and what they perceived to be an overwhelming amount of information. Parents trusted District staff representations that Student was making significant progress. (Tr. Vol. XIII at 2729:7-2730:14.)

Transition to kindergarten.

110. On April 4, 2018 the District issued a Special Education Notice of Team Meeting scheduling a meeting for May 1, 2018 to develop an IEP to serve Student during his/her kindergarten year (2018-2019 school year). (Ex. D51.) On April 11, 2018, the District issued a Notice of IEP Team Meeting again notifying Parents of a meeting set for May 1, 2018 to develop an IEP for Student. In addition, the notice indicated that this would also be a kindergarten transition meeting. (Ex. D52 at 1.) The April 11, 2018 notice listed the following required attendees and their roles for the meeting:

- Parents;
- Denali Meidema, Service Coordinator;
- Anne Cole, SLP;
- Kathy Peldyak, SLP;

- Jeanne Welch, PT;
- Cynthia Ventura, Head Start Teacher;
- Haidee Copeland, Behavior Specialist;
- Adriane Acosta, SPED [special education] Teacher;
- Flurry Stone, School Psychologist;
- Kelly Beard, School Principal and District Representative; and
- Anne Carloss, Director of Special Education, LEA Representative.

(Ex. D52 at 1.) The line identifying the required kindergarten (general education) teacher was blank.²⁴ The notice indicated the meeting would be held at May Street Elementary School (May Street) in Hood River Oregon. (*Id.*)

111. The minutes for the May 1, 2018 IEP meeting indicate the team discussed Student’s recent eligibility determination under ASD. Student’s Head Start teacher, Ms. Ventura, also shared present level information for Student and summarized the ECSE team’s use of visual supports for Student, such as visual timers to alert him/her to upcoming transitions. Ms. Ventura also shared that Student displayed aggressive behaviors during the 2017-2018. (Ex. D55 at 3.)

112. According to Ms. Ventura, Student’s aggressive behaviors manifest around transition times and were directed at teachers, rather than other students in his/her Head Start class. (Ex. D55 at 3.) Ms. Ventura indicated that, if [Student] was in the middle of building (i.e., with Legos or blocks) when it came time to transition to a new activity, Student would “meltdown.” (*Id.*) Further, Ms. Ventura noted that, “[s]ometimes [Student] would need to be removed from [sic] classroom because [he/she] would throw things but that has improved and changed.” (Ex. D55 at 3.) According to the meeting minutes, “Cynthia [Ventura] said in the few weeks [he/she] was able to come down from an escalation without blowing out [sic]. Visuals and simple clear language help [him/her] to calm down.” (*Ibid.*)

113. In addition, at the May 1, 2018 IEP meeting, the team discussed Student’s need for one-to-one adult support. According to the meeting minutes, “[a] strong connection to one individual will be really important” noting, “[Student] will seek out Cynthia to help [him/her] problem solve even when other adults are with [him/her].” (Ex. D55 at 3.)

114. According to the meeting minutes, the team also spent a significant amount of time discussing the importance of routines for Student with included, in relevant part:

[Student] does very well with routines. *Any change in [his/her] routine will set [him/her] off.* It will be important to observe [his/her] actions as [he/she] creates [his/her] own routines. At recess when it was time to come in [he/she] would run to rock or playhouse. When teacher intervened before [Student] could run to these [he/she] had a meltdown. It was observed that [he/she] “needs” to run to [one] of these places at the end of recess as part is [sic] “[his/her] routine.” Someone

²⁴ The May 1, 2018 IEP was signed by Monica Vonlubken, Academic Advisor/Teacher at May Street Elementary. (Ex. D53 at 2.)

needs to have eyes on [him/her] during recess * * * to ensure safety. [Student] will *need an adult available at all times to intervene during transitions* so teacher can focus on class. Mom mentioned that it is important to prep [Student] and review what the change for the day is.

(Ex. D55 at 3; emphasis added.)

115. In addition, according to the meeting minutes, Mother inquired about dyslexia as a potential disability for Student because, according to Mother, [he/she] was not acknowledging words on a page and was still reversing some letters when writing. In response, Ms. Ventura explained that Student's challenges were "very developmentally appropriate" and were not indicative of dyslexia. (Ex. D55 at 3.)

116. Additionally, during the May 1, 2018 IEP meeting, Parents inquired about bus transportation to and from school and expressed concerns that Student may elope from the bus once it arrives at school in the morning. In response, Ms. Beard indicated that, if appropriate, someone could be assigned to meet Student at the bus in the morning. Parents expressed similar concerns about Student eloping from school during recess. Ms. Beard responded similarly to Parents' bus concerns, indicating the need for adult supervision at recess time. (Ex. D55 at 4.)

117. During the IEP meeting, Ms. Cole reported that "[Student's] academics are advanced that [*sic*] he has the ability to be able to learn and focus on behavior." (Ex. D55 at 4.)

118. The May 1, 2018 IEP reported Student's present levels of academic achievement and functional performance. (Ex. D53 at 4-6.) As with Student's previous IFSPs, the IEP contained a statement identifying his/her overall strengths, interests, and preferences which read,

[Student] likes to play with blocks, cars, airplanes, trains, hammer and nails, to help with chores such as carrying things, and to have [his/her] parents and teachers read to [him/her]. [He/she] also loves riding [his/her] bike, and taking things apart and putting them back together to figure out how they work.

(Ex. D53 at 4.) That information appeared verbatim in Student's 2016 and 2017 IFSPs. (*See* Exs. D25 at D36.)

119. In addition, the IEP present levels pages contained a space to include concerns of Parents that contained the following handwritten statements:

- Keeping [him/her] regulated. Everyone is safe[.]
- Needs clear directions [and] expectations. Very literal.
- May need deep pressure.
- Concerns about bus[.]

(Ex. D53 at 4.)

120. For Student's present levels of academic achievement, the May 1, 2018 IEP

contained a statement purporting to address cognitive skills which read, “[Student] attends to an activity for at least 10 minutes, looks at pictures in a book, searches for a removed object, matches colors, nests objects, imitates simple facial gestures, sorts similar and dissimilar shapes, and physically explores [his/her] environment.” (Ex. D53 at 4.) That information appeared verbatim in Student’s 2016 and 2017 IFSPs. (See Exs. D25 at 5 and D36 at 5.)

121. In addition, the IEP contained a statement of Student’s present level related to academic concepts that read, “[Student] is able to count to five consistently; after five [he/she] will often skip to a higher number, such as 9 [sic].” (Ex. D53 at 4.)

122. For Student’s present levels of functional performance, the May 1, 2018 IEP contained the following statement related to his/her adaptive functioning:

[Student] can zip a zipper that is fastened at the bottom, feed himself/herself with a fork and spoon, drink from a straw, help with simple household chores, demonstrate appropriate behaviors when riding in a car, and understand the use of a telephone.

(Ex. D53 at 5.) That statement appeared word-for-word in Student’s 2015, 2016, and 2017 IFSPs. (See Exs. D8 at 5, D25 at 5, and D36 at 5.)

123. Additionally, the May 1, 2018 IEP stated Student’s functional performance in the social/emotional domain as:

[Student] imitates relatively complex tasks as they are being performed, shows a desire to please others, imitates simple movements, plays near other children and continues playing with little fussing when caregiver leaves, says “please” (uses sign language) and “thank you” (“thank me”), and changes easily from one activity to another.

(Ex. D53 at 5.) Again, that statement was derived verbatim from Student’s 2015, 2016, and 2017 IFSPs. (See Exs. D8 at 5, D25 at 5, and D36 at 5.)

124. For Student’s present level information related to the sensory processing domain, the May 1, 2018 IEP borrowed directly from Mr. Crouch’s OT report contained in Dr. Copeland’s ASD evaluation report. (Exs. D53 at 5, D46 at 14-15.)

125. The May 1, 2018 IEP also contained a statement purporting to show Student’s present level of functional performance in the area of gross motor skills, which read:

[Student] had hip surgery this summer where [he/she] was in a case for 8 weeks and now will wear a brace for 1 year (3 months all day long, including at school). At this time, [he/she] is scooting around on the floor and kneeling. [He/she] is not standing or walking, but can begin to bear weight. Prior to [his/her] surgery, [Student] was able to walk, run, jump and deal a trike [sic]. [Student] will need to

adapt [his/her] movement skills, follow [his/her] doctor's restrictions, and regain [his/her] motor abilities.

(Ex. D53 at 5.) That statement also appeared verbatim in Student's September 2017 IFSP. The District updated Student's present levels of functional performance in this area to show whether he/she had made progress regaining motor function despite the passage of nine months since reporting present level information on the September 2017 IFSP. (Ex. D36 at 5.)

126. For Student's present level of functional performance related to his/her visual motor skills, the May 1, 2018 IEP read:

[Student] unwraps small objects, uses a twisting motion to wind a toy or screw a jar, turns the pages of a book or magazine one at a time, and completes a puzzle or [sic] at least two pieces or shapes. Occupational therapy to support visual motor needs with support for specially designed instruction, training/consultation with staff.

(Ex. D53 at 5.) The first sentence of that statement, sans typographical errors, was taken verbatim from Student's 2015, 2016, and 2017 IFSP present level statements related to fine motor skills. (Exs. D8 at 5, D25 at 5, and D36 at 5.)

127. The May 1, 2018 IEP also reproduced Student's receptive communication present level information word-for-word from his/her September 2017 IFSP and stated, "[Student] demonstrates understanding of a variety of words and concepts. [He/she] follows 2-step directions and identifies pictures." (Ex. D53 at 5.)

128. With regard to Student's present levels of performance in the area of expressive communication, the May 1, 2018 IEP stated the following:

[Student] is using a variety of words to communicate. [He/she] is producing 3+ word sentences to communicate [his/her] wants and needs. [He/she] is using [his/her] words with cues to communicate with peers during playtime.

[Student] demonstrates articulation errors which interfere with clear communication. Based on information from 3/15/18 (ECSE), [Student] is producing a clear /s/ in isolation. [He/she] is producing /k/ at the end of words 100% with a model. This skill is beginning to emerge with cues only for familiar words. [He/she] has not started working on the /g/. [Student] is beginning to produce /f/ at the beginning of words, 100% with a model.

(Ex. D53 at 5-6.)

129. The May 1, 2018 IEP contained a social/emotional AG which stated: "[Student] will actively engage in daily routines in [his/her] classroom by:[.]" (Ex. D53 at 9.) Following that statement, the IEP identified five non-consecutively numbered STOs which read:

2. Engaging in cooperative play with two to three peers in structured and unstructured activities.
3. Taking turns and sharing classroom materials with peers and adults during a variety of activities.
5. Engaging in music-motor activities, following finger plays and hand motions.
6. Using words to request toys and classroom materials from a peer.
7. Responding to peers and adults when they say [his/her] name, ask questions, or try to interact.

(*Id.*) The AG and each STO were reproduced verbatim from Student’s September 2017 IFSP.²⁵ (*See* Ex. D36 at 7.) The measurable criteria for this goal was stated as “80% of the time over a 2-week period.” (Ex. D53 at 9.) The IEP stated that progress would be reported to Parents in November, March, and June. (*Id.*) The May 1, 2018 IEP contained no information indicating what percentage of time Student was able to accomplish any of the identified STOs. (Ex. D53 at 1-19.)

130. For the expressive communication domain, the May 1, 2018 identified Student’s AGs as follows:

- [Student] will demonstrate improvement in [his/her] articulation by:
- [Student] will produce the /k,g/ in initial and final position of words.
- [Student] will produce /s/ in consonant blends in words (sp, st, sm, sn).

(Ex. D53 at 10.) In addition, the following handwritten notation was added, “add /l/ initial.” (*Id.*)

131. The STOs listed for Student’s expressive communication AG read, “1- With a model, 2- With cues, and 3- Spontaneously to name pictures.” (Ex. D53 at 10.) The May 1, 2018 IEP stated the measurable criteria as “9 of 10 opportunities.” (*Id.*) With the exception of the handwritten notation in the AG, all information for Student’s expressive communication AGs/STOs was taken verbatim from his/her September 2017 IFSP. (*See* Ex. D36 at 7.) The May 1, 2018 IEP contained no information indicating how many opportunities out of 10 that Student was able to accomplish any of the identified AGs/STOs. (Ex. D53 at 1-19.)

132. The May 1, 2018 also included a visual motor AG for Student which read, “[Student] will increase use of educational material to kindergarten level to complete classroom art projects as measured by completion of 3 step project.” (Ex. D53 at 11.) The IEP also identified three STOs related to that goal which read:

1. Draw with markers using a functional grasp on paper in 4/5 attempts.
2. Cut basic shapes circle, square, triangle in 4/5 attempts.
3. Print name on project in 4/5 attempts.

²⁵ Notably, District personnel who created the May 1, 2018 IEP ahead of the meeting did not renumber the STOs from Student’s social/emotional AG in the September 2017 IFSP.

(*Id.*) The IEP also indicated that progress would be measured “by school staff using therapist created rubric.” (Ex. D53 at 11.) The three STOs for Student’s visual motor goal were similar to the components of Student’s first STO for the social/emotional AG that appeared in the September 2017 IFSP.²⁶ (Ex. D36 at 7.) The May 1, 2018 IEP contained no information indicating how many opportunities out of five that Student was able to accomplish any of the identified STOs. (Ex. D53 at 1-19.)

133. Additionally, the May 1, 2018 IEP added an expressive language AG for Student which was stated as, “Producing [*sic*] 3-5 word sentences spontaneously to make a request, comment, label, gain attention, and ask for assistance using appropriate eye contact 8/10 opportunities/observations.” (Ex. D53 at 12.) That AG was a near verbatim reproduction of the first two STOs from Student’s expressive communication goal found in his/her September 2016 IFSP²⁷ and the fourth STO from Student’s social emotional goal in his/her September 2017 IFSP. (Exs. D25 at 8 and D36 at 7.)

134. The expressive language goal in the May 1, 2018 IEP contained no STOs. (Ex. D53 at 12.) In the space intended for the team to indicate how progress will be measured, the IEP states “observation with data.” (*Id.*)

135. In addition to the preprinted sections of Student’s expressive language goal, two handwritten notations appear in the blank portion of the page which read:

- [Student] will answer a variety of “wh” questions on 9/10 opp.
- [Student] will expand [his/her] sent[ence] length by using is/are, pronouns accurately 9/10 oppor.

(Ex. D53 at 12.) The IEP does not indicate whether these additions were meant as independent AGs or discreet STOs within the preprinted AG. (*Id.*) The May 1, 2018 IEP contained no information indicating how many opportunities out of 10 that Student was able to accomplish any of the identified skills. (Ex. D53 at 1-19.)

136. In addition, the May 1, 2018 IEP listed the following specially designed instruction (SDI) Student was to receive during his/her kindergarten year:

- Visual motor skills for 60 minutes per week;
- Communication skills for 40 minutes per week; and
- Behavior- social/emotional skills for 30 minutes per week.

(Ex. D53 at 13.)

²⁶ That STO read, “Participating in writing and art activities by cutting across paper and *cutting out shapes, utilizing an appropriate grasp on a writing tool, copying shapes, and printing [his/her] name.*” (Ex. D36 at 7; emphasis added.)

²⁷ See, Finding of Fact 21, above.

137. The May 1, 2018 IEP also identified the related services Student would need to access his/her education as:

- OT for 210 minutes per year;
- PT for 210 minutes per year;
- ASD services for 120 minutes per year; and
- Transportation to and from school each day.

(Ex. D53 at 13-14.)

138. The May 1, 2018 IEP also listed several supplementary aids, services, and accommodations Student was to receive, as well as the amount and frequency, which included:

- [Student] will be provided visuals and social stories and updated daily schedule; daily to support behavior and social goals.
- [Student] will be provide[d] with warning, preparation, and reminders for change in routine; daily for routine changes.
- Use visual timers to help with transitions/ending activities; daily during activities that have a clear end time.
- Allowing built in choice during typical daily routines (ex [sic] sit on chair or carpet square).
- Use clear direct concise language, give clear expectations; when speaking to [Student].
- Sensory Menu; throughout the day when [he/she] is dysregulated.
- Adult supervision for all transitions; during transitions.
- Instructional assistance when in gen[eral] ed[ucation] classroom who is trained in [Crisis Prevention Intervention] CPI; during beginning of school year, reassessed monthly.

(Ex. D53 at 14-15.) According to the District, CPI is a method designed to support students when they are escalating in behaviors and assist them in deescalating those behaviors. According to the District, it can be used to protect student from harming themselves or others. (Tr. Vol. I at 163:11-19.)

139. Student's May 1, 2018 IEP also identified consultation supports for school personnel in the form of SLP and OT services in the general education classroom for 20 minutes per trimester. (Ex. D53 at 15.)

140. According to the May 1, 2018 IEP, the team considered and rejected options for Student to be in the general education classroom less than 40 percent of the day, or between 40-70 percent of the day. Instead, the team determined that Student would be placed in the general education classroom at least 80 percent of the school day with pull-out services provided as specified in the IEP. (Ex. D53 at 18.)

141. The IEP placement page identifies the modifications and/or supplementary aids and services Student would need to participate in the chosen placement and states:

Modified core curriculum, instructional assistance time during the core, modified homework, small group specialized instruction of the grade common core, pre-teaching of grade level core concepts. *Possible behavior intervention plan as needed.*

(Ex. D53 at 18; emphasis added.) There is no mention of Student's previous BSP that was added to his/her IFSP in February 2018. (Ex. D53 1-19.) The placement code information was entered as "00- Not Specified." (Ex. D53 at 19.) That entry was crossed out and a handwritten notation was added indicating "30- 80% in gen ed." (*Id.*)

142. The May 1, 2018 did not contain a BSP for Student. (Ex. D53.) According to Ms. Cole, as of May 1, 2018, she believed Student needed a BSP to address his/her aggressive behaviors. (Tr. Vol. X at 2004:5-16.)

143. According to Father, Parents raised concerns about Student's aggressive behaviors when he/she becomes dysregulated. In addition, Ms. Ventura conveyed to the team her experiences with Student's aggressive behaviors upon dysregulation, including hitting and kicking of adults. According to Ms. Ventura, the most effective technique for helping Student to regulate his/her emotional state and control aggression was the use of deep pressure bear hugs. (Tr. Vol. XIII at 2747:13-2749:1.) According to Father, none of the District personnel expressed concerns about the ability of staff to handle Student's behavior issues. (Tr. Vol. XIII at 2751:22-2752:10.)

144. During the May 1, 2018 meeting, District personnel expressed concerns about Student attending May Street due to lack of supports for autistic children. In addition, the District indicated that Student might be overly distracted at May Street due to ongoing construction. As an alternative, Ms. Ferrick, the special education teacher and case manager at Westside Elementary (Westside), touted the increased supports and availability of more experienced instructional assistants at Westside. (Tr. Vol. XII at 2613:5-2614:2 and Vol. XIII at 2752:11-2753:12; see also Ex. D55 at 4.)

145. On May 9, 2018, the District issued a Special Education Notice of Team Meeting indicating a meeting would be held on May 18, 2018 to discuss Student's placement location. (Ex. D57.) At that meeting, the District informed Parents that Ms. Ferrick was the only teacher in the District with specialized training in autism and that her classroom at Westside elementary was the best equipped to deal with challenges associated with behaviors characteristic of autism. (Tr. Vol. XII at 2613:5-16.) In addition, Parents were informed that Ms. Ferrick's classroom also had a sensory room where Student could go to decompress and regulate his/her emotions if necessary. Based on the District's representations, Parents agreed to send Student to Westside. (Tr. Vol. XII at 2614:2-12; Exs. D58 and D59.)

146. Amalia Shaner, was assigned as Student's general education kindergarten teacher at Westside. Ms. Shaner initially met Student in spring 2018 when he/she visited Westside before the end of the 2017-2018 school year. At that time, Student was in Ms. Ferrick's special

education classroom²⁸ having a snack with other children. Ms. Ferrick asked Ms. Shaner to stop in to meet Student because he/she was to be assigned to Ms. Shaner's general education kindergarten classroom for the 2018-2019 school year. Ms. Shaner observed Student to be a very friendly child. (Tr. Vol. VI at 1256:7-1257:20.)

147. Ms. Shaner again met with Student in the summer of 2018 to complete a kindergarten assessment. After a brief introduction, Ms. Shaner asked Mother to leave the room so she could do a brief assessment of Student. Student proceeded to explore the classroom, located some toys that interested him/her, and began to play independently. Despite repeated efforts to engage Student in the assessment, Ms. Shaner was unable to convince him/her to abandon the toys and participate in the assessment. Ms. Shaner eventually gave up and asked Mother to come into the classroom to assist her due to Student's refusal to participate in the assessment. (Tr. Vol VI at 1257:24-1259:6.)

148. During Student's visit to Westside in summer 2018, Mother advised Ms. Shaner that he/she could be challenging. Ms. Shaner believed that, based on her experience with other children, Student would follow along with peer in the class and his/her behavioral challenges would not be an issue. (Tr. Vol. VI at 1259:7-16.)

2018-2019 school year- kindergarten.

149. Kindergarten at Westside during the 2018-2019 school year began at approximately 7:30 a.m. and continued until approximately 2:20 p.m. resulting in a school day of about seven hours for kindergarten students. (Tr. Vol. VI at 1308:16-20.)

150. Westside uses a staggered start schedule for kindergarten students which results in one-half of the class beginning on the first day of school with the remaining half beginning on the second day of school. The first day all kindergarten students attend class together is the third day of the school year. Student's first day of kindergarten at Westside was Tuesday, September 4, 2018. (Tr. Vol. VI at 1259:3-1260:4.)

151. The morning of Student's first day appeared to start well up to morning recess. When Student returned from morning recess, Ms. Shaner asked him/her to work on a classroom project. Student was playing with a tub of Legos and refused to break away from that activity. When she believed Student had finished with his/her building project, Ms. Shaner again asked Student to join the class in the project they were working on. Student refused. Ms. Shaner persisted and Student responded by picking up the tub of Legos and throwing it across the room. (Tr. Vol. VI at 1260:5-21; see also 1312:12-24.)

152. Ms. Shaner decided to remove Student from her classroom and escort him/her to the sensory room adjacent to Ms. Ferrick's special education classroom (SLC). Student continued to become dysregulated and threw a stool at Ms. Shaner and kicked her more than once on his/her way to the sensory room. There was one instructional assistant (IA) assigned to another Student in Ms. Shaner's class on the first day of school. There was no IA assigned to

²⁸ Ms. Ferrick's classroom at Westside is also referred to as the structured learning center. (Tr. Vol. I at 65:13-16.)

support Student in the general education classroom on that date. (Tr. Vol. VI at 1277:17-1278:6.)

153. Ms. Shaner contacted William Newton, Principal at Westside, to come to the sensory room and intervene with Student. According to Mr. Newton, Student's behaviors were unsafe for him/her, and staff. Therefore, he determined that Parents would need to pick Student up from school early. (Tr. Vol. I at 67:3-68:411.)

154. Father received a telephone call from Mr. Newton at approximately 12:30 p.m. on September 4, 2018, approximately three hours after Student was escorted to the sensory room, asking him to come to the school to pick up Student. Father advised Mr. Newton that he could not leave home until after the bus dropped off Student's younger sibling from Head Start. Nonetheless, Father advised Mr. Newton that Mother was on her way back to Hood River from Portland and would likely return by 1:00 p.m. Mr. Newton indicated that waiting was not an option and insisted Father pick up Student as soon as possible. (Tr. Vol. XII at 2622:24-2623:15.)

155. When Father arrived at school, Mr. Newton indicated that Student had become dysregulated and had been removed to the sensory room. Student was still dysregulated and contained in the sensory room when Father arrived. Father reminded Mr. Newton that the best method for assisting Student in regulating his/her emotional state was to provide deep pressure "bear hugs." Mother also arrived at Westside at about the same time and, after a brief discussion, Parents took Student home just before 1:00 p.m. (Tr. Vol. XII at 2623:20-2624:17.)

156. On the morning of September 5, 2018, Ms. Ferrick sent a text message to Parents stating, "Flurry Stone the school psychologist is the person that is in charge of placement and reduced time at school. Newton and I have both contacted him. We need him at the meeting." (Ex. S123 at 5.) Ms. Ferrick was aware the District planned to hold a meeting with Parents on Thursday September 6, 2018 regarding Student's placement and believed Mr. Stone would need to be present to address the placement change proposed by the District. (Tr. Vol. VII at 1500:5-24.) That meeting was later postponed to September 10, 2018. (*See* Ex. D61.)

157. Mother exchanged several text messages with Ms. Ferrick expressing her frustration and asking if Student was being provided the necessary supports including visual transition aids for activities. Mother also expressed concern that Student was in a completely foreign environment and not placed in a classroom with any of his/her Head Start peers. (Ex. S123 at 5-8.) Ms. Ferrick responded by stating, "[t]here is a protocol I have to follow. I understand what you are going through. You are not the first family to face this." (*Id.* at 10.) The protocol to which Ms. Ferrick was referring in that message related to the District's protocol for changing a student's placement. (Tr. Vol. VII at 1502:8-13.)

158. Later on September 5, 2018, Ms. Ferrick again texted Parents, "FYI-psychologist is not attending the meeting Thursday morning. He has talked with Newton. *If you are not happy with the outcome of the meeting you need to talk to the psychologist yourself.* I have all ready [*sic*] told him that you have questions that only he can answer." (Ex. S123 at 13, emphasis added.)

159. Student's second day of kindergarten was September 6, 2018. Upon entering the classroom, Student hung his/her backpack and coat as he/she was taught in Head Start.²⁹ Ms. Shaner preferred for students to use cubbies to store items and told Student to put his/her backpack in the assigned cubby. Student became upset at the disruption to his/her routine and kicked an IA. As a result, Student was removed to the sensory room again. (Tr. Vol. I at 68:20-69:10.)

160. At approximately midday on September 6, 2018, Mr. Newton again contacted Parents and informed them that Student was agitated, aggressive, and becoming unsafe and consequently Parents would need to pick up Student from school as soon as possible. (Tr. Vol. I at 70:22-71:4.)

161. When Parents arrived at Westside, they checked in with the front desk and were told Student was in the sensory room. Upon entering the sensory room, Father was shocked by disarray in the room indicating, "it looked like somebody had taken a toy store and ripped it open and everything just went everywhere." (Tr. Vol. XII at 2628:17-2629:16.)

162. Inside the sensory room Parents observed Legos and balls from a small play pit strewn about the room and various other toys spread across the entirety of the room. Off to one side against the wall Parents observed Mr. Newton and two other adults standing around Student each holding a large play mat. The adults used the mats to form a triangular wall around Student who was seated on the floor in a pseudo-fetal position sobbing. (Tr. Vol. XII at 2629:12-2630:8; Ex. S72 at 1-2.)

163. When Parents entered the room, the adults pulled the play mats away to allow Father access to Student. Father sat on the floor next to Student who climbed into his lap. (Tr. Vol. XII at 2630:13-18.) Student appeared scared at that time. According to Father, when he arrived in the sensory room, it looked like Student was "being cornered like a wild animal." (Tr. Vol. XIII at 2794:17-2795:7.)

164. Parents attempted to calm Student and engage him/her to help clean up the sensory room mess. Mother believed it was important to show Student that he/she was responsible for cleaning up the mess he/she made. Ms. Newton and other staff insisted they would clean up the mess and handed Student's belongings to Parents and asked them to take Student home. (Ex. S161 at 1-2; *see also* Tr. Vol. XII at 2630:13-2631:4.)

165. Over the course of Student's first two days of kindergarten, he/she was removed from the general education classroom and placed in the sensory room for extended periods of

²⁹ Student's June 7, 2016 IFSP revision contained an adaptive skills AG aimed at helping him/her follow classroom routines. One of the STOs required Student to hang up his/her coat and backpack independently or with no more than one verbal cue. (Ex. S16 at 7.) That AG and STO also appeared in Student's September 2016 IFSP. (Ex. S25 at 7.) According to Head Start progress reports, Student was making significant progress toward that STO prior to April 5, 2017. (Ex. S38 at 3.) By September 18, 2017, Student's progress was sufficient to terminate the STO. (Ex. S40 at 2.)

time without access to same age peers. Parents believe the District caused Student's dysregulation and behavioral outbursts by failing to use the necessary visual supports, choice options, and established routines identified in Student's IEP. Father believes the District's response to Student's challenging behaviors created an aversion to the school environment at Westside and reinforced Student's negative behaviors by allowing him/her to avoid school by acting out. (Tr. Vol. XIII at 2793:11-2794:16.)

166. Student's third day of school was Friday, September 7, 2018. The bus did not arrive to take Student to school on that date. When Mother contacted the bus barn to inquire about Student's transportation, she was informed that the bus barn had been advised by the District not to pick up Student until further notice. Therefore, Parents drove Student to school. (Ex. S161 at 2.)

167. Upon arriving at school, Parents met with Mr. Newton and Ms. Ferrick who informed Parents that Student's school day was being shortened to four hours per day and that they needed to pick him/her up at 11:00 a.m. each day following lunch. Mr. Newton and Ms. Ferrick indicated that the change would allow Student to adjust to the demands that kindergarten placed on him/her. (Ex. S161 at 2; Tr. Vol. XII at 2632:8-2633:4 and Vol. XIII at 2768:24-2769:9.)

168. Student did not spend any time in the general education classroom on September 7, 2018. (Tr. Vol. VI at 1313:14-21.)

169. Father arrived at 11:00 a.m. on September 7, 2018 to pick up Student. At that time, Father observed Dr. Copeland and Katie Rae, Student's IA, escorting Student back from the lunch room. The adults were each holding one of Student's arms. Student was protesting, saying he/she wanted to go to recess with his/her friends. Dr. Copeland and Ms. Rae said recess was not an option for Student. Father explained to Student that he/she had to leave school and was not permitted to stay for recess. Student became upset because he/she wanted to stay at school. (Tr. Vol. XII at 2770:4-2771:9.)

170. Ms. Rae has been an instructional assistant with the District since 2016. (Tr. Vol. VI at 1177:17-1178:20.) During her tenure with the District, Ms. Rae has served as a one-to-one IA for three students receiving SDI and related services. (Tr. Vol. VI at 1184:8-15.) Ms. Rae did not begin working with Student until September 7, 2018 (Tr. Vol. VI at 1185:10-14.) and was not available to Student on September 4 or 6, 2018. (Tr. Vol. VI at 1185:17-1186:13.)

171. Despite the May 1, 2018 IEP requirement for a sensory menu to support Student at school when he/she became dysregulated, the District's OT did not develop a sensory menu for Student until sometime in October 2018. (Tr. Vol. VI at 1386:21-1387:19.)

172. On September 7, 2018, District issued a Special Education Notice of Team Meeting setting a meeting for 8:15 a.m. on Monday, September 10, 2018, at Westside. (Ex. D61 at 1.) The stated purpose of the meeting was to develop or review Student's IEP and placement. The notice listed the following required participants and each individual's role:

- Bill Newton, Principal;
- Flurry Stone, School Psychologist;
- Haidee Copeland, Autism Specialist;
- Amalia Shaner, Academic Advisor/Teacher;
- Sandra Ferrick, Learning Specialist;
- Jeannie Chance, Speech/Language Pathologist.

(*Id.*)

173. The District did not propose or seek permission to conduct a functional behavior assessment (FBA) of Student during the first week of school during the 2018-2019 school year. (Tr. Vol. XIII at 2768:10-13.)

174. Due to disagreements between Parents and District team members, the September 2018 IEP meeting was broken into three meetings held over two days. On September 10, 2018, the IEP team met at 8:15 a.m. The meeting was later continued to 2:40 p.m. that same day. In addition, at least some of the team members, including Mother, met again on the morning of September 11, 2018 to finalize new components of the IEP and sign the final plan. (Tr. Vol. I at 72:2-13 and Vol. II at 485:7-10.; Ex. S161 at 2-4.)

175. At the morning meeting on September 10, 2018, the District advised Parents that Student's day would be shortened to two hours per day and presented Parents with the option of Student beginning school at the scheduled start time or later in the morning.³⁰ (Tr. Vol. 12, 2638:14-2639:8; Ex. S161 at 1-2.)

176. Parents advocated for alternatives to the two hour abbreviation to Student's day including placement in Ms. Ferrick's SLC classroom or a longer, albeit still abbreviated, day of four hours to allow Student additional time with peers. The District refused to consider options other than the abbreviated two hour schedule with Student in the sensory room with an IA.³¹ (Tr. Vol. XV at 3223:15-3224:19 and 3226:24-3227:18.)

177. Based on her limited interactions with Student during the first two days of school, Ms. Ferrick believed that Student could not attend a full day in any classroom, even with additional supports. (Tr. Vol. II at 455:20-456:10 and Tr. Vol. III at 517:18-23.)

³⁰ At hearing, the parties disputed the reason for calling the September 10, 2018 IEP meeting. For instance, while Parents maintain that the stated purpose of the meeting was to address the District's decision to reduce Student's school day, at hearing Mr. Newton asserted that the purpose of calling the meeting was to "review his/her goals and to make sure that we had supports in place in order to be able to support him/her." (Tr. Vol. I at 74:22-74:5.) Based on the evidence in the record documenting exchanges between Parents and the District, I am persuaded that Parents are correct and that the District had determined prior to the meeting that Student's school day would be shortened. Notably, the draft IEP presented to Parents at that September 10, 2018 meeting made no alterations to Student's AGs or STOs.

³¹ After meeting with District personnel on September 10, 2018, Parents understood Student would spend his/her two hour school day with an IA in the sensory room to learn behavioral regulation. (Tr. Vol. XII at 2645:13-2646:6.)

178. The draft IEP presented to Parents at the September 10, 2018 meeting was similar to Student's May 1, 2018 IEP but contained additional text related to Student's present levels of academic and functional performance. That information read:

9/10/2018 Update- [Student] has attended kindergarten classes at Westside Elementary school in a class of 28 students with an assistant using visuals and sensory support for students with autism. For the three days that [he/she] attended [he/she] had to leave school early due to unsafe behavior towards [him/herself] and others. The first day of classes [he/she] attempted in the general education setting [sic]. [He/she] needed extreme prompting from the IA while in the general education classroom to stay on task and follow the school day routine. [He/she] was removed in the morning after 45 minutes from the classroom due to [his/her] kicking the classroom teacher and assistant. There were a total of 8 kicks to the classroom teacher, 6 kicks and punches to the IA, 11:25- elopement and had 60 minutes of aggressive behavior to others in the sensory room. Parent were called and [he/she] went home. One [sic] Thursday [he/she] returned to school. [I]t [sic] was scheduled for 15 minutes in the classroom, [he/she] entered the room and threw [his/her] bag and kicked the IA. [He/she] was taken to the sensory room. There in a 2:1 situation up till [sic] 11:25. [He/she] had 8 hits and punches and one choke. At 11:30 [he/she] was 4:1 in the sensory room and had repeated head but [sic], hit and kick for 60 minutes until parents were called. On Friday [he/she] had 2:1 in the sensory room, at 7:45 [he/she] had 3 hit attempts, and one hit and kick. [he/she] did attend lunch with peers. Lunch was observed by the behavior specialist. During that time, [he/she] had 3 occurrence[s] of hitting the IA. It [sic] came back to the sensory room and had 20 minutes of unsafe behavior that was supported by 4 adults.

(Ex. D60 at 5-6.) References to 2:1 and 4:1 refer to the number of adult staff supporting one student. (Tr. Vol. I at 75:18-76:6.) The IEP does not indicate what supports, if any were used or attempted before removing Student from the general education classroom on September 4 or 6, 2018. In addition, there is no information demonstrating why Student was not allowed into the general education classroom on September 7, 2018 and instead placed immediately in the sensory room upon his/her arrival at school. (Ex. D60.)

179. In addition, the September 2018 IEP increased Student's SDI in the area of social/emotional skills from 60 minutes per week to 60 minutes per day. (Ex. D60 at 14.) The September 2018 also identified several new supplementary aids and services in the form of a behavior support plan, a school safety plan, and a step-up plan.³² (*Id.* at 16.)

³² While the IEP appears to refer to three separate documents, at the September 10 and 11, 2018 IEP meetings, the District presented two documents titled Individual Student Safety Plan (ISS) (Ex. D62) and Step Up Plan (Ex. D64). According to testimony from Dr. Copeland, the document labeled "Individual Safety Plan" contains elements of all three documents referred to in the IEP. At hearing, Dr. Copeland indicated that the first page of the ISS is the school safety plan, the second page contains the BSP, and the third page contains the District's crisis plan which Dr. Copeland indicated is part of the step-up plan. (Tr.

180. According to the District, a step-up plan is a document used when a student is placed on an abbreviated school day and identifies the criteria that student must meet in order to have their school day increased. (Tr. Vol. I at 80:8-20.)

181. The nonparticipation justification in the September 2018 IEP indicated,

[Student] is removed from the general educaiotn [sic] classroom to address [his/her] behavioral and communication needs as stated in [his/her] school step up plan, safety plan[,] and behavior support plan. *As [his/her] behaviors decrease the amount of time in the general education classroom will increase.*

(Ex. D60 at 17; emphasis added.)

182. Despite the District's concerns regarding Student's behavior and the determination that he/she was unable to participate in the general education setting due to safety concerns, the District did not propose an FBA because District staff "did not see a need to at the time." (Tr. Vol. II at 380:23-381:2.)

183. At the morning meeting on September 10, 2018, Mother offered to accompany Student to school in order to provide assistance with strategies to keep him/her regulated in the classroom. According to Mother, Flurry Stone indicated that Parents assistance in the classroom was not appropriate. (Tr. Vol. XV at 3222:9-3223:6.)

184. Parents were unable to decide between the two start-time options presented by the District for his/her new two hour day and asked for some time to consider their options. The IEP team reconvened the meeting at 2:40 p.m. on September 10, 2018. Neither Ms. Shaner (the general education teacher) nor Flurry Stone (the school psychologist responsible for abbreviated school day determinations) attended the second part of the IEP meeting. Parents were not asked to sign a written excusal for either IEP team member. (Exs. S161 at 3, S78 at 5, and D61 at 1; Tr. Vol. VI at 1281:20-1283:5; and Tr. Vol. XV at 3231:25-3232:23.)

185. At the afternoon IEP meeting on September 10, 2018, the only District personnel in attendance were Ms. Newton, Dr. Copeland, and Ms. Ferrick. Upon reconvening, Parents again tried to convince the District team members in attendance to allow Student to attend school for more than two hours per day. The District refused to consider any option other than a two hour school day for Student and again reiterated that Parents could choose between a 7:30 a.m. start time and a 9:30 a.m. start time. At that time, Parents also reminded District staff about the use of deep pressure hold, as previously identified by Mr. Crouch, and asked why that support had not been used during the first week to help Student regulate his/her emotional state. Mr. Newton again asked Parents to choose what time Student's new school schedule would begin but failed to otherwise respond to Parents' inquiries. (Exs. D65 at 6 and S161 at 3.)

186. Parents were still unable to decide which option was best for Student and asked

Vol. IV at 739:23-740:11.) Based on testimony in the record and the information contained in the document, this order refers to the Individual Student Safety Plan as the BSP.

for additional time to consider the information provided by the District. Parents were advised that they would need to inform Mr. Newton of their decision no later than 8:00 p.m. that evening. Parent returned home to discuss the matter. After some contemplation, Parents elected for the later start time to allow Student to participate in lunch and recess with peers. Mother telephoned Mr. Newton that evening and informed him of Parents choice of a 9:30 a.m. start to Student's school day. (Ex. S161 at 3-4.)

187. On September 11, 2018, Mother met with Ms. Ferrick, Ms. Chance, and Dr. Copeland to finalize changes to Student's placement and sign the final versions of the BSP and step-up plan. (Exs. S161 at 4, D62 at 4 and D65 at 7.) Father was unable to attend that meeting. (Tr. Vol. XIII at 2275: 21-2776:1.)

188. The step-up plan presented on September 11, 2018 identified Student's target behaviors and stated, "[w]hen [Student] is overheated or frustrated [he/she] may hit/kick/headbutt /throw items or elope. The intensity of the strike/blow and elopement presents a specific risk of injury to student/staff and others." (Ex. D64 at 1.)

189. For his/her current level of functioning, the step-up plan stated, "[Student] is currently served primarily within Ms. Ferrick's classroom with the availability of a 1:1, visual supports, etc. due to challenging behavior." (Ex. D64 at 1.)

190. The step-up plan also identified a goal for Student which read, "[Student] will be served primarily within a general education classroom for up to 80% of [his/her] instruction with the availability of an instructional assistant, visual schedules and support, frequent breaks, etc." (Ex D64 at 1.)

191. The step-up plan identified three phases for Student to progress to in order to have his/her school day increased and return to the general education classroom. Each phase consisted of an expectation and specific goal criteria to meet within a two week period. Each phase identified in the plan also contained space for recording progress and any changes to the plan as well as a column to indicate when the goal for that phase was met. (Ex. D64 at 1.)

192. The phase one expectation of Student's step-up plan read:

Student participates in a 2-hour school day within the structured environment with 2 or fewer incidences of physical aggression/throwing heavy items.

(Start with 2 hour day with 15 mins in gen ed classroom/or lunch room).

(Ex. D64 1.) The goal criteria for that phase of the step-up plan indicated, "Student can maintain this level for 3 or more-day [sic] school days." (*Id.*)

193. The phase two expectation of the step-up plan stated:

Student participates in an increased school day, as decided by the IEP team, within the structured environment with 2 or fewer incidences of physical

aggression/throwing heavy items.

(Start 2 + hour day with 15 mins + in gen ed classroom/or lunch room).

(Ex. D64 at 1-2.) The goal criteria to be met over two weeks for phase two was stated as, “Student can maintain this level for 3 or more-day [sic] school days.” (*Id.*)

194. The phase three expectation of the step-up plan stated:

Student participates in an increased school day as decided by the IEP team within the structured environment with 1 or fewer incidences of physical aggression/throwing heavy items per week.

(Start 2 + hour day with 15 + mins in gen ed classroom/or lunch room).

(Ex. D64 at 2.) For the goal criteria applicable to this phase, the time frame was listed as “TBD.” (*Id.*) The criteria specified, “if criterion meet [sic]for 4 consecutive days, plan is terminated.” (*Id.*)

195. At the September 11, 2018 meeting, Mother asked how the BSP and step-up plan would be changed if no progress was made. District personnel indicated that the team would meet every two weeks or sooner if appropriate to review Student’s progress and revise the plan as necessary. (Ex. D65 at 7-8.) The intent of the District was to increase Student’s time at school by 30 minutes as he/she moved through each phase of the plan. (Tr. Vol. I at 80:8-20.)

196. Mother signed the BSP and the step-up plan on September 11, 2018. (Exs. D62 at 4 and D64 at 2.)

197. On September 11, 2018, Student’s IEP placement code was changed to indicate he/she would spend less than 40 percent of the school day in the general education classroom. The District did not change Student’s IEP to reflect the reduction in his/her school day or to specify where Student would spend his/her time while at school. (*See Ex. D60*)

198. When the bus arrived to drop off Student on September 11, 2018, the bus driver informed Mother that Student had unbuckled his/her seat belt on the ride home. Mother spoke to Student about the incident and he/she stated, “I want my old bus back, in kindergarten.” (Ex. S161 at 4.) The bus and driver that arrived to transport Student on September 11, 2018 were different than the bus and driver from his/her first week of kindergarten. (*Id.*)

199. On September 12, 2018, Mr. Newton contacted Parents and informed them that Student had unbuckled his/her seatbelt and headed for the emergency exit while on the bus ride to school that morning. Mr. Newton made the decision to assign a bus monitor to ride with Student to and from school. That afternoon, the bus driver indicated Student attempted to hit and kick the bus monitor on the ride home. Parents then received a phone call from Mr. Newton who indicated Student would not be allowed to ride the bus to or from school until the District could devise a solution to his/her transportation issues. Until that time, Mr. Newton indicated Parents

would need to transport Student to and from Westside. (Ex. S161 at 4.)

200. On September 13, 2018, Heather McClure, Student's private OT, reached out to Ms. Ferrick via email to collaborate about Student's behaviors and possible interventions. Ex. S84. Tr. Vol. 7, 1421:12-15 but Ferrick never talked to McClure during the 2018-19 academic year. Tr. Vol.7, 1422:4.

201. On the afternoon of September 18, 2018 Mother attended a step up meeting to review Student's progress and determine whether his/her school day would be increased. Ms. Newton, Ms. Ferrick, and Dr. Copeland attended the meeting. No other members of Student's IEP team were present at that meeting. (Ex. D66 at 1.)

202. At the September 18, 2018 meeting, Mother asked for a tutor to give Student to address academic work he/she was missing due to the reduced time at school. (Ex. D66 at 1.) Mr. Newton stated that Student did not qualify for tutoring services because he/she was attending school 10 hours per week. (Tr. Vol. I at 191:8-19 and Vol. II at 321:2-322:24.) Mr. Newton made that determination based on District policies despite his opinion that Student would have received educational benefit from having a home tutor in addition to his/her abbreviated school day. (Tr. Vol. II at 324:13-19.) Instead, Mr. Newton proposed that Parents use the District's i-Ready math and ConnectEd reading programs at home with Student to increase academics. (Ex. D66 at 1-2.)

203. After the District shortened Student's school day, it implemented the use of behavior logs to track data related to Student's physical aggression. (*See* Ex. D104 generally.) Based on information from the behavior logs, the District refused to increase Student's time at school after two weeks. (Tr. Vol. VII at 1439:7-15.) No changes were proposed to the step-up plan on September 18, 2018 despite the lack of progress from Student. (Exs. D64 at 1 and D66 at 1-2.)

204. On days when the District sent Student home early due to behavioral issues, Parents engaged Student in educational activities and academic work in an attempt to keep him/her on track with his/her kindergarten peers. (Tr. Vol. XIV at 2967:15-2969:7; *See also* Ex. S247.)

205. On September 20, 2018, Father reached out to Ms. Carloss via email and expressed Parents' frustration with Student's rough start to the 2018-2019 school year. Father also informed Ms. Carloss that Parents had contacted Disability Rights Oregon (DRO) for advice as to their legal rights regarding Student's education. In that email, Father requested Ms. Carloss provide Parents with "a concrete plan to increase [Student] to a full day of school that does not require four consecutive days of no behavioral issues." (Ex. S97 at 3.) At that time, Parents also requested reintegration of Student into a general education classroom to increase his/her learning and interactions with peers. In addition, Parents requested the District conduct an FBA of Student that included staff from ESCE who had previously worked with Student in order to help identify positive behavior supports and tools that worked for Student in the past. (*Id.*)

206. On September 25, 2018, Mother signed a Permission to Conduct a Functional Behavior Assessment form provided by the District. (Ex. D69.)

207. On September 27, 2018 Ms. Carloss informed Parents via email that she had reached out to the District's behavior specialist and asked that individual to initiate an FBA of Student. (Ex. S97 at 2.)

208. On September 28, 2018, The District issued a Notice of Special Education Team Meeting setting an IEP meeting for October 15, 2018 at 2:00 p.m. (Ex. D68.)

209. Sometime prior to October 3, 2018, Heather Whitecotton began providing transportation on behalf of the District for Student to and from school. Ms. Whitecotton was unaware of Student's behavior challenges before starting as his/her bus driver. The District did not provide Ms. Whitecotton any training regarding Student's behavior support plan or behavior challenges prior to September 28, 2018. (Tr. Vol. XIII at 2693:25-2695:5; *see also* Ex. S102.)

210. If Student would not get off the bus in the morning, and/or displayed physical aggression on the bus, Mr. Newton instructed Ms. Whitecotton to take Student home. (Tr. Vol. XIII, 2682:9-18.)

211. On October 2, 2018 The District issued a Special Education Notice of Team Meeting scheduling a step-up plan meeting for October 8, 2018 at 2:00 p.m. (Ex. D70.)

212. Parents began working with Jeffrey Carrell, Family Care Coordinator (FCC) at Mid-Columbia Center for Living (MCCL), on October 4, 2018. As an FCC, Mr. Carrell's role was to provide skill building techniques, based upon the MCCL therapist's recommendations, to help Student regulate his/her emotions. (Tr. Vol. XV at 3150:1-10 and 3151:6-14.)

213. On October 8, 2018, the District convened a step-up plan meeting to review Student's progress and determine if his/her school day should be increased. During the meeting, Parents expressed their frustration with the District's approach and stated their desire to have Student attend more than two hours per day. Father expressed his dismay over what he perceived to be a lack of progress. The District did not consider increasing Student's school day at that time, despite telling Parents that he/she was making academic progress. (Tr. Vol. VII at 1461:19-1462:4; Ex. D72 at 1-4; *see also* Ex. D64 at 1.)

214. At the October 8, 2018 meeting, Parents also expressed concerns over the lack of peer interaction and socialization because Student was still assigned to the sensory room with a one-to-one IA but no same age peers. (Tr. Vol. XV at 3160:21-25.)

215. In response to Parents' concerns about limited school time and socialization, Dr. Copeland indicated that, until Student met the criteria of the step-up plan, there were no other options. (Tr. Vol. XIII at 2792:5-16.)

216. Also at the October 8, 2018 meeting, the District advised Parents that the amount of time dedicated to working on Student's speech goals would be decreased "for the next few weeks." (Ex. D72 at 3.) Student's IEP was not changed to reflect the reduction in speech services. (Tr. Vol. VII at 1465:2-19.)

217. The District convened an IEP meeting on October 15, 2018. Parents requested that Student's IA, Ms. Rae, attend the IEP meeting, but Ms. Carloss refused because it was not typical for IAs to attend IEP meetings within the District and because she believed Ms. Rae did not want to attend. (Tr. Vol. XII at 2431:9-2432:13.)

218. In addition to Parents, the following individuals attended the IEP meeting:

- Mr. Carrell;
- Ms. Shaner;
- Dr. Copeland;
- Ms. Carloss;
- Ms. Ferrick;
- Ms. Chance;
- Mr. Newton; and
- Erin Bertram, OT.

(Ex. D73 at 1.)

219. At the October 15, 2018 IEP meeting, Parents expressed concerns that Student would not be allowed to attend a full day of school by the end of the academic year. Father was upset about the lack of progress in Student's education and the accumulation of missed educational time imposed by the abbreviated day. (Ex. D73 at 1-7.)

220. At one point, Ms. Ferrick admitted to Parents that she "had dropped the ball" with regard to Student's transition into kindergarten because she was distracted by a residential move over summer and failed to get involved prior to the start of the 2018-2019 school year. (Tr. Vol. XIII at 2812:19-2813:3.)

221. During the meeting, Ms. Shaner asked Parents why they chose to send Student to Westside instead of Student's neighborhood school, May Street. Father responded by indicating Parents asked for Student to attend May Street, but the District denied that request. (Ex. D73 at 11; see also Tr. Vol. II at 370:21-371:10.)

222. On October 16, 2018, the District issued a Prior Written Notice of Special Education Action notifying Parents that the District declined to make any changes to Student's IEP. (Ex. D76 at 1.)

223. The District convened a step-up plan meeting on October 22, 2018. In addition to Parents, Mr. Carrell, Dr. Copeland, and Ms. Chance attended the step-up meeting. Mr. Newton, Ms. Ferrick, and Ms. Shaner were invited but did not attend the meeting. (Ex. D78 at 1.)

224. At the October 22, 2018 meeting, the District presented an FBA conducted for Student on October 15, 2018. (Ex. D75.) The FBA identifies specific target behaviors of Student including, "hit/kick/throw items/elope." Nonetheless, with regard to potential triggers, the FBA makes no mention of problem transitions or disruption to Student's routine that

occurred in Ms. Shaner's classroom. (*Id.* at 3.) The FBA lists the following participants: Ms. Ferrick, Ms. Shaner, Mr. Newton, Ms. Chance, Ms. Bertram, Ms. Rae, and Dr. Copeland. (Ex. D75 at 1; Tr. Vol. IV at 805:22-25.)

225. Ms. Whitecotton was not asked to participate in an FBA related to Student. (Tr. Vol. XIII, 2703:22-25.)

226. Ms. Shaner did not participate in creating the FBA for Student in September or October 2018. (Tr. Vol. VI at 1292:23-1293:8.)

227. Along with the October 15, 2018 FBA, the District also drafted a new BSP for Student. The only new strategy added to the BSP following the FBA was allowing Student to be a helper in Ms. Ferrick's classroom. (Ex. D75 at 5-9; Tr. Vol. VII at 1497:22-1498:7.)

228. During the October 22, 2018 meeting, the participants went over Dr. Copeland's FBA and BSP. Parents expressed ongoing concerns that Student would not be able to learn any of the skills in the step-up plan or his/her IEP because he/she was being completely isolated in the sensory room with an IA and away from other children. Parents communicated their belief that Student needs peer modeling to learn classroom routines and socialization and again asked for him/her to be returned to a classroom with same age peers rather than in the sensory room with Ms. Rae. (Ex. D78 at 1-2.)

229. At the October 22, 2018 meeting, Dr. Copeland asked Parents to share any other strategies that work with Student. Parents asked for the District to consider ABA therapy for Student in school. Dr. Copeland stated that ABA "was not done here." (Ex. D78 at 2.) When Mother asked for clarification, Dr. Copeland told Parents that ABA "was a program was mostly done at home." (Ex. D78 at 2; Tr. Vol. XIII 2848:15-2849:7.)

230. Parents expressed frustration with what they perceived as the District's unwillingness to listen to them when Parents attempted to offer alternative strategies to support Student's behavioral struggles. At the end of the October 22, 2018 meeting, the District elected to maintain Student's time at school at two hours. (Ex. D78 at 2-3.)

231. On November 2, 2018, Mr. Newton called Parents to report that Student had a difficult time transitioning between activities before lunch that day and did not want to eat lunch. Mr. Newton was called to go the sensory room with Student. While in the sensory room, Student grabbed a pair of scissors and inserted the tip into an electrical outlet. The electrical outlet popped and scared Student but he/she was not hurt. Ms. Newton acknowledged that the outlet plugs should have covers and scissors should be kept out of reach. (Ex. S161 at 8.)

232. On November 5, 2018, the District convened another step-up plan meeting to review Student's progress and determine if his/her day school should be increased. The following individuals were invited: Parents, Ms. Ferrick, Mr. Newton, Ms. Bertram, Ms. Shaner, Ms. Chance, and Dr. Copeland. (Ex. D79 at 1.) Both Parents attended the meeting along with Mr. Newton, Ms. Shaner, Ms. Chance, and Dr. Copeland. (Ex. D80 at 1.)

233. Despite behavioral concerns reported by Mr. Newton on November 2, 2018, the participants at the step-up plan meeting elected to increase Student's time at school by 30 minutes per day. Dr. Copeland indicated Student had met the criteria of three days with no aggression and proposed adding 15 minutes for circle time with other students and 15 minutes of speech time for Student. (Exs. D80 at 1 and S161 at 8; see also Ex. D64 at 1.)

234. Following the November 5, 2018 meeting, the District revised Student's step-up plan to reflect that he/she was now in phase two of the plan. The District also revised the phase two expectations and goal criteria from the September 11, 2018 plan. The new phase two expectation read:

While attending school for 2.5 hours, [Student] will increase [his/her] safe behavior at school, occur [sic] for 4 consecutive days.

Safe Behavior: Keeping hands/feet to self and using objects as intended.

(Ex. D81 at 1-2.) The District significantly altered the plan's goal criteria for this phase to read:

Team will meet every 2 weeks to assess progress toward reducing significant problem behavior.

Significant problem behavior is defined as:

Type 1: Bite/strike self or others with intent to hurt or

Type 2: Bite/strike/throw objects with increase[d], *sustained* intensity over a 10 minute period. (Unable to descale with/without supports. At 5 mins [sic] principal is called, at 10 minutes parents are contacted and efforts are taken to help student end [his/her] school day.)

1. Increase school day: If [Student] has 4+ days of zero instances of significant problem behavior time at school will be increased.
2. Keep current schedule: 3 days of zero significant problem behaviors.
3. Regression: Return to prior phase. If [Student] has 2 or fewer school days of zero significant problem behaviors.

(*Id.*; emphasis in original.)

235. In the column for recording progress and/or changes to the plan, the District added the following:

- Note: As problem behavior decreased, opportunities for social and academic instruction with peers will increase.
- I.e. [sic]while the criterion of 4+ consecutive school days of zero physical aggression is in place, at each phase, incremental steps towards full

inclusion will also be implemented.

(Ex. D81 at 2.)

236. The revised expectation for consecutive phases in the November 5, 2018 step-up plan read:

Phase 3 (A 3 hour school day with 5+ consecutive school days with zero significant problems behaviors.)

Phase 4 [Blank]

Phase 5 [Blank]

(Ex. D81 at 2.) The revised goal criteria for these phases stated:

For each consecutive phase the time would:

1. Add .5 hours additional school day time
2. Increase inclusion
3. Increase academic expectations
4. Increase behavioral expectations

This would continue until [Student] is no longer attending via an abbreviated school day.

(*Id.*) The District's revised step-up plan added additional phases rather than terminating the plan once Student was able to meet the criteria of phase three as stated in September 11, 2018 step-up plan. (Exs. D81 and D64.)

237. On November 9, 2018, the District issued a progress report for Student's AGs/STOs. With regard to Student's expressive communication and expressive language AGs/STOs, Ms. Chance provided a narrative indicating that Student was making progress toward the goals and objectives but did not include quantifiable data with regard to the number of successful opportunities (out of 10) or percentage of time Student was able to perform the stated goals or objectives. (Ex. S153 at 2 and 4.)

238. According to Ms. Chance, she was unable to collect data on Student's progress because the IEP team had decided to reduce Student's speech time at school. Rather, Ms. Chance reported qualitative information on Student's observed performance while in the speech room with Ms. Chance. (Tr. Vol. V at 1122:7-1123:10.)

239. On November 19, 2018, the District convened another step-up plan meeting. Mother, Ms. Shaner, Ms. Newton, and Dr. Copeland attended the meeting on that day. Ms. Ferrick did not attend. (Ex. S165 at 2.) At that meeting, the District presented the revised step-up plan to Mother. (Exs. S165 at 2 and D83.) At that meeting, Mother shared that Student has

been receiving ABA therapy at Playworks Gorge Children's Therapies. The District elected to maintain Student in the then-current two and one-half hour school day. (Ex. S165 at 2.)

240. At about 9:30 a.m. on November 26, 2018, Parents received a phone call from Mr. Newton asking them to pick up Student from school because staff could not get him/her to settle down. Father arrived at school and proceeded to the sensory room where he found Student's shoes, backpack, and blanket outside the door. Upon entering the room, Father observed Mr. Ferrick holding up play mats as a barrier to corral Student on one side of the room. Student attempted to push through the barriers to try to reach Father, but was rebuffed by Ms. Ferrick. Student then ran to a desk that had been placed at the corner of the room and crawled under the desk. (Ex. S171; Tr. Vol. XIV at 2901:17-2902:20.)

241. Father observed Student was visibly upset and attempted to coax him/her out from under the desk. After a couple minutes, Father was able to get Student calm enough to get his/her shoes on and both left the school grounds. (Ex. S171.)

242. On December 7, 2018, the District convened another step-up plan meeting to review Student's behavior and determine if his/her school day should be increased. At that meeting, Dr. Copeland shared that Student was demonstrating a reduction in physical aggression and stated that staff were typically seeing problem behaviors every other day or so, rather than daily. The District decided to maintain Student's time at school at two and one-half hours per day. (Exs. D84 and D85.)

243. On December 13, 2018, the District convened another step-up plan meeting. According to the meeting notice, Ms. Ferrick, Dr. Copeland, Mr. Newton, Ms. Chance, and Ms. Shaner were listed as required participants. (Ex. D86 at 1.)

244. Parents attended the meeting with Ms. Ferrick and Dr. Copeland. No other District staff attended the December 13, 2018 meeting. (Ex. D87 at 1.) The participants agreed that Student had more than four consecutive successful days of no physical aggression. The District agreed to increase Student's day at school by 30 minutes, for a total of three hours at school. The meeting participants agreed to add the additional time to the end of Student's day to allow him/her to attend lunch and recess with peers and then participate in math with Student's general education peers. (Ex. D87 at 1-2; Tr. Vol. VIII at 1600:23-1601:9.)

245. Also on December 13, 2018, the District issued a Prior Notice of Special Education Action identifying a change in Student's placement to reflect the additional time at school. (Ex. D88; Tr. Vol. VIII at 1602:4-10.)

246. No changes were made to Student's IEP to reflect the change in placement on December 13, 2018. (Tr. Vol. VIII at 1601:17-20.)

247. Despite additions to Student's school day and the indication by the District that he/she would be in the general education classroom for math following the December 13, 2018 meeting, Student did not return to Ms. Shaner's classroom until January 2019. (Tr. Vol. VI at 1272:17-22.) Ms. Shaner did not receive training on implementation of Student's BSP in the

classroom. (Tr. Vol. VI at 1272:14-16.)

248. On January 7, 2019, following winter break, the District held another step-up plan meeting. Mother attended the meeting along with Mr. Newton, Ms. Ferrick, and Dr. Copeland. At the meeting, the District reported that “the past two weeks have gone very well!” (Ex. S201.) As a result of Student’s increased behavior regulation, the District agreed to increase his/her school day by an additional 30 minutes for a total of three and one-half hours per day. During that additional 30 minutes, Student was scheduled to be in the general education kindergarten class. (*Id.*)

249. On January 22, 2019, Student engaged in physical aggression toward a peer who took a toy that Student wanted. Student also engaged in aggressive behavior toward an adult staff member who attempted to intervene. The incident lasted approximately one minute. (Ex. S206 at 4.) Also on that day, Student resisted returning to class after lunchtime recess. At that time, Student hit and kicked an adult staff member who tried to encourage him/her to return to class. Student was placed in the sensory room. After approximately 15 minutes, Student calmed down but was not allowed to return to the general education class. Instead, Student remained in the sensory room for the remainder of his/her school day. (*Id.*)

250. At approximately 9:30 a.m. on January 23, 2019, Student refused to clean up a project he/she was working on and transition to the scheduled language arts activity. Student began throwing toys and displaying aggressive behavior toward adult staff. Mr. Ferrick called Mr. Newton to come to the sensory room with Student. Mr. Newton called Parents at 9:55 to pick up Student from school. Parents requested that the bus bring Student home. Student remained in the sensory room until the bus came to pick him/her up from school at 10:10 a.m. (Ex. D207 at 3.)

251. At approximately 8:45 a.m. on January 24, 2019, Student displayed physical aggression by hitting and kicking adult staff during circle time in the general education classroom. Parents were called at 8:50 a.m. to pick Student up from school. (Ex. S208; Tr. Vol. XII at 2653:21-10.)

252. At 11:05 a.m. on January 24, 2019, Father sent Mr. Newton an email expressing concerns that Student was experiencing renewed behavior outbursts without any triggers identified by the District. Father also informed Mr. Newton that Parents would be keeping Student home for a few days “until [the] team can present a plan that addresses the problems that [Student] is having as well as providing specific supports to help [him/her] succeed.” (Ex. S209 at 2.) Father asked that the District provide Parents a plan as soon as possible so that they could return Student to school and resume his/her education. (*Id.*)

253. Mr. Newton responded to Father’s email on January 25, 2019 indicating that the District “stand[s] ready to implement [Student’s] IEP and BSP as currently written and believe [he/she] is making progress on [his/her] goals. (Ex. S209 at 2.)

254. Father responded to Mr. Newton’s email on the same date stating:

Obviously the plan is not working since you are having to call us everyday [*sic*] to call us come and pickup [Student] because [he/she] is having problems. Either something has changed, or someone has changed in the way [Student] is being dealt with. At this time, given the plan details that are in place, what would be different if we brought [Student] back to school?

(Ex. S212 at 1.)

255. Also on January 25, Mother responded to Mr. Newton expressing frustration with the District's lack of response to Student's renewed behavior issues stating:

[Student] was only at school for 20 minutes before we were called to come and get [him/her] yesterday. From my take of the situation [he/she] has gotten away with throwing, kicking and hitting and being able to come home when [he/she] acts out. [He/she] is playing the game.

Also, I observed [he/she] was in the sensory room with Miss Katie [Rae]. I'm sure [Student] is not fond of the sensory room or being in there with [Ms. Rae] as [he/she] spent 8 weeks there isolated with her instead of begin with [his/her] classmates. [] Think of how you would react as an adult yet alone a child [] being put back into stressful situations. I'm not [sure] how else you expect [him/her] to act when you put [him/her] back into that situation. * * *.

I'm not sure what "plan" [Dr. Copeland] is doing that is different than [*sic*] what was happening a week ago or after winter break when [he/she] was successful. * * * [I]t is hard to figure out what Westside is doing differently then [*sic*] Playworks, PCIT, Phycologist [*sic*], the ABA therapist, or event with other adults in our church who deal with [Student].

* * * * *

This is not rocket science, [Father] and I both can handle [Student] and as you have experts in the autism field I'm sure you will be able to come up with a plan of action to meet [Student's] needs. * * *.

When you have that in writing or are ready to set up a meeting to outline the details please let [Father] and I know so we can plan accordingly. Until then, I will keep [Student] home so [he/she] can learn and try to catch up to what [his/her] peers are learning in school.

(Ex. S209 at 1.)

256. On January 28, 2019, Mr. Newton sent Parents a letter stating, in relevant part:

You have expressed the desire to delay implementation of [Student's] IEP. The purpose of this letter is to let you know that Hood River County School District

stands ready to implement the special education and related services in your child's IEP, or to hold an IEP meeting at your request to consider any changes in your child's special education needs.

(Ex. D89 at 1.)

257. On February 22, 2019, the District sent Parents a Special Education Notice of Team Meeting via email setting an IEP meeting for March 8, 2019 at the District's offices in Hood River. (Ex. D90.)

258. On March 8, 2019, the District convened an IEP meeting for Student. Father attended the meeting as well as Ms. Bertram, Ms. Shaner, Ms. Ferrick, Ms. Carlross, Dr. Copeland, Ms. Chance, and Mr. Newton. The team reviewed Student's progress prior to January 24, 2019. Dr. Copeland asked about Parents' concerns, to which Father replied that their concerns had been shared previously. Father was provided a copy of Student's draft March 8, 2019 IEP, the step-up plan, and BSP. Father indicated that he would like to review with Mother. Ms. Ferrick advised Father to contact Mr. Newton after Parents had a chance to review the information so another meeting could be scheduled. (Ex. D92 at 1-2.)

259. The District made several alterations to Student's SDI and related services in the March 8, 2019 IEP that were not explained to Parents. Those alterations included:

- Student's AG/STOs in the social emotional domain were changed despite no evidence Student had met the prior AG/STOs;
- New communication and visual motor AGs were added to Student's program;
- Math and language arts AGs/STOs were added to the IEP;
- Student's fine/visual motor SDI was reduced from 60 minutes per week to 10 minutes per week;
- Student's communication SDI was changed from 40 minutes per week to 160 minutes per month;
- Student's SDI for behavior/social/emotional skills was reduced from 60 minutes per day to 60 minutes per week;
- SDI in math was added to the IEP for 30 minutes per week;
- SDI in language arts was added for 30 minutes per week;
- Student's OT services were increased from 120 minutes per year to 210 minutes per year;
- PT was removed from the IEP;
- ASD services were increased from 120 minutes per year to 120 minutes per month;
- Accommodations for social stories, updated daily schedules, and warnings, preparation, and reminders for change in routine were removed;
- Accommodations allowing built-in choice for Student was removed;
- Accommodations requiring the use of clear, direct, concise language when communicating with Student were removed;
- Student's sensory menu accommodation was removed from the IEP;

- Accommodation for adult support during transitions was removed;
- Student’s accommodation providing an IA and other adults trained in CPI was also removed;
- The school safety plan was removed from the IEP;
- Modified curriculum was added to Student’s IEP;
- SLP consultation time was changed from 20 minutes per trimester to 10 minutes per month;
- OT consultation was removed from the IEP; and
- In-service training and monthly check-ins for CPI use was removed from Student’s IEP.

(Ex. D91 at 10-18; *see also* Tr. Vol. XIV at 2941:6-2947:20.)

260. According to Ms. Ferrick, the accommodations for social stories and updated daily schedules were removed from Student’s March 2019 IEP because he/she was placed in Ms. Ferrick’s classroom and she considered those “standard accommodations” in her class. (Tr. Vol. VIII at 1691:19-1692:10.)

261. In addition, Ms. Ferrick removed the accommodations for warnings, preparation, and reminders of upcoming changes to Student’s schedule because she also considered those to be standard accommodations in her classroom. (Tr. Vol. VIII at 1693:6-16.)

262. Similarly, according to Ms. Ferrick Student’s accommodations for the use of visual timers to assist him/her with transitions between activities was removed from the IEP because she considered that a standard accommodation in the SLC. (Tr. Vol. VIII at 1694:21-1695:5.)

263. In the March 8, 2019 IEP, Student’s assigned placement remained the same as the September 10, 2018 IEP. (Ex. D91 at 20.)

264. The step-up plan included with the March 8, 2019 IEP did not alter Student’s time at school from the previous three and one-half hours. (Ex. D93.)

265. The only alteration to Student’s BSP in March 2018 was the removal of deep pressure holds for Student to help him/her regulate behavior. (Ex. D94 at 3-4.)

266. Student did not return to school in the District after January 24, 2019. (Tr. Vol. I at 114:22-24.)

Student’s interactions with non-District providers during the 2018-2019 school year.

267. Nicholas Santillano is a Board Certified Behavior Analyst (BCBA). (Tr. Vol. 16, 3347:13-17.) Mr. Santillano began working with Student in September or October 2019. Mr. Santillano’s work with Student focused primarily on developing appropriate behavioral responses using ABA therapy. (*Id.* at 3370:2-23.)

268. As a BCBA, Santillano created a therapeutic program for Student and supervised

the implementation of that program by a Registered Behavior Technician (RBT). After completion of initial assessments, Student began receiving ABA service for approximately 15 hours per week. (Tr. Vol. XVI at 3366:16-24.) During therapy session, Student sometimes displays challenging behaviors and/or physical aggression. When this occurs, Student's RBT will not terminate the session but will instead wait out Student's behavior and continue once Student has regained composure. (*Id.* at 3375:9-3376:6.)

269. As part of the ABA program developed by Mr. Santillano, Student is working on the 'My-way' procedure. My-way involves "teaching a child to ask appropriately to terminate aversive scenarios such as work or being denied access to items. It also teaches them to appropriately respond to being told no." (Tr. Vol. XVI at 3378:4-13.)

270. Kali Dominguez is an RBT working for Mr. Santillano at Gorge Behavior Solutions. (Tr. Vol. XVI at 3397:13-20.) In her role as an RBT, Ms. Dominguez is responsible for implementation of ABA programs developed by the supervising BCBA. (Tr. at 3397:21-3398:2.)

271. Ms. Dominguez began working with Student in late October or early November 2019. As of the date of hearing in this matter, Ms. Dominguez was working with Student approximately twelve hours per week. (Tr. Vol. XVI at 3398:20-3399:17.)

272. During her time working with Student, Ms. Dominguez has witnessed incidents of physical aggression by Student. Despite these observations, Ms. Dominguez has never terminated a session early and instead works through the negative behavior using the My-way procedure. In this way, Ms. Dominguez is able to reinforce positive behaviors and practice scenarios to allow Student to learn to accept being denied access to an item or activity. (Tr. Vol. XVI at 3399:23-3400:23).

273. Ms. Dominguez has found that, in most circumstances, the My-way procedure is effective at working through Student's challenging behaviors. On the rare occasions that therapeutic interventions do not assist Student in regulating his/her behavior, Ms. Dominguez will wait for the behavior to subside. (Tr. Vol. XVI at 3402:10-3403:9)

274. According to Ms. Dominguez, one of Student's primary triggers is being denied access to preferred items. In those instances, it can take time for Student to be redirected but eventually he/she will resume the task posed by Ms. Dominguez. (Tr. Vol. XVI at 3403:22-3404:16.)

275. Ms. Dominguez has not had to wait longer than 20 minutes for Student to return to a regulated state. (Tr. Vol. XVI at 3407:1-5.)

276. Carla-Marie Myers is the CEO of Discovery Behavior Solutions. Ms. Myers is licensed in both Washington and Oregon as a Licensed Behavior Analyst (LBA). Ms. Meyers is also a Board Certified Behavior Analyst (BCBA). (Ex. S265.)

277. Ms. Myers first met Student at her office on October 22, 2019. Ms. Meyer's initial meeting with Student lasted for approximately two hours on that date. At that time, Ms.

Myers observed Student engage in independent play, allowed him/her to roam freely around the clinic to observe which areas or items Student gravitated toward, and prompted him/her to engage in a structured game for a short period. Ms. Myers and her staff also engaged Student in limited instructional tasks such as writing his/her name and completing a worksheet. (Tr. Vol. XVII at 3503:22-3505:10.)

278. During that visit, Ms. Myers also observed Student engage in free play with similar, albeit not same age, peers.³³ At that time, Ms. Myers observed Student initiate and accept interactive play with peers. Ms. Myers and staff also engaged Student in pretend play. During this session, staff also engaged in multiple transitions between preferred and non-preferred items or tasks to observe his/her tolerance. (Tr. Vol. XVII at 3505:11-3506:5 and 3506:23-12.)

279. Ms. Myers selected activities and transitions that Student's historical records indicated were a struggle or trigger for his/her challenging behaviors. (Tr. Vol. XVII at 3507:13-21.)

280. Ms. Meyers repeatedly observed Student communicate "I want it my way" in response to non-preferred activities presented by her or her staff. Ms. Myers noted that Student's was using a specific protocol in ABA that teaches functional communication to children as a replacement for challenging behavior. In response, Ms. Myers and staff accepted Student's communication by telling him/her that he/she could continue with the preferred activity for two more minutes and then it would be time to move on. They thanked Student for using his/her words and reinforced his/her positive use of self-regulation and communication. In Ms. Myers' expert opinion, Student' challenging behaviors were avoided by allowing and accepting his/her My-way communication. (Tr. Vol. XVII at 3507:22-3508:24.)

281. At the time of Ms. Myers' assessment, Student had never visited her clinic and had not met Ms. Myers or other staff in advance of the assessment. Despite the unfamiliar environment and unfamiliar adults and peers, Student did not engage in any physically or verbally aggressive behaviors toward adults or peers. (Tr. Vol. XVII at 3510:18-3512:14.)

282. Ms. Meyers also withheld warnings before transitioning to certain activities, presented academic work and other non-preferred activities to Student in an effort to identify triggers for his/her concerning behaviors. Ms. Meyers was unable to trigger verbal or physical outbursts or elopement behaviors from Student. (Tr. Vol. XVII at 3515:24-3521:16.)

283. In her practice, Ms. Meyers encounters clients who exhibit physically aggressive behaviors and property destruction but does will not end a session or send the client home as a result. In Ms. Meyers' opinion, ending a session or sending a client home early due to aggression or property destruction simply reinforces bad behavior and teaches the client that bad behavior is a way to avoid non-preferred tasks. (Tr. Vol. XVII at 3563:2-3565:1.)

³³ At hearing, Ms. Myers testified that the average age of her clients is six or younger. At the time of her initial visit with Student, he/she had just turned seven. According to Ms. Myers, the peers that she observed Student interact with were at least two years younger than him/her. (Tr. Vol. XVII at 3505:11-19.)

284. Between October 22 and 31, 2019, Ms. Myers conducted multiple of assessments of Student including the Social Responsiveness Scale, Second Edition (SRS II), the Vineland-III, and a functional behavior assessment. (Tr. Vol. XVII at 3483:3-7; *see* Exs. S258, S260, and S263.)

285. According to the results of the SRS II, Student demonstrated significant difficulties with environmental awareness and his/her ability to pick up on environmental cues from others. Student also displayed severe social cognitive deficits demonstrating he/she is less likely to understand social rules. Further, Student showed significant impairment in his/her communication abilities, indicating that self-advocacy and peer communication is a likely trigger for challenging behaviors. Student also displayed restricted interests and repetitive behaviors, indicating severe perseveration and stereotypy as well as the need for self-stimulatory behaviors. (Tr. Vol. XVII at 3483:12-3489:13; *see also* Ex. S258.)

286. According to Ms. Myers, the results of the SRS II were utilized to generate goals and determine how to support Student. (Tr. Vol. XVII at 3489:18-3490:10.)

287. Similarly, the results of the Vineland III showed Student's adaptive skills in communication, daily living skills, socialization, and motor skills to be well below that of same age peers. (Tr. Vol. XVII at 3492:16-3493:15; *see also* Ex. S260 at 3.)

288. According to Ms. Meyers, the Vineland III results also indicated Student's receptive, expressive, and written communication skills were significantly impaired. (Tr. Vol. XVII at 12-3496:6.)

289. Moreover, the Vineland III results demonstrated Student's community daily living skills and coping skills were moderately low, indicating he/she requires substantial support outside of the home. According to those results, Student possesses some baseline skills but may be unable to use them on every occasion. (Tr. Vol. XVII at 3497:12-3500:23; *see also* Ex. S260 at 9-10.)

290. As part of her assessment of Student, Ms. Meyers drafted an FBA for Student, identifying outbursts and elopement as the target behaviors. As part of the FBA, Ms. Myers gathered data on antecedent, behavior, and consequences (ABC). That information informs environmental triggers, the target behaviors in response to those triggers, and how those around Student respond to his/her behaviors. (Tr. Vol. XVII at 3515:24-3516:20.)

291. On November 1, 2019, Ms. Myers also drafted a BSP for Student following her observations and assessments of him/her. (Tr. Vol. XVII at 3521:17-25; Ex. S264.)

292. Ms. Meyers does not draft BSPs without first conducting an FBA because, in her opinion, it is important to know the function of a behavior before developing strategies or interventions to teach new and more appropriate behaviors. (Tr. Vol. XVII at 3621:15-3622:5.)

293. Ms. Meyers believes his/her BSP should incorporate teaching Student the

necessary skills utilizing principles of ABA. (Tr. Vol. XVII at 3525:4-6.) In the BSP, Ms. Meyers recommends several supports that can be used to successfully redirect Student or assist him/her in self-regulating behavior. According to Ms. Meyers, those recommendations are necessary across all environments where Student spends his/her time and include:

- Functional communication training;
- Visual supports;
- Coping skills;
- Stress tolerance training;
- Token economy;
- Priming;
- Offering choices;
- Non-contingent reinforcement;
- Behavioral momentum;
- First/Then (Premack Principle);
- Environmental modification;
- Timers;
- Clear and reasonable expectations (follow through); and
- Preference assessments.

(Ex. S264 at 2-4; *see also* Tr. Vol. XVII at 3525:9-3532:5.)

294. In addition, Ms. Myers included strategies in the BSP for reinforcing Student's positive behavior changes (differential reinforcement) and for addressing challenging behaviors without unintentionally reinforcing Student's undesired behavior (reactive strategies). In Ms. Meyers' expert opinion, adult reactions to Student's challenging behaviors must be aligned with the function of the behavior in order to avoid reinforcing those negative or undesirable behaviors. (Tr. Vol. XVII at 3544:17-22.)

295. In Ms. Myers' expert opinion, Student's reentry into school should include a BCBA and dedicated one-to-one support. Ms. Myers believes that, based on Student's historical challenges, reentry should start slowly on a limited schedule and increase as Student's behavior skills increase. (Tr. Vol. XVII at 3548:14-3550:1.) According to Ms. Myers, Student should receive between 15 and 25 hours per week of one-on-one ABA therapy from a BCBA and/or RBT. (Tr. Vol. XVII at 3557:12-3558:10.) Ms. Myers believes Student needs that level of therapy for a minimum of one year. (*Id.* at 3560:4-11.) Ms. Myers was unable to opine how soon after beginning that level of therapy that Student would be able to return to school full time. (Tr. Vol. XVII at 3562:17-3563:1.)

296. In Ms. Myers' expert opinion, any paraprofessional or other person providing one-to-one support or therapy to Student needs to have foundational knowledge of ABA principles. Ms. Meyers does not believe entry-level or untrained staff would have the appropriate knowledge and skills to handle, or prevent, Student's challenging behaviors or to effectively teach Student new behaviors. (Tr. Vol. XVII at 3559:3-23.)

CONCLUSIONS OF LAW

1. The District failed to issue appropriate IFSP progress reports with sufficient information, failed to provide proper documentation to Parents within a timely manner, and denied Parents the opportunity to meaningfully participate in the development of Student's IFSP, resulting in a denial of FAPE, during the 2016-2017 academic year

2. The District failed to issue appropriate IFSP progress reports, failed to provide proper documentation to Parent within a timely manner, failed to complete and provide Parents with Student's then-current IFSP and Individualized Education Program (IEP), and denied Parent the opportunity to meaningfully participate in the development of Student's IFSPs and IEP, resulting in a denial of FAPE, during the 2017-2018 academic year.

3. The District failed to issue appropriate IEP progress reports, failed to convene IEP meetings when appropriate, failed to provide proper documentation to Parent within a timely matter, unilaterally made changes to Student's educational program without an IEP meeting, failed to have required attendees at one or more IEP meetings, and denied Parents the opportunity to meaningfully participate in the development of Student's IEP, resulting in denial of FAPE during the 2018-2019 academic year.

4. The District failed to properly evaluate Student in all areas of suspected disability during the 2016-2017 and 2017-2018 academic years

5. The District failed to properly identify Student as a student with a disability in all areas of suspected disability during the 2016-2017 and 2017-2018 academic years.

6. The District failed to properly implement Student's IEP resulting in a denial of FAPE during the 2018-2019 academic year.

7. The District predetermined Student's academic placement and failed to provide him/her with an appropriate placement in the least restrictive environment during the 2018-2019 academic year resulting in a denial of FAPE.

8. Parents are entitled to relief as outlined in this order.

STANDARDS GENERALLY APPLICABLE TO PARENTS' ECSE CLAIMS³⁴

The following relevant portions of administrative rules are generally applicable to Student and Parents' claims during the 2016-2017 and 2017-2018 school years, when Student attended a Head Start preschool program within the District.

³⁴ The cited administrative rules are applicable to both early intervention and early childhood education claims. Early childhood special education services, as well as special education services for school-age children with disabilities, are governed by Part B of the IDEA, 20 USC 20 USC §§ 1411-1419. Early intervention services for children with disabilities ages birth to two year are governed by Part C of the IDEA, 20 USC Chapter §§ 1431-1444. The regulations promulgated under the IDEA, 34 C.F.R. 300 *et seq.* are mirrored in the Oregon Administrative Rules Chapter 581, Division 015, Section 2000 *et seq.* For convenience, this order cites to the applicable state standards whenever possible.

OAR 581-015-2700 Definitions — EI/ECSE Program

For the purposes of OAR 581-015-2700 to 581-015-2910, the definitions in this rule and 581-015-2000 apply.

* * * * *

(3) “Contractor” means the agency designated by the Department to administer the provision of EI and ECSE within selected service areas.

* * * * *

(6) “Early childhood special education (ECSE)” means free, specially designed instruction to meet the unique needs of a preschool child with a disability, three years of age until the age of eligibility for public school, including instruction in physical education, speech-language services, travel training, and orientation and mobility services. Instruction is provided in any of the following settings: home, hospitals, institutions, special schools, classrooms and community childcare or preschool settings, or both.

* * * * *

(13) “IFSP Content” means the definition as stated in OAR 581-015-2815 which includes:

- (a) “Frequency” which means the number of days or sessions that a service is provided;
- (b) “Duration” which means projecting when a given service will no longer be provided (such as when the child is expected to achieve the outcomes in his or her IFSP);
- (c) “Intensity” which means whether a service will be provided on an individual basis;
- (d) “Method” which means how a service is provided; and
- (e) “Location” which means the actual place or places where a service will be provided.

* * * * *

(16) “Individualized family service plan (IFSP)” means a written plan of early childhood special education, related services, early intervention services, and other services developed in accordance with criteria established by the State

Board of Education for each child eligible for services under this chapter.

* * * * *

(35) “Related services” includes transportation and such developmental, corrective, and other supportive services, including orientation and mobility services, speech language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation including therapeutic recreation, school health services and school nurse services, counseling, social work services, parent counseling and training, and medical services, as may be required to assist a child with disabilities, three years of age until the age of eligibility for public school, to benefit from special education or early childhood special education and includes early identification and assessment of disabling conditions. Medical services shall be for diagnostic and evaluation purposes only. This definition incorporates the exception for services for children with surgically implanted devices, including cochlear implants, in 34 CFR 300.34(b) and the definitions for individual related services in 34 CFR 300.34(c).

OAR 581-015-2750 Parent Participation — General — EI/ECSE Program

(2) For a child age three and older, contractors or subcontractors must provide parents with an opportunity to participate in meetings with respect to the identification, evaluation, IFSP, placement of the child, the provision of a free appropriate public education and transition to school age or other services. For IFSP and placement meetings, contractors and subcontractors must also follow requirements of OAR 581-015-2755.

* * * * *

(5) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, instructional plans, or coordination of service provision if those issues are not addressed in the child’s IFSP. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response parent proposal that will be discussed at a later meeting.

(6) Conducting a meeting without a parent in attendance: A meeting may be conducted without a parent in attendance if the public agency has given the parent notice under subsection (3) or, for IFSP or placement meetings, in accordance with OAR 581-015-2755.

OAR 581-015-2755 Additional Parental Participation Requirements for IFSP and Placement Meetings — EI/ECSE Program

(2) For a child age three and older:

(a) Contractors or subcontractors must take steps to ensure that one or both of the parents of a child with a disability are present at each IFSP or placement meeting or are afforded the opportunity to participate* * *:

* * * * *

(3) The contractor or subcontractor must give the parent a copy of the IFSP at no cost to the parent. If the parent does not attend the IFSP meeting, the contractor subcontractor must ensure that a copy is provided to the parent.

OAR 581-015-2815 IFSP Content

(1) Contractors or subcontractors must use IFSP forms and directions published by the Oregon Department of Education.

(2) Oregon Department of Education IFSP forms combine the content requirements for IEPs under Part B of IDEA, IFSPs under Part C of IDEA, and IFSPs under ORS 343.521.

(3) Each individualized family service plan must contain:

(a) A statement of the child's present level of development, including how the child's disability affects the child's participation in appropriate activities for the child's age. For a child under age three, the statement must include present levels of physical development including vision, hearing and health status, cognitive development, communication development, social development and adaptive development. The statement must be based on information from assessments using professionally acceptable objective criteria.

(b) A statement of major outcomes or annual goals and short-term objectives expected to be achieved for the child and family related to:

(A) Meeting the child's needs that result from the child's disability to enable the child to participate in appropriate activities;

(B) Meeting each of the child's other developmental needs that result from the child's disability.

* * * * *

(d) For a child age three and older, the IFSP contains IEP content including, a statement of ECSE 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 personnel that will be provided for the child:

(A) To advance appropriately toward attaining the annual goals;

(B) To participate in appropriate activities 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.

* * * * *

(f) The projected dates for initiation of services and modifications and the anticipated frequency, location, intensity, method and duration of the services as defined in OAR 581-015-2700 and modifications described in subsection (3)(d) of this rule and the payment arrangements, if any.

* * * * *

(i) For a child age three and older, 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 (3)(d) of this rule.

(j) A statement of:

(A) How the progress toward major outcomes or annual goals will be measured, including the criteria, procedures and timelines used to determine:

(i) The degree to which progress toward achieving the outcomes or goals is being made; and

(ii) Whether revisions of the outcomes or goals or services are necessary.

(B) For a child age three and older, how the child's parents will be regularly informed of:

(i) Their child's progress toward major outcomes or annual goals; and

(ii) The extent to which that progress is sufficient to enable the child to achieve the outcomes or goals by the annual IFSP review date.

* * * * *

(l) The steps to be taken to support the transition of the child from early childhood special education to public schooling or other education setting, in accordance with OAR 581-015-2805, 581-015-2750, and 581-015-2810.

OAR 581-015-2820 IFSP Team Consideration and Special Factors

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

(a) The strengths of the child and the concerns of the parents for enhancing the development of their child; and

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

(c) For a child age three and older, the academic, developmental and functional needs of the child.

(2) For children age three and older, in developing, reviewing and revising the child's IFSP the IFSP team must consider the following special factors:

(a) The communication needs of the child; and

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

(3) For children age three and older, in developing, reviewing and revising the IFSP of children described below, the IFSP team must consider the following additional special factors:

(a) For a child whose behavior impedes his or her development or that of others, consider strategies, positive behavioral interventions and supports to address that behavior;

* * * * *

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

(5) Nothing in OAR 581-015-2815 or this rule may be construed to require the IFSP team to include information under one component of a child's IFSP that is already contained under another component of the child's IFSP.

OAR 581-015-2830 Implementation of the IFSP

(3) Contractors and subcontractors must:

(a) Ensure that the IFSP is available as soon as possible and at no cost to the parents. They must also ensure copies of the IFSP are available to each regular preschool teacher, EI/ECSE specialist, related service provider and other service

provider who is responsible for its implementation; and

(b) Inform each teacher and provider described in (2)(a) of his or her specific responsibilities for implementing the child’s IFSP and the specific accommodations, modifications and supports that must be provided for on behalf of the child in accordance with the IFSP.

(4) Contractors or subcontractors must provide EI or ECSE and related services to a child with a disability in accordance with an IFSP.

(5) Nothing in this rule limits a parent’s right to ask for revisions of their child’s IFSP or to invoke due process procedures.

OAR 581-015-2850 Free Appropriate Public Education (FAPE) for ECSE

(1) Contractors and subcontractors must provide ECSE and related services to all resident children from three years of age until the age of eligibility for public school.

* * * * *

(4) For purposes of this rule, “school district” means contractors or subcontractors.

OAR 581-015-2870 Due Process Hearings

OARs 581-015-2340 through 581-015-2385 apply for EI and ECSE programs with the following exceptions:

(1) “School District” means contractors and subcontractors;

(2) Parents may not seek reimbursement or attorney fees under ORS 343.175 for EI hearings;

(3) The Department must submit a copy of the hearing decision to the State Advisory Council for Special Education and the State Interagency Coordinating Council[.]

STANDARDS GENERALLY APPLICABLE TO PARENTS’ REMAINING PART B CLAIMS

OAR 581-015-2000 Definitions

The definitions below apply to OARs 581-015-2000–581-015-2999, unless the context indicates otherwise.

(4)(a) “Children with disabilities” or “students with disabilities” means children or students evaluated in accordance with OAR 581-015-2100 through 581-015-2180 as having autism spectrum disorder; * * * developmental delay; [or] other health impairment * * * and who, by reason thereof, need special education and related services.

* * * * *

(b) The terms used in the definition of a child with a disability are defined as follows:

(A) “Autism Spectrum Disorder” means a developmental disability that includes persistent deficits in social communication and social interaction across multiple contexts; restricted, repetitive patterns of behavior, interests, or activities. Characteristics are generally evident before age three but may not become fully evident until social demands exceed limited capacities, or may be masked by learned strategies. Characteristics cause educationally and developmentally significant impairment in social, occupational, or other important areas of current functioning. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. However, a child who qualifies for special education under the category of autism spectrum disorder may also have an emotional disturbance as a secondary disability if the child meets the criteria under emotional disturbance. The term “Autism Spectrum Disorder” is equivalent to the term “autism” used in ORS 343.035 and in 34 CFR §300.8.

* * * * *

(D) “Developmental Delay” means 1.5 standard deviations or more below the mean in two or more of the following developmental areas for Early Childhood special education and school-aged special education (ages 3-9), that adversely affects a child’s developmental progress when the child is three to kindergarten and the student’s educational performance when the student is kindergarten through age nine:

- (i) Cognitive development;
- (ii) Physical development;
- (iii) Communication development;
- (iv) Social or emotional development; and
- (v) Adaptive development.

* * * * *

(5) “Consent” means that:

(a) The parent or adult student has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language or other mode of communication;

(b) The parent or adult student understands and agrees in writing to the carrying out of the activity for which consent is sought; and the consent describes that activity and lists any records that will be released and to whom; and

(c) The parent or adult student understands that the granting of consent is voluntary and may be revoked at any time in accordance with OAR 581-015-2090(4) or 581-015-2735.

* * * * *

(9) “EI/ECSE” means early intervention/early childhood special education and refers to services or programs for preschool children with disabilities.

* * * * *

(11) “Evaluation” means procedures used to determine whether the child has a disability, and the nature and extent of the special education and related services that the child needs.

* * * * *

(25) “Placement” means educational placement, not social service placement by a state agency.

* * * * *

(29) “Related services” includes transportation and such developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education, and includes orientation and mobility services, speech language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation including therapeutic recreation, school health services and school nurse services, counseling services, including rehabilitation counseling services, social work services in schools, parent counseling and training, school health services and medical services for diagnostic or evaluation purposes, and includes early identification and assessment of disabling conditions in children. This definition incorporates the exception for services for children with surgically implanted devices, including cochlear implants, in 34 CFR 300.34(b) and the definitions for individual related services in 34 CFR 300.34(c).

* * * * *

(35) “Short term objectives” means measurable intermediate performance steps that will enable parents, students and educators to gauge, at intermediate times during the year, how well the child is progressing toward the annual goals by either:

(a) Breaking down the skills described in the goal into discrete components, or

(b) Describing the amount of progress the child is expected to make within specified segments of the year.

(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.

(38) “Supplementary aids and services” means aids, services and other supports that are provided in regular education classes or other education-related settings and in extracurricular and nonacademic settings to enable children with disabilities to be educated with children without disabilities to the maximum extent appropriate.

OAR 581-015-2040 Free Appropriate Public Education (FAPE) and Age Ranges

(1) Except as provided in OAR 581-015-2045, school districts must provide a free appropriate public education all school-age children with disabilities for whom the district is responsible pursuant to ORS 338, ORS 339, OAR 581-021-0019, or

open enrollment under section 9, chapter 718, Oregon Laws 2011, “School-age children” are children who have reached five years of age but have not yet reached 21 years of age on or before September 1 of the current school year.

OAR 581-015-2070 Nonacademic Services

(1) School districts must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child’s IEP team, to provide nonacademic and extracurricular services and activities in a manner to afford children with disabilities an equal opportunity for participation in those services and activities.

(2) Nonacademic and extracurricular services and activities may include meals, recess periods, counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school district, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the school district and assistance in making outside employment available.

OAR 581-015-2090 Consent

(1) Consent means that the parent or adult student:

(a) Has been fully informed, in his or her native language or other mode of communication, of all information relevant to the activity for which consent is sought; and

(b) Understands and agrees in writing to the carrying out of the activity for which his or her consent is sought.

(2) Consent is voluntary on the part of the parent and meets the requirements of the consent provisions of this rule and 34 CFR 300.622 and 34 CFR 99.30 implementing IDEA, and FERPA respectively.

(3) Consent for initial evaluation:

(a) The school district must provide notice under OAR 581-015-2310 and obtain informed written consent from the parent or adult student before conducting an initial evaluation to determine if a child qualifies as a child with a disability under OAR 581-015-2130 through 581-015-2180.

(A) Consent for initial evaluation may not be construed as consent for the initial provision of special education and related services.

(B) The school district must make reasonable efforts to obtain the informed consent from a parent for an initial evaluation to determine a child’s eligibility for

special education services.

OAR 581-015-2100 Responsibility for Evaluation and Eligibility Determination

- (1) For school-age children, school districts * * * are the public agencies responsible for evaluating children and determining their eligibility for special education services.
- (2) For preschool children,
 - (a) School districts are responsible for the eligibility evaluations of children for EI/ECSE services.
 - (b) Designated referral and evaluation agencies are responsible for determining the eligibility of children for EI/ECSE services.
 - (c) EI/ECSE programs are responsible for conducting any necessary evaluations other than for eligibility determination.

OAR 581-015-2105 Evaluation and Reevaluation Requirements

- (1) General: A public agency must conduct an evaluation or reevaluation process in accordance with this rule and 581-015-2110 before:
 - (a) Determining that a child is a child with a disability under OAR 581-015-2130 through 581-015-2180;
 - (b) Determining that a child continues to have a disability under OAR 581-015-2130 through 581-015-2180;
 - (c) Changing the child's eligibility, or
 - (d) Terminating the child's eligibility as a child with a disability, unless the termination is due to graduation from high school with a regular diploma or exceeding the age of eligibility for a free appropriate public education under OAR 581-015-2045.
- (2) Request for initial evaluation: Consistent with the consent requirements in OAR 581-015-2090, a parent or public agency may initiate a request for an initial evaluation to determine if a child is a child with a disability.
- (3) When initial evaluation must be conducted:
 - (a) An initial evaluation must be conducted to determine if a child is eligible for special education services when a public agency suspects or has reason to suspect that:

(A) The child has a disability that has an adverse impact on the child's educational performance; and

(B) The child may need special education services as a result of the disability.

(b) The public agency must designate a team to determine whether an initial evaluation will be conducted.

(A) The team must include the parent and at least two professionals, at least one of whom is a specialist knowledgeable and experienced in the evaluation and education of children with disabilities.

(B) The team may make this decision without a meeting. If a meeting is held, parents must be invited to participate in accordance with OAR 581-015-2190.

OAR 581-015-2110 General Evaluation and Reevaluation Procedures

(2) Notice and consent.

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

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

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

* * * * *

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

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

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

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

preschool child, to participate in appropriate activities);

* * * * *

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

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

* * * * *

(b) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

* * * * *

(d) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(e) The evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified; and

(f) The evaluation includes assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.

(5) Evaluation timelines:

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

* * * * *

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

(A) The parents of a child repeatedly fail or refuse to produce the child for an evaluation, or for other circumstances outside the school district's control.

(B) The student is a transfer student in the process of evaluation and the district and the parents agree in writing to a different length of time to complete the evaluation in accordance with subsection (d);

(C) The district and the parents agree in writing to extend the timeline for an

evaluation to determine eligibility for specific learning disabilities in accordance with OAR 581-015-2170.

OAR 581-015-2190 Parent Participation – General

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

(2) Meeting Notice:

(a) School districts must provide parents with a written notice of the meeting sufficiently in advance to ensure that one or both parents will have an opportunity to attend.

(b) The written notice must:

(A) State the purpose, time and place of the meeting and who will attend;

(B) Inform the parent that they may invite other individuals whom they believe have knowledge or special expertise regarding the child;

(C) Inform the parent that the team may proceed with the meeting even if the parent is not in attendance; and

(D) Inform the parent of whom to contact before the meeting to provide information if they are unable to attend.

(3) The school district must take whatever action is necessary to ensure that the parent understands the proceedings at a meeting * * *.

(4) A meeting does not include informal or unscheduled conversations involving school district personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

OAR 581-015-2195 Additional Parent Participation Requirements for IEP and Placement Meetings

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

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

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

* * * * *

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

OAR 581-015-2200 Content of IEP

(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.

OAR 581-015-2205 IEP Team Considerations and Special Factors

(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.

(5) Nothing in OAR 581-015-2200 or this rule may be construed to require the IEP team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

OAR 581-015-2560 Individualized Educational Program/Individualized Family Service Plan

(1) An eligible child must have an individualized educational plan (IEP) developed in accordance with OAR 581-015-2220 or an individualized family service plan (IFSP) in accordance with OAR 581-015-2815.

(2) The IEP/IFSP must be developed by an appropriately constituted team in accordance with OAR 581-015-2825 for preschool children, and 581-015-2210 for school-age children. A designated regional program staff must be included in the development of the IEP/IFSP.

(3) The IEP/IFSP serves as the basis for determining the child's unique developmental or educational needs and the extent and nature of services to be provided, including services provided by the regional program.

OPINION

In due process proceedings alleging violations of the IDEA, 20 U.S.C § 1400 *et seq.*, the party seeking relief has the burden of proof. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter, Parents, on behalf of Student and themselves, filed a due process complaint on March 20, 2019, alleging procedural and substantive violations of the IDEA resulting in a denial of FAPE for Student during portions of the 2016-2017, 2017-2018, and 2018-2019 school years. Specifically, the period in issue begins March 20, 2017 and continued through the date Parents filed the due process complaint. Parent seeks the following remedies: compensatory education; evaluations of Student in all areas of suspected disability; a facilitated IEP meeting; training for District staff; reimbursement of educational expenses incurred by Parents, and attorney's fees incurred for bringing this action. The burden rests on Parents to prove the violations alleged in the due process complaint and the appropriateness of the remedies sought.

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

The IDEA was enacted to require state educational agencies (SEA) receiving federal funds to provide special education services for students with qualifying disabilities. *See* 20

U.S.C. § 1400(d)(1)(A). To meet its substantive obligation under the IDEA, a school must offer an “individualized education program” reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Andrew F. v. Douglas County School District*, 580 ___ U.S.(2017). Under the IDEA, all children deemed eligible for special education have a right to receive a FAPE. 20 U.S.C. §1412(1). The IDEA defines FAPE as special education and related services that: (a) have been provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the state educational agency; (c) include an appropriate preschool, elementary, or secondary school education in the state involved; and (d) are provided in conformity with the IEP required under §1414(a)(5) of the IDEA. 20 U.S.C. §1401(a)(18); *Amanda J. v. Clark County School Dist.*, 267 F3d 877, 890 (9th Cir. 2001).

Determining whether a school district provided a student with a FAPE is a twofold inquiry: (1) whether the district complied with the procedures set forth in the IDEA; and (2) whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefits. *Board of Educ. of Hendrick Hudson School District v. Rowley*, 458 US 176 (1982) (*Rowley*). Further, the United States Supreme Court has determined that, in order for an IEP to be deemed sufficient to meet the stated goals, it must be appropriately ambitious in light of the child’s unique needs and circumstances. *Andrew F.*, 580 U.S. ___ (2017).

In this case, Parents allege both procedural and substantive violations of the IDEA. 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.)

To provide a FAPE in compliance with the IDEA, a public school district must identify, locate, and evaluate a student in all areas of suspected disability, determine whether that student

is eligible for special education, and formulate and implement an IEP with appropriate measurable goals and related services. 20 U.S.C. §§ 1412 and 1414; see also OARs 581-015-2080, 581-015-2100-2110, and 581-015-2200. A student’s IEP informs how he or she is to be educated, particularly with regard to the student’s particular 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). 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). For these reasons, “[p]arental participation in the IEP team process is central to the IDEA’s goal of protecting disabled students’ rights.” *Southfield Pub. Sch. Dist.*, 115 LRP 31270 (SEA MI 06/19/15). Parent participation means more than simply having an opportunity to attend and/or speak at IEP meetings. Rather, meaningful parent participation required by the IDEA means that school districts should be receptive and responsive to parents’ input. *R.L. v. Miami-Dade County School Board*, 757 F.3d 1173, 1188 (11th Cir. 2014). Those same requirements apply equally to IFSP team considerations and IFSP content pursuant to OARs 581-015-2810 through 581-015-2830.

This order addresses the issues as distilled from a reading of Parents’ pleadings as chronologically as possible to promote clarity and readability.

I. 2016-2017 school year - Head Start.

*A. Failure to identify*³⁵

Parents first allege the District failed to meet its Child Find obligations by failing to properly identify and evaluate Student as a student with a disability during the 2016-2017 school year because the District failed to identify and evaluate Student in all areas of suspected disability once Parents provided information to the District that Student was diagnosed with autism. Parents argue that, despite the District’s early identification of Student as eligible for EI/ECSE services under the disability category of Developmental Delay, the District was further obligated to identify and evaluate Student to determine if he/she was eligible for special education and related services under the category of ASD as early as November 2016.

34 CFR §300.111 identifies the IDEA’s Child Find requirements as applicable to state and local education agencies and provides:

(a) *General.* (1) The State must have in effect policies and procedures to ensure that—

³⁵ In the Complaint, Parents identify this alleged violation as substantive rather than procedural. However, a school district’s Child Find obligation is part of the process-based requirements of IEP formulation. This order analyzes Parents’ allegations that the District failed to properly carry out the processes for identifying and evaluating Student and developing IFSPs/IEPs as procedural violations. By contrast, this order treats Parents’ allegations related to IFSP/IEP implementation, placement (including least restrictive environment), and/or the adequacy of SDI and related services in the IFSP/IEP as substantive violations of the IDEA.

(i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

(ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

(b) *Use of term developmental delay.* The following provisions apply with respect to implementing the child find requirements of this section:

(1) A State that adopts a definition of *developmental delay* under §300.8(b)³⁶ determines whether the term applies to children aged three through nine, or to a subset of that age range (*e.g.*, ages three through five).

³⁶ 34 CFR §300.8 defines the term “child with a disability and provides, in relevant part:

(a) *General*—(1) *Child with a disability* means a child evaluated in accordance with §§300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, * * * and who, by reason thereof, needs special education and related services.

* * * * *

(b) *Children aged three through nine experiencing developmental delays.* *Child with a disability* for children aged three through nine (or any subset of that age range, including ages three through five), may, subject to the conditions described in §300.111(b), include a child—

(1) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive development;

* * * * *

(c) *Definitions of disability terms.* The terms used in this definition of a child with a disability are defined as follows:

(1)(i) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

(2) A State may not require an LEA to adopt and use the term *developmental delay* for any children within its jurisdiction.

(3) If an LEA uses the term *developmental delay* for children described in §300.8(b), the LEA must conform to both the State's definition of that term and to the age range that has been adopted by the State.

(4) If a State does not adopt the term *developmental delay*, an LEA may not independently use that term as a basis for establishing a child's eligibility under this part.

(c) *Other children in child find.* Child find also must include—

(1) Children who are suspected of being a child with a disability under §300.8 and in need of special education, even though they are advancing from grade to grade; and

(2) Highly mobile children, including migrant children.

(d) *Construction.* Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in §300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.

(Emphasis original.) Oregon administrative rules identifying and defining qualifying disabling conditions also provide distinct definitions of such disabilities. *E.g.* OAR 581-015-2127 (Developmental Delay) and OAR 581-015-2130 (Autism Spectrum Disorder).

Similar to the federal regulations, OAR 581-015-2080 identifies a school District's Child Find obligations and, as relevant to this order, provides:

(1) The requirements of this rule apply to all children unless they are no longer entitled to a free appropriate public education under OAR 581-015-2040–581-015-2050.

(2) Pursuant to ORS 338, 339, OAR 581-021-0019, or open enrollment under section 9, chapter 718, Oregon Laws 2011 school districts must identify, locate and evaluate all children with disabilities for whom they are responsible, regardless of the severity of the disability, who are in need of early intervention, early childhood special education, or special education services, including:

* * * * *

(d) Children who are suspected of having a disability even though they are advancing from grade to grade;

* * * * *

(g) Children below the age of compulsory school attendance who are not enrolled in a public or private school program; and

(h) Children above the age of compulsory school attendance who have not graduated with a regular high school diploma[.]

The regulatory scheme set out above identifies an educational agency's child find obligations in terms of identification, location, and evaluation of students with one or more disabilities. The record reveals that the District identified Student as experiencing developmental delays and conducted evaluations of Student and found him/her eligible for EI/ECSE under the category of DD as early as October 2015.³⁷ See Exhibits D7 and D9. In that respect, it is undisputed that the District identified and evaluated Student, who resided within the District, for suspected developmental delays, thereby satisfying its Child Find obligation under the statutes, regulations, and state administrative rules above with regard to Student's suspected developmental delays.

Nonetheless, Parents' Complaint alleges that, during the 2016-2017 school year, the District's Child Find obligation also extended to the identification and evaluation of Student in all categories of suspected disability, *to wit*, ASD. It is uncontested that Student was diagnosed with autism in October 2016 by the ASD clinic at Doernbecher Children's Hospital. The record clearly demonstrates that the District became aware of this diagnosis through Parents, who provided the District with a copy of Student's diagnostic evaluation reports from Doernbecher, in November 2016. Further, the uncontroverted evidence reveals that, upon learning of Student's recent autism diagnosis, the District elected to take no action to amend Student's identification or eligibility to reflect that diagnosis or to determine if Student was eligible for services under an alternate or additional disability category. Finally, the undisputed evidence indicates the District delayed conducting any evaluations of Student related to his/her diagnosis of autism until April 2018, approximately 18 months after learning of the diagnosis. In this matter, the District failed to identify Student as a student with autism and to evaluate him/her for eligibility related to that disability during the 2016-2017 school year. A strict reading of the procedural requirement indicates the District failed to satisfy at least one component of its Child Find obligations.

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

³⁷ The record suggests the District began providing EI services to Student when he/she was approximately 18 months old. Nonetheless, those services are outside the period in issue and Parents' Complaint makes no claim for violations related to the provision of EI services.

denial of a FAPE. *Amanda J.*, 267 F.3d at 892. *See also L.M v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008) (Finding harmless procedural errors do not constitute a denial of FAPE.).

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

Procedural errors rise to the level of a denial of FAPE where, absent such errors, there is a "strong likelihood" that alternative educational possibilities for the student "would have been better considered." *M L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 657 (9th Cir. 2005). Such alternative educational opportunities might include additional SDI or related services, or an alternate placement in the educational environment. "Thus, an IEP team's failure to properly consider an alternative educational plan can result in a lost educational opportunity even if the student cannot definitively demonstrate that [the student's] placement would have been different but for the procedural error." *Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1047 (9th Cir. 2013). There is no compelling reason to expect that the Ninth Circuit, in *Doug C.*, intended that this analysis should be limited to alternative educational placements. Rather, logic dictates this analysis applies equally to alternative related services or modifications needed by a student to access his or her educational environment and curriculum. Thus, Parents' claim that the District failed to meet its Child Find obligation may rise to a denial of FAPE if Parents' can demonstrate the District failed to consider an alternate educational plan, including an alternate placement or alternate related services had Student been identified and evaluated under the category of ASD.

Because the District's Child Find obligation incorporates the District's duty to evaluate as well as identify, the District's decision not to evaluate Student for eligibility under the category of ASD must be examined next to determine whether the District's procedural violation resulted in a denial of a FAPE to Student.

B. Failure to evaluate Student in all areas of suspected disability.

In conjunction with their contention that the District failed to properly identify Student, Parents also allege the District failed to properly evaluate Student during the 2016-2017 academic year and to properly assess him/her in all areas related to suspected disabilities. As identified above, the District initially identified, evaluated, and found Student eligible for EI/ECSE services under the category of DD. In November 2016 Parents provided the District with an evaluation report from Doernbecher, indicating Student was diagnosed with autism, and requested further evaluation of Student. The District refused to conduct further evaluations of Student during the school year. At hearing, the District claims the decision to withhold evaluations of Student during the school year was mutual between the District and Parents.

OAR 581-015-2790 (2012) provides requirements for ECSE evaluations and provides, in relevant part:

(1) General. A public agency must conduct an evaluation or reevaluation process in accordance with this rule before:

(a) Determining that a child is a child with a disability under OAR 581-015-2795; or

(b) Determining that a child continues to have a disability under OAR 581-015-2795; or

(c) Changing the child's eligibility; or

(d) Terminating the child's eligibility as a child with a disability.

(2) Request for initial evaluation. Consistent with the consent requirements in OAR 581-015-2735, a parent or public agency may initiate a request for an initial evaluation to determine if a child qualifies for ECSE services.

* * * * *

(5) Notice and consent.

* * * * *

(c) If the public agency refuses an evaluation or reevaluation requested by the parent, the public agency must provide the parent with prior written notice under OAR 581-015-2745.

(d) Parents may challenge the public agency's refusal to conduct an evaluation or reevaluation under OAR 581-015-2870.

(6) ECSE evaluation requirements: *For a child suspected of being eligible for ECSE services, the following evaluation must be conducted:*

(a) For a child suspected of having any of the following disabilities, an evaluation in all areas of the suspected disability following OAR 581-015-2130 through 581-015-2180, respectively:

(A) Autism spectrum disorder;

* * * * *

(10) Evaluation timelines:

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

* * * * *

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

(A) The parents of a child repeatedly fail or refuse to produce the child for an evaluation, or for other circumstances outside the school district's control;

(B) The student is a transfer student in the process of reevaluation and the public agency and the parents agree to a different length of time to complete the evaluation in accordance with subsection (d); or

(C) *The public agency and parent agree to extend the timeline for an evaluation to determine eligibility for specific learning disabilities* in accordance with OAR 581-015-2170.

(Emphasis added.)

At hearing, the District presented testimony from Ms. Cole that the team, including Parents, elected to hold off on conducting evaluations of Student for eligibility under the ASD category due to complications with Student's vision and recovery from hip surgery. By contrast, Parents testified that, when they presented Student's diagnostic evaluation to the District's IFSP team members and requested an ASD evaluation, the District discouraged them from pursuing the ASD evaluation by indicating, if found eligible under ASD, services for Student would change and that such changes might not be best for Student. Tr. Vol. XIV at 2985:20-22. I am persuaded that Parents' testimony is more consistent with the persuasive weight of the evidence in this matter.

As set forth in the findings above, Student participated in the Doernbecher ASD evaluations without issue and without the eye patch mentioned by District staff as a justification for delaying Student's ASD evaluation. In addition, while District staff claimed that Student experienced access issues due to a brace and cast resulting from hip surgery at that time, the record clearly demonstrates Student did not have hip surgery until the end of June 2017, approximately seven months after the District learned of the ASD diagnosis. Further, a review of the evaluation reports provided by Doernbecher indicated that Student was mobile and experienced no access issues during either the ASD or associated psychological evaluations conducted in October 2016.

As set forth above, to provide a FAPE in compliance with the IDEA, a public school district must 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. Prior to making the determinations necessary for proper IEP formation and implementation, a school district must perform proper evaluations of a student

in all areas of suspected disability.

The IDEA provides no specific right for a student to be classified under a particular disability. Nonetheless, it does require that the student's educational program be designed to suit the student's demonstrated needs. *Fort Osage R-I School District v. Simms*, 641 F.3d 996, 1004 (8th Cir. 2011) ("Given the IDEA's strong emphasis on identifying a disabled child's specific needs and addressing them * * * the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs."). A school district's failure to conduct appropriate assessments or to evaluate in all areas of suspected disability is a procedural violation that may result in a substantive denial of FAPE. *Park v. Anaheim Union High School Dist.*, 464 F.3d 1025, 1031 through 1033 (9th Cir. 2006).

In the Ninth Circuit, "the sufficiency of a school district's actions, including evaluation decisions and decisions regarding the student's substantive educational curriculum are judged by the snapshot rule." *Forest Grove Sch. Dist. v. Student*, No. 3:12-cv-01837-AC, 2014 WL 2592654 at *20 (D. Or. June 9, 2014) (citing *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999).) When making an assessment of whether an eligibility determination is "appropriate" under the IDEA, the administrative law judge looks to the time of the student's evaluation by the school district. See *L.J. v. Pittsburg Unified Sch. Dist.*, 835 F.3d 1168, 1175 (9th Cir. 2016.) In applying the snapshot rule, a court must determine whether the school district's actions were reasonable considering the facts known when the decision was made. *Adams*, 195 F.3d at 1149. Moreover, the team's decision is judged based on whether it took into account all relevant information from the snapshot period. *L.J.*, 835 F.3d at 1175.

The Court of Appeals for the Ninth Circuit has clearly established that a disability is suspected, and therefore must be assessed by a school district, when the school district has notice that the child has displayed symptoms of that disability. *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9th Cir. 2016). In *Timothy O.*, school administrators noted that a three-year-old child displayed autistic-like characteristics. In response, the school district hired an outside consultant to informally observe the child. That individual then concluded, erroneously, that the child did not have autism. The court specifically held that school districts cannot circumvent their responsibility "by way of informal observations, nor can the subjective opinion of a staff member dispel such reported suspicion." *Id.* at 1119. The school district's failure to assess the child in all areas of suspected disability "deprived his IEP team of critical evaluative information about his developmental abilities as an autistic child," denying him/her "critical educational opportunities and substantially impairing his parents' ability to fully participate in the collaborative IEP process." *Id.*

Here, Parents raised concerns about Students' autism diagnosis and requested the District conduct and evaluation of Student for ASD. Rather than address the diagnosis, District personnel discouraged Parents' from pursuing an ASD evaluation, indicating it might have negative implications for Student's services. As stated previously, the District argues that it was relieved of its duty to evaluate Student in November 2016 because Parents agreed to delay the evaluation. Parents' evidence does not demonstrate an informed and voluntary decision to delay the evaluation. Instead, the evidence indicates that the District discouraged them from pursuing

the evaluation and Parents conceded based on the District's negative representations of how an ASD eligibility might impact Student's services while attending Head Start.

In the Ninth Circuit, the "informed suspicions of parents, who may have consulted outside experts," triggers the duty to evaluate, even if the school personnel disagree with the parents' suspicions. *Pasatiempo by Pasatiempo v. Aizawa*, 103 F.3d 796, 802 (9th Cir.1996). Nonetheless, a parent's request to evaluate a student in an area of suspected disability is not absolute; the suspicions must be informed, such as by a medical diagnosis or outside professional opinion. *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2008). In this matter, Parents presented Student's IFSP team with a medical diagnosis and evaluation reports indicating Student is a child with autism. Those documents went well beyond informed suspicions and presented medical evidence of Student's disability and needs; a disability not previously suspected by his/her IFSP team and, therefore, not previously addressed through evaluations or an appropriate IFSP. Under *Pasatiempo* and *N.G.*, the District was obligated to evaluate Student for ASD eligibility. I am not persuaded that the District was relieved of that obligation by Parents' concession not to evaluate based on representations by the District that Student's educational opportunities might suffer.. Further, I find no such justification in OAR 581-015-2790(6) (pertaining to ECSE evaluations) or (10) (pertaining to timelines for conducting evaluations). In fact, the only provision of the applicable administrative rule that permits an extension of time for conducting necessary evaluations by agreement is found in OAR 581-015-2790(10)(c)(C), which applies specifically to evaluations for DD. It does not, according to the plain text of the rule, apply to evaluations for ASD or evaluations generally.

As set forth above, OAR 581-015-2790(1) mandates that a school district must conduct an evaluation or reevaluation process in accordance with the rule before determining that a child is a child with a disability, that a child continues to have a disability under OAR 581-015-2130 through 581-015-2180, or changing the child's eligibility. OAR 581-015-2790(1)(a) through (c). OAR 581-015-2790(9)(a) requires that school districts ensure students are assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. These requirements mirror those found at OAR 581-015-2110(4)(c) pertaining to requirements for evaluating school age children who may be eligible for special education and related services through an IEP. The tools and strategies selected by a school district must be tailored to assess specific areas of educational need, target all areas related to the suspected disability, be sufficiently comprehensive to identify all of a student's special education and related service needs, and provide relevant information that directly assists persons in determining the educational needs of the child. 34 C.F.R. §300.304(c); 20 U.S.C. §1414(b)(3); *see also Timothy O.*, 822 F.3d at 1122.

Nothing in the record demonstrates that the evaluations conducted of Student in October 2015, relating to his/her DD eligibility, were sufficient to assess Student in all areas of educational need related to ASD. Importantly, the District failed to put forth any evidence indicating that Student's SDI or related services would be substantially similar to those offered if Student had been found eligible under the category of ASD. In light of the extensive services recommended in the ASD evaluation report from Doernbecher, particularly those services related to ABA interventions and therapy, the record suggest Student's services under an ASD eligibility

would have been significantly different. Because November 2016 is outside the period in issue, this order does not address the impact of the violation prior to March 20, 2017. Nonetheless, because the District's failure to evaluate Student in the area of ASD continued until approximately April 4, 2018, the violation was ongoing and covered the vast majority of this school year as well as the following school year. For purposes of this order, the procedural violations of the District's Child Find obligation and duty to evaluate Student in all area of suspected disability begins March 20, 2017. The District did not evaluate Student for ASD eligibility until approximately March 22, 2018 (*see*, Ex. D46 at 1), resulting in 12 months of ongoing violation.

The District also argues that, despite its failure to evaluate Student for ASD, Parents' have not demonstrated that Student suffered substantive harm sufficient to rise to a denial of a FAPE. I disagree. The District bases its argument on Parents' positive assessment of Student's progress at Head Start during the 2016-2017 school year. Taking that argument at face value, Parents' favorable views of Student's progress at Head Start does not mean the District provided Student with a FAPE. Rather, reviewed in the context of the entirety of the record, it demonstrates Parents' were much happier with the approach used by Head Start staff, when addressing Student's behavioral challengers, than they were with the approach used by District staff at Westside Elementary School during Student's kindergarten year, which consisted of limiting Student's time on campus to no more than three and one-half hours per day.

In addition, under the District's argument, Student was more likely than not deprived of educational opportunities because eligibility under the category of ASD may well have necessitated adding educational and related services to Student's IFSP that were not available under the DD eligibility category. In addition, the failure to evaluate Student for ASD eligibility deprived the IFSP team of crucial information necessary to craft an appropriate IFSP and denied Parents' an opportunity to meaningfully participate in the formulation and implementation of Student's IFSP by advocating for the proper educational and supportive services. This point is underscored by Student's highly unsuccessful transition to kindergarten. There is no evidence in the record demonstrating Student's eligibility for ASD would have been any different in Mach 2017 (the beginning of the period in issue) than it was when the District finally elected to conduct the required evaluations in April 2018, immediately preceding Student's May 2018 IEP meeting addressing his/her transition to kindergarten.

More likely than not, had the District timely evaluated Student for ASD eligibility, he/she would have been eligible for additional services including sensory and other services geared specifically toward assisting Student in dealing with challenging behaviors and learning positive behavior replacements, *to wit* ABA or similar behavior modification and self-regulation strategies. Had the District elected not to add such services, Parents would have been entitled to challenge that decision through a due process hearing. Further, if Parents elected to continue to place their faith and trust in the District and accepted alternate techniques, rather than the ABA techniques suggested by Doernbecher, they and the District would have been able to gauge the efficacy of the chosen strategies and services.

The District's failure to properly evaluate Student for ASD eligibility denied him/her educational opportunities and denied Parents' the opportunity to meaningfully participate in the

development of Student's IFSP resulting in a denial of FAPE beginning March 20, 2017 and continuing through the end of the 2016-2017 school year.

C. IFSP Progress Reports.

Parents also assert that the District failed to provide them with IFSP progress reports containing sufficient information to allow Parents to monitor and measure Student's progress toward his/her IFSP goals and objectives. Parents argue that the April 4 and 5, 2017 IFSP progress reports did not report progress in a manner that corresponded to the measurable criteria identified in Student's IFSP.

Periodic progress reporting for Student's receiving SDI and related services under an IFSP or IEP is required by the IDEA. 20 U.S.C. §1414(d)(1)(A); 34 CFR §300.320(a)(3)(ii). According to Student's IFSPs (and later IEPs), progress reports were the specified method by which the District would report his/her progress toward the AGs and STOs. The District argues that there is no per se right under the IDEA to receive progress reports in the form provided by the District or containing the quantitative progress information advocated for by Parents. Nevertheless, the District fails to address whether Parents had a right to receive quantitative data in those progress reports because the District established quantitative benchmarks in the criteria for each stated AG and STO in Student's IFSP.

Additionally, with regard to Parents' right to receive progress reports in any form, the District fails to address recent guidance, following the Court's opinion in *Andrew F.*, from the United States Department of Education identifying the "periodic progress reporting required at 34 C.F.R. §300.320(a)(3)(ii)." *Questions and Answers on Andrew F. v. Douglas County School District Re-1* U.S. Department of Education (Dec. 7, 2017). Based on the evidence in the record and the Department of Education's characterization above, this order addresses the District's failure to provide IEP Progress Reports to Parent with sufficient data to allow Parents to monitor Student's progress toward his/her IFSP AGs and STOs as a denial of Parents' right to meaningfully participate in the IFSP process.

Student's September 2016 IFSP identified two separate AGs for his/her cognitive skills, one AG for Student's adaptive skills, three AGs for his/her social/emotional skills, and one AG each for Student's gross motor and expressive communication skills. *See* Exhibit D29. Each of the AGs/STOs included measurable criteria stated in quantitative (4 of 5 opportunities over two weeks or 80% of the time over two weeks) rather than qualitative terms.

By contrast, the April 2017 progress reports contained only general summaries of Student's progress, without any quantifiable data to show how Student was progressing toward the stated measurable criteria necessary to meet the AGs. In addition, the April 2017 progress reports contained several inconsistencies. For instance, while the District indicated that Student's progress was sufficient to meet many of the AGs, the narratives indicated the goals should be continued. Without any quantitative data, Parents were unable to correlate information reported in the progress reports to the AGs in the IFSP and determine whether Student was actually progressing in the AGs/STOs and, if so, to what degree. This conclusion was supported by testimony of more than one District witness who indicated that Parents would be required to

infer Student's baseline data and current progress due to a lack of quantitative data in the April 2017 progress reports.

Given the standard set forth in *Target Range*, *Federal Way*, and *Doug C.*, this tribunal must determine whether the procedural errors contained in the District's April 2017 progress reporting resulted in loss of educational opportunity for Student. The Ninth Circuit noted that "[t]he significance of the procedures provided by the IDEA goes beyond any measure of a child's academic progress during the period at issue." *Target Range*, 960 F.2d at 1485. FAPE is available even to students who are advancing from grade to grade. OAR 581-015-2080. "Congress did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Amanda J.*, 267 F.3d at 890. Here, Parents object to the District's failure to provide measureable data in Student's progress reports that would enable them to measure Student's progress toward the AGs and STOs in his/her IFSP, and to determine whether alternative or additional aids or services might be appropriate. Parents' objections are well founded.

The Ninth Circuit recently opined that, "[u]nder the IDEA, parental participation doesn't end when the parent signs the IEP. Parents must be able to use the IEP to monitor and enforce the services that their child is to receive." *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1198 (9th Cir. 2017). The Court went on to point out that, when a parent cannot monitor which services a student receives as well as the manner in which such services are provided to a student, FAPE has been denied regardless of whether the parent had the opportunity to participate in the formulation of the IEP (or IFSP). *Id.* While the Court in *Antelope Valley* addressed a school district's failure to include an accurate offer of services in a student's IEP and a subsequent unilateral revision of that IEP without parental knowledge or participation, the court's reasoning would apply to a parent's access to measureable data sufficient to monitor a student's progress toward goals and objectives contained in the IEP or IFSP, particularly where the IFSP identified such measurable data as the basis for determining whether the student was making progress and/or had met a particular goal or objective.

Parents were deprived of the opportunity to evaluate Student's then-current ability toward achieving his/her IFSP goals and objectives and suggest changes to AGs or STOs if they deemed it appropriate to help Student make progress. As such, Parents were unable to meaningfully participate in the formulation of, or amendment to, Student's IFSP that was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances. Parents were also unable to participate in the enforcement of Student's IFSP to ensure all required aids and services were provided as specified in the IEP or to determine whether revisions to Student's AG's, STO's, or supplemental aids and services were necessary because the District's deficient progress reports deprived them of the ability to monitor and gauge Student's progress toward the goals and objectives in the IFSP. Those procedural errors may well also have deprived Student of educational benefit or additional educational opportunities.

D. Prior Written Notice.

Parents also allege the District failed to provide them with a prior written notice of its refusal to conduct ASD evaluations of Student in November 2017. OAR 581-015-2745

identifies the requirements for prior written notice and notice of procedural safeguards in the EI/ECSE program and provides, in part:

(1) Prior written notice must be given to the parent * * * a reasonable time before the contractor or subcontractor proposes to initiate or change, *or refuses to initiate or change, the identification, evaluation, placement of the child*; or

* * * * *

(b) The provision of a free appropriate public education to the child if the child is three years of age to eligibility for public school.

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

(a) *A description of the action proposed or refused* by the contractor or subcontractor;

(b) *An explanation of why the contractor or subcontractor proposed or refused to take the action*;

(c) A description of any options that the IFSP team and reasons why those options were rejected;

(d) A description of each evaluation procedure, assessment, test, record, or report which is directly relevant to the proposal or refusal;

(e) A description of any other factors relevant to the contractor's or subcontractor's proposal or refusal;

(f) A statement that the parents of a child with a disability have procedural safeguards and, if it is not an initial referral for evaluation, the means by which a copy of the Notice of Procedural Safeguards may be obtained[.]

(Emphasis added.) The rule is unequivocal in its requirement that a school district issue prior written notice to parents of a disabled student any time it either proposes to initiate a change or refuses to do so with regard to the student's identification, evaluation, educational placement, or the provision of FAPE.

In this case, as discussed in detail above, the District refused to evaluate Student for eligibility under the category of ASD despite Parents informing the IFSP team in November 2016 that he/she was diagnosed with autism and expressly requesting an appropriate evaluation. That refusal required the District to issue a prior written notice to Parents identifying its refusal to evaluate Student and the reasons for that refusal. The District failed to issue any such notice to Parents related to its refusal to evaluate Student any time during the 2016-2017 school year.

While the District argues that Parents agreed in November 2016 to delay Student's ASD

evaluation, nothing in the cited rule absolves the District of its obligation to issue a prior written notice of its refusal to conduct the evaluation. In this instance, the parties do not agree on the nature of Parents' acquiescence to the proposed delay. Had the District issued a prior written notice, indicating its refusal to conduct the evaluation, and stating that refusal was based on mutual agreement among the IFSP team, Parents would have been provided an opportunity to dispute the District's decision and reasoning. Further, Parents would have been made aware of their procedural rights and safeguards related to the District's refusal (assuming the District complied with the content requirements of prior written notice) and may have sought dispute resolution with the District. Of course, all of this is speculation because Parents were deprived of the required notice, which more likely than not also deprived them of the opportunity to meaningfully participate by disputing the District's decision if they elected to do so.

Based on the above, the District's failure to issue a prior written notice in November 2017 deprived Parents of a meaningful opportunity to participate in the formulation and implementation of Student's IFSP because that failure deprived them, at least in part, of the opportunity to advocate for evaluations necessary to identify necessary SDI and related services for Student's unique needs as a child with autism.

For the 2016-2017 school year, Parents have demonstrated that the District failed to properly identify and evaluate Student as a student with a disability, failed to issue required notice regarding its refusal to evaluate Student, and failed to issue progress reports according to the criteria set forth in Student's IFSP denying Parents the opportunity to meaningfully participate in the educational decision making for Student.

At hearing and in closing briefs, the District stressed Parents' prior statements (during the 2018-2019 school year) about how well they believed Student did in Head Start. The District argues that such statements demonstrate Student received educational benefit and, therefore, any procedural error(s) is/are harmless and therefore not compensable. I disagree.

A review of the record demonstrates, as the District points out, that Parents repeatedly referred to Student's successes at Head Start when discussing concerns about Student's behavior with his/her IEP team at Westside. Nonetheless, when viewed in context of the record as a whole, it is clear that Parents' comparisons between Head Start and Westside related primarily to the differences between the two in reacting to Student's challenging behaviors. In response to the Westside IEP team's decision to reduce Student's school day to no more than two hours per day, Parents repeatedly referred to Student's time at Head Start and pointed out that he/she was never sent home early due to behavioral issues, nor was his/her day at Head Start reduced in any way. The record reveals that Parents' point in those instances was an argument in favor of Student being allowed to attend more than the two hours implemented by the District in September 2018. Those details are discussed more fully below in Section III related to the 2018-2019 school year.

In addition, Father testified that, during the 2016-2017 school year, Parents were overwhelmed with the volume of information coming at them from Head Start staff, outside providers, and medical professionals related to Student's recent autism diagnosis. That, coupled with the challenges of dealing with Student's emerging behavior problems left Parents struggling

and feeling as though they were “drinking from the firehose.” Tr. Vol. XIII at 2729:7-2730-7. Therefore, according to Father, Parents put a significant amount of faith and trust in Head Start staff and their verbal assurances that Student was making significant progress.

The District’s argument appears predicated on the assumption that some educational progress nullifies any number of procedural errors. I would agree that, in certain circumstances, controlling case law referenced throughout this order indicates procedural errors may be found to be harmless where a school district demonstrates that, despite one or more technical violations of the procedural rules, a student’s IFSP or IEP was otherwise appropriately developed and implemented. Nonetheless, that is not the case here. In this instance, the District’s errors were not insignificant and deprived the IFSP team of information necessary to develop an appropriately ambitious educational service program that considered Student’s unique needs and circumstances as a newly diagnosed child with autism and related emerging behavioral challenges. To rule otherwise would be to disregard the Court’s recent guidance in *Andrew F.* addressed above.

As discussed more fully below, the District’s procedural violations carried over into Student’s final year of Head Start, resulting in a deficient IFSP. Further, had the District fulfilled its procedural obligation to identify and evaluate Student in a timely manner, there is a strong likelihood that the IFSP team would have changed the services provided to Student by including at least some of the recommendations from Doernbecher. That, in turn, likely would have allowed the team to consider behavioral intervention strategies much earlier than it did in February 2018. Further, those behavior interventions likely would have been more appropriately tailored to teach Student positive replacement behaviors because they would have taken into account Student’s unique challenges stemming from autism. In addition, there is a strong likelihood that an earlier identification and evaluation of Student for ASD eligibility would have better prepared District staff to meet Student’s transition need from Head Start to Kindergarten at Westside in the 2018-2019 school year.

II. 2017-2018 school year - Head Start.

A. Failure to develop an appropriate IFSP.

Next, this order turns to Student’s final year of Head Start and his/her transition to kindergarten. Parents’ grievances regarding the District’s actions during the 2017-2018 school year begin almost at the outset with the development of Student’s September 2017 IFSP. Parents assert the District failed to develop an appropriately ambitious IFSP reasonably calculated to enable Student to make progress appropriate in light of his/her unique circumstances. Parents contend that the District’s September 2017 IFSP did not contain updated AGs or STOs, eliminated certain other AGs without providing any justification, and failed to consider Student’s unique needs as a child with autism because, as of September 2017, the District still had not evaluated Student for eligibility under the category of ASD. In addition, the Parents argue that the September IFSP removed required services and supports without explanation or justification. Finally, Parents assert that the September 2017 IFSP was deficient because it lacked sufficient information regarding Student’s present levels.

This order addresses the District's alleged failure to include appropriate AGs and STOs as well as the purported lack of sufficient present level information as procedural violations because each requirement goes to the process of developing Student's service plan. By contrast, the alleged failure to consider Student's unique needs as a child with autism and the claimed removal of needed supports and services speak directly to the substantive content of Student's September 2017 IFSP and are analyzed accordingly.

a. Failure to consider Student's unique needs as a child with autism.

As repeatedly addressed throughout this order, the IDEA requires school district's to develop an appropriately ambitious IFSP/IEP reasonably calculated to enable disabled children to receive educational benefits in light of the child's unique needs and circumstances. *See Andrew F.*, 580 ___ U.S. (2017). The IDEA contemplates that, by the time a school district convenes an IFSP or IEP meeting, it has complied with the detailed procedural requirements of locating, identifying, evaluating, and determining as eligible children with disabilities in needs of special education and related services. *See* OARs 581-015-2080, 581-015-2790, and 581-015-2795. Only after compliance with those strict procedural requirements will a school district be adequately prepared to craft an educational plan with content appropriate to meet the substantive requirements of the IDEA. *See* OARs 581-015-2815, 581-015-2820 (IFSPs) and OARs 581-015-2200, 581-015-2205 (IEPs).

In developing an IFSP that complies with the requirements of the IDEA, the team must consider parental concerns for enhancing the development of the disabled child, communication needs of the child, and the behavioral intervention needs of the disabled child if his or her behavior impedes his or her development or that of other children. OAR 581-015-2820(1)(a), (2)(a), and (3)(a).

Student's September 2016 IFSP contained a statement of how his/her disability affected participation in appropriate activities which read, "[Student] has some difficulty expressing [his/her] wants and needs." Ex. D25 at 5. In November 2016, Parents informed the District that Student was recently diagnosed with autism and asked for an evaluation to determine his/her eligibility and/or service needs related to that disability. The District elected not to proceed with any such evaluation until at least April 2018.

At the September 20, 2017 IFSP meeting, the District presented a draft IFSP that changed the prior statement identifying how Student's disability affected his/her participation to read, "[Student] has some difficulty expressing [his/her] wants and needs, *and with sharing and taking turns with classmates.*" Ex. D36 at 5; emphasis added. The draft IFSP contained no mention of Student's recent diagnosis of autism or how that disability might or in fact did affect his/her participation. This is perplexing in light of the evidence indicating that the District was aware of Student's increased sensory needs leading to unsafe behaviors, easy distractibility, lack of response to sensory or social cues, and increasing aggressive behavior problems. In addition to the Doernbecher reports provide by Parents in November 2016, the record also demonstrates that the District's OT, Mr. Crouch, documented similar needs of Student in May of that same year. Nonetheless, the District failed to mention Student's autism diagnosis or how his/her behaviors most likely related to that condition affected his/her participation and development.

Moreover, the developmental information page contains a brief narrative near the top related to Student's health status. That statement was updated to reflect Student's hip surgery in July 2017 as well as his/her recovery status. Nonetheless, the health statement in the September 2017 IFSP contained no mention of Student's October 2016 autism diagnosis.

The IFSP team could not craft an IFSP that met the rigorous requirements of the IDEA to provide Student educational benefit within the meaning of *Rowley, Andrew F. and Amanda J.* without considering Student's unique needs and circumstances as a child with autism. The IDEA contemplates that challenge and strives to minimize or eliminate such deficient educational programs through the detailed procedural safeguards addressed above. The District's procedural errors during the 2016-2017 school year were carried forward into Student's 2017 IFSP resulting in a substantively inadequate educational program that failed to address Student's unique circumstances. Thus, Parents have met their burden to demonstrate, more likely than not, that the September 2017 IFSP denied Student a FAPE. At hearing, the District presented no evidence to suggest that, despite its failure to consider Student's autism diagnosis and related educational or developmental needs, the September 2017 IFSP was appropriate.

b. Removal of necessary services and supports.

Next, Parents allege the September 2017 IFSP was deficient and therefore denied Student a FAPE because the District removed necessary services and supports from the IFSP without explanation or justification. Specifically, Parents point out that the September 2017 IFSP drafted by the District reduced Student's consultation support for his/her cognitive, adaptive, social/emotional, gross motor, and expressive communication skills from 90 minutes per month in the September 2016 IFSP to 60 minutes per month in the September 2017 IFSP. In addition, Parents identified further reductions to Student's direct support for cognitive, adaptive, social, gross motor, and expressive communication skills, which the District decreased from four hours per week to one hour per month. Additionally, Parents object to the reduction of Student's PT consultation services from 30 minutes per month to 15 minutes per month.

OAR 281-015-2815(3)(d) requires each IFSP to contain IEP content including, a statement of ECSE and related services and supplementary aids and services to be provided to or on behalf of the disabled child as well as a statement of the program modifications or supports for personnel that will be provided for the disabled child. A review of the September 2017 IFSP in the context of that rule demonstrates that the District complied with the procedural requirements for IFSP content related to services and supports to be provided to Student during the 2017-2018 school year. Nonetheless, that is not the end of the inquiry because Parents' complaints extend beyond procedural compliance and assert that the reduction of the above services and supports resulted in an IFSP that failed to address Student's increasing service and support needs as a child with autism. I agree.³⁸

³⁸ This conclusion is also supported by the May 1, 2018 IEP in which the District, after conducting an evaluation and finding Student eligible under the category of ASD, added back multiple goals and objectives for discreet domains and increased SDI for Student in several areas including communication, PT, O/T, behavior (social/emotional), and motor skills. The increase in instruction and service minutes

As identified throughout this order, to provide a FAPE, school districts must offer an individualized education program (or family service plan) reasonably calculated to enable a disabled child to make progress appropriate in light of that child's circumstances. Parents have demonstrated that, at the time the September 2017 IFSP was created, Student's needs in multiple areas were increasing rather than decreasing. This included Student's needs related to aggressive or otherwise inappropriate behavior, as well as his/her communication, adaptive, and motor skills needs. Additionally, the District identified mobility issues for Student resulting from hip surgery that the District indicated would continue for several months into the school year, alluding to a need for increased rather than decreased support from the PT.

At hearing and through closing briefs, the District asserts that Parents agreed to the September 2017 IFSP and never objected to the reduction of service minutes in the plan at any time during the 2017-2018 school year. The District's arguments imply that, if a parent does not dispute the substance of an IFSP or IEP during its effective period, they waive any objections related to the sufficiency of the plan. I disagree.

To accept the District's arguments would contravene the IDEA's well-established two year statutory look back period permitting a party to a due process complaint to request a hearing up to two years after that party knew or should have known of the event giving rise to the complaint. 20 USC § 1415(f)(3)(C). The IDEA does not require a parent to object to an IEP at the time it is drafted to preserve their right to file a due process complaint regarding the sufficiency of the educational program. Moreover, a parent may be so unfamiliar with the procedural safeguards and substantive provisions of the IDEA that he or she may be unaware of a violation at the time it occurs.

Here, Parents do not dispute that Mother attended the September 2017 IFSP meeting and signed the resulting IFSP. However, the evidence indicates that the District team members did not bring the substantive changes to her attention and that those changes were not discovered until she and Father were able to go over the document together at home. In addition, the preponderant weight of the evidence demonstrates that Parents were unaware of the impact that the District's changes to the September 2017 IFSP, as well as the District's failure to evaluate Student for ASD, would have on his/her development and education. Parents are not professional educators and therefore cannot be expected to understand how the deficiencies in the IFSP could or would impact Student.

By removing and/or reducing necessary services and supports in the September 2017 IFSP the District failed to offer Student a FAPE.

c. AG/STO deficiencies.

The September 2017 IFSP also removed AGs/STOs for previously identified areas of need and consolidated several of Student's prior goals and objectives into the social emotional domain. Parents argue that such alterations denied Student a FAPE during the 2017-2018 school

exceeded those provided in the September 2016 IFSP. Unfortunately, it appears to have been too little too late to provide Student with a successful transition.

year. Specifically, the September 2017 IFSP removed Student's AGs/STOs in the areas of cognitive, adaptive, and gross motor skills development without explanation or justification. Confusingly, the District imported the vast majority of Student's developmental information, identifying his/her areas of need along with present levels and deficits, verbatim from the September 2016 IFSP.³⁹ Exs. D25 at 5 and D36 at 5. Each of the imported narratives indicated Student had deficits in the identified areas, despite mid-year progress reports indicating Student had made sufficient progress in the areas of cognitive, social/emotional, and adaptive skills to satisfy the goal criteria in the September 2016 IFSP. The evidence indicates that either the removal of AGs/STOs in those domains was inappropriate as of September 2017 or the present level information was deficient (or both).⁴⁰

OAR 581-015-2815(3)(b) requires that each IFSP contain a statement of major outcomes or annual goals and short term objectives for the disabled child and his or her family related to meeting the child's disability related needs. In addition, for disabled children over age three in Oregon, an IFSP must contain IEP content including all special education and related services necessary to meet the disabled child's needs and enable him or her to advance appropriately toward AGs/STOs and to be educated and participate with non-disabled children. OAR 581-015-2815(3)(d)(A)-(C). In addition, the IFSP team must consider a disabled child's communication and behavior intervention needs in developing an appropriate IFSP. OAR 581-015-2820(2)(a), (3)(a).

The District's September 2017 IFSP altered Student's AGs and STOs by eliminating specific goals in the cognitive, adaptive, and gross motor domains and consolidating STOs previously included in the AGs for those domains, as well as others, into Student's new social/emotional AG/STOs. For instance, Student's new social/emotional goal included eight distinct STOs. Of those eight STOs, only one (number two, identifying the need for cooperative play with peers) was previously included in Student's social/emotional domain. Of the remaining seven STOs, one (number five, requiring engagement in music-motor activities) was previously included in Student's prior IFSP as an objective within one of his/her gross motor skills AGs, and four (numbers three, four, six, and seven) were previously included as objectives within Student's expressive communication AGs. This is particularly perplexing in light of the fact that the September 2017 IFSP included AGs for expressive communication. The new social/emotional AG also contained a fine motor objective (number one, requiring Student to demonstrate proficiency in cutting shapes, demonstrating appropriate grasp, and writing his/her name) as well as a final objective that appeared to apply to Student's cognitive development (by requiring him/her to count up to 15 items) rather than his/her social or emotional needs. Again, these objectives are confounding in light of the District's removal of Student's cognitive AGs and a review of prior IFSPs indicating Student had no fine motor needs. *See* Exs. D18 at 4 and D25 at 5. Moreover, the District removed Student's cognitive AG, requiring him/her to recite lines from a familiar song or book, despite progress reporting that indicated Student was not making progress sufficient to meet the goal and the District's recommendation that the goal be continued. Ex. D34 at 1. Finally, the District elected not to include any goals or objectives for

³⁹ The only developmental area containing original information was the gross motor skills data provided by Ms. Welch, the District's PT.

⁴⁰ Lack of sufficient present level data in the September 2017 IFSP is addressed elsewhere in this order.

Student in the adaptive skills domain despite information from Mr. Crouch in May 2016 related to Student's sensory and adaptive needs and the November 2016 autism diagnosis and report from Doernbecher indicating Student's needs in those areas.

The record demonstrates that the District converted Student's previous gross motor AG from the September 2016 IFSP, aimed at increasing his/her participation in music-motor activities, to an STO within the social/emotional AG in the September 2017 IFSP. The practical effect was the elimination of at least two discreet objectives for the gross motor AG which the District indicated Student needed to continue. Ex. D31 at 1. In addition, the September 2017 IFSP converted one of Student's prior AGs in the cognitive domain, targeting his/her ability to play cooperatively with peers, into an objective in the new social/emotional AG. Again, in doing so, the District eliminated at least three discreet STOs from the prior AG despite reporting to Parents that the cognitive goal as stated in the September 2016 IFSP would need to be continued in the September 2017 IFSP. Ex. D34 at 2. Additionally, the District converted at least four of Student's prior objectives for expressive communication AGs into STOs for the newly crafted social/emotional AG (objective numbers three, four, six, and seven). The District provided no explanation to Parents as to why the alterations were necessary or appropriate for Student's development and/or education.

As a result, the September 2017 IFSP offered a plan that did not fully and appropriately address Student's developmental and educational needs thereby depriving him/her of educational benefit through the deprivation of necessary special education and/or related services. Consequently, the District failed to offer Student an appropriately ambitious IFSP reasonably calculated to enable him/her to receive educational benefits in light of his/her unique needs and circumstances resulting in a denial of a FAPE during the entirety of the 2017-2018 school year.

d. Lack of appropriate present level data.

Parents also argue the September 2017 IFSP was deficient because it lacked any baseline data related to Student's present level of ability while establishing criteria requiring Student to demonstrate progress by accomplishing AGs/STOs according to specified quantitative benchmarks. Similar to their complaints related to the District's progress reporting during the period in issue, Parents assert that the September 2017 IFSP stated criteria for Student's AGs/STO in quantifiable and measureable terms but failed to include any baseline data related to Student's present level of ability toward reaching the measurable criteria. The District does not dispute this allegation but instead argues that the level of detail expected by Parents is not required under the IDEA. That argument has been addressed above in the discussions pertaining to the District's inadequate progress reports. To reiterate briefly, because the District framed the criteria by which Student's progress would be measured in quantitative terms (*e.g.* 80 percent of the time over a two week period or 9 of 10 opportunities measured through data collection, etc.), it was required to inform Parents of Student's progress in similar terms to allow Parents to participate meaningfully in the development of the September 2017 IFSP.

At hearing, Mr. Crouch testified that, at the time of the September 2017 IFSP, he believed Student could accomplish five of the STOs (numbered one, two, three, five, and eight) about 20 percent of the time. Nonetheless, Mr. Crouch also acknowledge that neither he, nor

anyone else from the District, conveyed that information to Parents. Further, the District failed to report that present level information anywhere in Student's IFSP. Ms. Cole testified similarly with regard to Student's present level of performance in areas identified in the communication goals and objectives contained in the September 2017 IFSP. At hearing, Ms. Cole justified the lack of quantifiable data in Student's IFSP by indicating that she prefers to communicate with Parents in positive terms because she doesn't feel any parent likes to hear that their child is capable of "zero percent" of a given goal or objective. Tr. Vol. X at 2248:17-2049:4. That testimony underscores Parents' arguments against the informative value of the present level information. Without accurate present level information, reported in a manner correlated to the measureable criteria in the IFSP, Parents were unable to determine if the goals and objectives were appropriate for Student.

Pursuant to OAR 581-015-2815(3)(a), the District was required to include information related to Student's present levels of ability in each of the identified areas of need. The District's present level summaries in the September 2017 IFSP were imported verbatim from Student's September 2016 IFSP and contained insufficient information for Parents to determine Student's current level of ability in each goal area. In addition, while the District imported the present level narrative from the prior service plan, the District altered the criteria, in the September 2017 IFSP, by which Student's progress was to be measured (*i.e.*, 4/5 trials on each of three consecutive data days; at least one opportunity on each of three consecutive data days, etc.). Because the District's chosen criteria for progress measurement was stated in specific percentages, it was required to report Student's present level of ability in the same manner. See OAR 581-015-2815(3)(j)(A)(i) (requiring the IFSP to include a statement showing the degree to which progress toward achieving the outcomes or goals is being made.).

The District's failure to report accurate measureable present level information related to Student's current progress toward the AGs/STOs in his/her IFSP deprived the Parents of a meaningful opportunity to participate in the development of a service plan for Student that was reasonably calculated to enable him/her to make progress appropriate in light of his/her unique circumstances. Without sufficient information allowing them to gauge Student's present level of ability, Parents were unable to determine the appropriateness of the AGs and STOs or related services contained in the September 2017 IFSP. Given sufficient information to determine that Student was unable to achieve the stated goals and objectives with any degree of success, Parents may well have advocated for alterations to goals and objectives that had been repeatedly carried over from one IFSP to the next. Parents were deprived of this opportunity due to the District's failure to adequately report Student's present level information. The evidence shows, more likely than not, Student was deprived of educational opportunities in the form of SDI and related services designed around appropriate goals and objectives.

Student's September 2017 IFSP was both procedurally and substantively deficient. These deficiencies resulted in a denial of a FAPE to Student during the 2017-2018 school year because they resulted in a denial of educational opportunities, and denied Parents the opportunity to participate meaningfully in the development of Student's IFSP. In addition, the District failed to consider the unique needs of Student by ignoring his/her autism and removed required substantive content necessary to provide Student with a FAPE.

B. Failure to identify.

For Student's final year of Head Start, Parents again allege the District failed to meet its Child Find obligations by failing to properly identify and evaluate Student as a student with a disability during the majority of the 2017-2018 school year because the District's ongoing failure to identify and evaluate Student under the category of ASD.

As discussed more fully above, The District failed to fulfill its Child Find obligations, set forth in 34 CFR §300.111 and OAR 581-015-2080, during that portion of the 2016-2017 school year that falls within the period in issue, *to wit* March 20 through approximately mid-June 2017. For Student's final year in Head Start, the record reveals that the District's did not identify Student as a student with a disability, under the potential eligibility category of ASD, until at least February 7, 2018 when it initially proposed evaluating Student for ASD eligibility. Therefore, based on the evidence in the record, the District's failure to properly identify Student resumed in early September 2017, the beginning of the school year in the District, and continued until February 2018. Again, the District's Child Find obligations encompass not only the duty to identify but also to evaluate Student in all areas of suspected disability. As addressed below, the District failed to evaluate Student for ASD eligibility until approximately April 2018. As such, the District failed to fulfill its Child Find obligations for at least eight months of the 2017-2018 school year.

The question of whether that failure resulted in a denial of a FAPE to Student is addressed below.

C. Failure to evaluate.

For the 2017-2018 school year, Parents allege the District failed to conduct appropriate and timely evaluations of Student in multiple areas, including ASD and dyslexia, resulting in a denial of a FAPE to Student. In addition, Parents assert the District failed to properly evaluate Student, by failing to conduct an FBA of him/her, prior to drafting and implementing a BSP for Student. Parents allege that failure also resulted in the denial of a FAPE to Student. Each allegation is addressed in turn below.

a. District's failure to conduct an ASD evaluation of Student until April 2018.

As with the prior school year, Parents' Complaint alleges that the District failed to evaluate Student in all areas of suspected disability. The District's justifications aside, the uncontroverted evidence shows Student was not evaluated for eligibility under the category of ASD, despite an ongoing increase in inappropriate behaviors resulting in the addition of a BSP, until April 2018, approximately six weeks before the end of the 2017-2018 school year. Specifically, the record reveals that Dr. Copeland conducted an ASD evaluation in two parts, on March 22, 2018 and April 4, 2018, and prepared an Autism Spectrum Disorder Evaluation Report. On April 4, 2018, Student's IFSP team met and reviewed Dr. Copeland's ASD report. The team consisted of Parents, Ms. Welch, Ms. Miedema, Ms. Cole, Dr. Copeland, and Mr. Crouch all of whom agreed Student was eligible for special education under the category of ASD, rather than DD. According to the record, at the time of the April 4, 2018 meeting, Dr.

Copeland made several observations of Student over the course her evaluation of Student and believed he/she was prepared, both academically and socially, to enter in the 2018-2019 school year and attend a full day of school.

Parents' allegation that the District failed to evaluate Student in all areas of suspected disability is inextricably intertwined with their assertion that the District failed to evaluate Student properly by failing to conduct an FBA before implementing a BSP to address his/her inappropriate behaviors linked directly to his/her autism diagnosis. Therefore, this order addresses Parents' allegation regarding failure to conduct an FBA before addressing whether the District's failure to follow the required procedural protocols resulted in a denial of a FAPE to Student.

b. District's failure to conduct an FBA prior to drafting and implementing a BSP.

Next, this tribunal must address Parents' claim that the District failed to conduct an FBA of Student to develop a hypothesis about the function of Student's aggressive behavior and, as appropriate, recommendations for a BSP. The District initially developed what it considered to be a BSP for Student on February 16, 2018. There is no evidence in the record indicating the District conducted an FBA prior to drafting or implementing the BSP in February 2018.

The Office of Special Education Programs (OSEP), within the U.S. Department of Education (DOE), has opined that an FBA, used to determine the nature and extent of special education and related services that a student requires, is an evaluation as defined by the IDEA and its implementing rules and regulations. See *Letter to Christiansen*, 48 IDLER 161 (OSEP 2007). According to that guidance, an FBA conducted to develop or modify a BSP requires PWN to the parent(s) and includes the right of the parent(s) to request an [independent education evaluation] IEE at public expense if he or she disagrees with the school district's FBA. *Id.* Moreover, the U.S. DOE has stated that, "IEP teams must consider and, if necessary to provide FAPE, include appropriate behavior goals and objectives *and other appropriate services and supports* in the IEPs of children whose behavior impedes their own learning or the learning of peers." *Questions and Answers on Andrew F. v. Douglas County School District Re-1*, 71 IDLER 68 (ED 2017), emphasis added.

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

(1) As used in this rule:

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

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

(B) Increase or teach an alternative appropriate behavior.

* * * * *

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

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

(e) “Serious bodily injury” has the meaning given that term in ORS 339.285.⁴¹

(f) “Service provider” includes school personnel who:

(A) Are or will be providing services related to the implementation of an individualized education program or a 504 Plan to the student; and

(B) Do not hold a teaching license or an administrative license.

(2)(a) *A school district must conduct a functional behavioral assessment and develop, review or revise a behavior intervention plan within 45 school days of receiving parental consent to conduct the assessment for every student who has:*

(A) An individualized education program or a 504 Plan; and

(B) Placed the student, other students or staff at imminent risk of serious bodily injury as a result of the student’s behavior.

(b) For purposes of this subsection, if a functional behavioral assessment has been previously completed, the school district must review and/or revise the existing functional behavior assessment.

(3) When a behavior intervention plan is developed, reviewed or revised as provided by subsection (2) of this section, the school district must:

(a) *Ensure that the behavior intervention plan is based on a functional behavioral assessment that was conducted by a qualified person;*

(b) Ensure that the behavior intervention plan appropriately addresses the student’s needs;

* * * * *

(e) Ensure that the behavior intervention plan was correctly implemented before making any revisions.

⁴¹ ORS 339.285(4) reads, “Serious bodily injury” means any significant impairment of the physical condition of a person, as determined by qualified medical personnel, whether self-inflicted or inflicted by someone else.

(Emphasis added.)

It is undisputed that Student exhibited an increase in inappropriate behaviors including hitting, kicking, throwing objects in classroom, pushing other kids, screaming, and throwing or knocking over furniture in the classroom beginning in the 2017-2018 school year. Those behaviors no doubt put Student, his/her classmates, and District staff at imminent risk of serious bodily injury, particularly those behaviors involving thrown objects. The District determined, appropriately, that Student's emerging inappropriate behaviors required a plan for appropriate behavior interventions designed to decrease Student's inappropriate behaviors and to teach him/her positive behavior replacements.

Unfortunately, in their haste to develop and implement a BSP to address Student's inappropriate behaviors, the District failed to conduct an appropriate FBA. OAR 581-015-2181(2)(a) requires the District to perform an FBA and develop a BSP within 45 days of obtaining parental consent. Here, the District failed to seek consent and simply developed and then presented the BSP to Mother in February 2018. The resulting BSP was deficient because the District failed to comply with OAR 581-015-2181(3)(a) by ensuring the BSP was based on an FBA conducted by a qualified person.

The District was required to perform an evaluation, in the form of an FBA, to determine, to the greatest extent possible, the reasons for Student's behavior and only then develop a BSP based on that FBA to address his/her inappropriate and aggressive behavior when it occurred. That BSP, when necessary, is a required component of Student's IFSP or IEP. The District failed to comply with the procedural requirements of the rule. The District's failure denied Parents the right to meaningfully participate in Student's educational program because they were deprived of the right to provide input and, if they disagreed with the results of the District's FBA, the right to seek an independent evaluation during the period in issue. Consequently, Student was deprived of educational benefit in the form of alternate and, more likely than not, more appropriate BSP. This conclusion is bolstered by the fact that, at the time the District drafted the February 2018 BSP, the District was aware of but still not addressing Student's service needs as an autistic child.

Given the opportunity to seek an alternate FBA, Parents' would almost certainly have presented the evaluator with Student's recent autism diagnosis and corresponding reports from Doernbecher. That, in turn, would likely have allowed the evaluator to develop and present a more accurate hypothesis about the function of Student's inappropriate behaviors. More likely than not, that hypothesis would have resulted in a BSP more appropriate to address Student's inappropriate behaviors taking into account his/her needs as a child with autism. As discussed more fully below in Section III, the importance of appropriately tailored behavioral interventions for autistic children cannot be gainsaid, particularly in light of the potential for unsuitable interventions to reinforce, rather than redirect, inappropriate behaviors. The District's failure to follow the required procedural protocols deprived Parents the opportunity to meaningfully participate in Student's educational program resulting in the denial of a FAPE to Student. Because the District failed to conduct an FBA of Student until October 2018, Student was denied a FAPE from February 22, 2018 through June 2018, the remainder of the 2017-2018 school year.

c. Failure to evaluate Student for dyslexia

Next, Parents contend the District failed to conduct required evaluations of Student in the area of dyslexia in or around May 2018. The record reveals that Parents' claim arises from an inquiry made by Mother during the May 1, 2018 meeting with Student's newly assembled IEP team. The purpose of that meeting was to address Student's transition to kindergarten and draft an appropriate IEP. As such, if Parents requested an evaluation for dyslexia based on their informed suspicions, the District was obligated to either evaluate Student or issue a prior written notice to Parents stating its refusal to evaluate and the reasons for that refusal. *See Pasatiempo*, 103 F.3d at 802 (9th Cir.1996). In this instance, I find Mother's statements during the May 1, 2018 IEP meeting do not constitute a request for evaluation based on informed suspicions and therefore the District was not obligated to evaluate Student in the area of dyslexia or to issue a prior written notice to Parents.

OAR 581-015-2105 provides evaluation and reevaluation requirements for eligible school age students served through, or who may be eligible for, an IEP, rather than an IFSP, and provides in pertinent part:

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

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

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

(c) Changing the child's eligibility, or

(d) Terminating the child's eligibility as a child with a disability * * *.

(2) Request for initial evaluation: Consistent with the consent requirements in OAR 581-015-2090, a parent or public agency may initiate a request for an initial evaluation to determine if a child is a child with a disability.

(3) When initial evaluation must be conducted:

(a) An initial evaluation must be conducted to determine if a child is eligible for special education services when a public agency suspects or has reason to suspect that:

(A) The child has a disability that has an adverse impact on the child's educational performance; and

(B) The child may need special education services as a result of the disability.

In addition, OAR 581-015-2110 provides general evaluation procedures, including notice requirements, for school age children who may be eligible for SDI and related services under an IEP and reads, in part:

(2) Notice and consent.

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

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

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

On May 1, 2018, the District convened an IEP meeting to develop Student's educational program for the upcoming 2018-2019 school year. Mother attended the meeting on behalf of Parents. According to the record, at that meeting, Mother inquired about whether dyslexia might be an additional area of eligibility because Student was, at times, reversing some letters when he/she wrote. IEP team members from the District conveyed to Mother that such errors were common of children within Student's age group and was, therefore, not indicative of dyslexia. Mother's inquiry stopped there. According to a preponderance of the evidence, Mother's inquiry was not accompanied by a medical diagnosis or outside professional opinion but was simply an inquiry during a brainstorming session among the team. As such, it does not rise to the level of a request to evaluate based on an informed suspicion within the meaning of *Pasatiempo*. See *N.G.*, 556 F. Supp. 2d at 16. In this instance, the District did not refuse a request by Parents but instead simply responded to an inquiry by Mother. For that reason, the District was not obligated to conduct an evaluation or issue a prior written notice to Parents.

Nonetheless, a preponderance of the evidence establishes that, during the 2017-2018 school year, the District failed to evaluate Student for ASD eligibility between September 2017 and April 2018. As identified previously in this order, to provide a FAPE in compliance with the IDEA, the District was required to evaluate Student in all areas of suspected disability, determine whether Student was eligible for special education, and formulate and implement an IFSP, and later IEP, with appropriate measurable goals and related services to address Student's individual needs. The District was required to conduct proper evaluations of Student in all areas of suspected disability before it could determine Student's individual needs and craft appropriate AGs/STOs. Applying the court's standard set forth in *Timothy O.*, ASD was or should have been suspected, and therefore required to be assessed by the District, when the District received notice that Student displayed symptoms of and had been diagnosed with autism. See, 822 F.3d at 1120.

In addition, as discussed in detail above, the District failed to properly evaluate Student by conducting the required FBA prior to drafting the February 2018 BSP and incorporating it into Student's IFSP.

Consistent with the conclusions in this order related to the prior school year, I find Student was more likely than not deprived of educational opportunities because the high probability that eligibility under the category of ASD, prior to April 2018, would have necessitated adding educational and related services to Student's IFSP that were not available under the DD eligibility category. Specifically, ABA or other similar services designed to address his/her unique needs as a child with autism. Those additional services would also have informed Student's incoming IEP team with regard to the extent of Student's needs and, more importantly, strategies and supports tailored to Student's ASD eligibility utilized by the team at Head Start as well as the degree of success for such strategies. That, in turn, more likely than not, would have more fully informed Student's IEP team, in May 2018, of his/her transition needs, quite possibly averting Student's unsuccessful kindergarten experience. The District's failure to evaluate Student for ASD eligibility prior to April 2018 deprived his/her IFSP and IEP teams of crucial information, particularly related to the severity of Student's behavioral needs, necessary to craft an appropriate service and educational plans and denied Parents' an opportunity to meaningfully participate in the formulation and implementation of those plans by advocating for the proper educational and supportive services.

The District's failure to properly evaluate Student for ASD eligibility denied him/her educational opportunities and denied Parents' the opportunity to meaningfully participate in the development of Student's IFSP resulting in a denial of FAPE beginning September 2017 and continuing through April 2018. The District's procedural violations in this respect were compounded by its failure to conduct an appropriate FBA of Student prior to implementing the February 2018 BSP, more likely than not resulting in a denial of educational opportunities for Student and denying Parents a meaningful opportunity to participate in the development and implementation of Student's BSP and subsequent IEP.

D. IFSP Progress reports.

During the 2017-2018 school year, the District issued progress reports for Student in September 2017, immediately preceding the IFSP meeting held that month, and again in February and March 2018, preceding the District's evaluation of Student for eligibility under the category of ASD. Again, Parents argue that the progress reports issued during that school year were inadequate because the District failed to include sufficient baseline or present level data regarding Student's progress to allow Parents to monitor and enforce his/her IFSP. I agree that, while some of the progress reports issued during this school year contained more appropriate and informative present level narratives, the District failed to convey to Parents information sufficient to allow them to evaluate Student's progress. As this order has discussed in detail, failure to provide progress information sufficient to allow Parents to monitor progress and enforce Student's IFSP deprived them of the meaningful opportunity to participate in the IFSP process.

In September 2017, Ms. Welch reported Student's progress toward his/her gross motor

skills AG/STOs. In that progress report, Ms. Welch included an updated narrative identifying changes in Student's health status relevant to his/her progress and ability related to gross motor skills. Specifically, Ms. Welch reported that, prior to hip surgery in June 2017, Student had made significant progress with his/her stated STOs and outlined that progress. Ms. Welch also included an updated status narrative addressing Student's temporary limited mobility following hip surgery. Finally, Ms. Welch updated the progress narrative for Student's STOs and reported, where appropriate, the degree to which Student was able to achieve the objective or participate appropriately (*e.g.*, [Student] is working towards consistency with circle time routines and may need to adapt motions due to mobility needs. Partial participation 25-50%). *See*, Ex. D31. Ms. Welch's September 2017 progress report did not contain quantitative data for each STO within Student's stated AG. Nonetheless, the omission of such information does not render the gross motor skills progress report deficient because the AG/STOs as written in Student's September 2016 IFSP included quantitative criteria for measuring success or progress for only a single STO. For that STO, Ms. Welch reported that, post-surgery, Student was able to meet the criteria approximately 25 to 50 percent of the time. Ms. Welch also reported that Student had met the STO's but recommended continuing two out of the three in order to strengthen Student's skills. For the final STO, Ms. Welch recommended discontinuing the STO because Student achieved the objective and did not demonstrate a need for reinforcement.

Additionally, in September 2017 Mr. Crouch issued a progress report on behalf of the District for Student's adaptive skills AG. That progress report repeated the quantitative criteria by which Student's progress was to be measured and reported, in narrative form, that Student's progress was sufficient to meet each objective and the goal. Despite the fact that Mr. Crouch did not include any quantitative baseline data regarding how frequently Student was able to accomplish the goal in a given time, I find this progress report was sufficient to meet the reporting requirements of the IDEA. In this instance, the lack of numeric data in Student's progress report was inconsequential because, according to the narrative information for the goal as a whole and for each objective individually, Mr. Crouch reported Student's success in meeting the goal with no need to continue working on any of the identified objectives. Therefore, it was reasonable to expect that Parents would infer Student was achieving his/her goals and objectives according to the stated criteria or better. This progress report is easily distinguishable from previous reports because the information provided by Mr. Crouch is internally consistent and presents no conflicts for Parents to puzzle through. As detailed above, previous progress reports contained conflicting information regarding whether Student's progress was sufficient to meet the goals without providing Parents any way to measure and monitor his/her progress. Further, the majority of those reports recommended continuing the goals and objectives without presenting any suggested changes to the AGs/STOs or methodology. By contrast, Mr. Crouch's adaptive skills progress report provides sufficient clarity for Parents and the remaining members of Student IFSP team to understand that the particular goal and objectives are no longer appropriate because Student has successfully achieved the stated criteria.

Unfortunately for Parents, the remainder of the District's progress reports in September 2017 reported only vague and inconsistent information related to Student's progress. For instance, Ms. Cole's September 2017 progress report for Student's expressive communication goals and objectives indicated Student "made nice progress" opining that his/her language skills "increased significantly" during the reporting period. Ex. D33. Nonetheless, the progress report

failed to include any numeric data by which Parents could measure Student's progress toward demonstrating "4 of 6 skills at least 80% of the time over a 2 week period" as stated in his/her IFSP. *Id.* Ms. Cole went on to indicate that Student's progress was insufficient to meet the goal. Further, where the District should have reported changes that were planned for this goal or its objectives in order to improve Student's progress, Ms. Cole simply indicated "[c]ontinue goals on next IFSP." *Id.*

Likewise, the District's September 2017 progress reports for Student's cognitive and social emotional AGs/STOs, signed by Ms. Miedema, were unclear, incomplete, and confusing. First, unlike the progress reports from Ms. Welch and Mr. Crouch, Ms. Miedema included no summary or other narrative description of Student's overall progress during reporting period. Additionally, those progress reports contained no numeric data regarding Student's present level of ability toward attaining the quantitative metrics set forth in his/her IFSP. Notably, Ms. Miedema's progress report for Student's second cognitive goal (requiring recitation of at least two lines of at least four word from a familiar song or book) reproduced progress reported in April 2017, which indicated that Student's progress was sufficient to meet the goal in April, along with Student's purported progress as of September indicating Student's progress was no longer sufficient to meet the goal. In the progress report, Ms. Miedema indicates this goal will be part of Student's next IFSP cycle but did not include any information hypothesizing why Student appeared to lose progress or suggesting changes to Student's AGs/STOs to address the apparent set back. Rather, Ms. Miedema simply stated, "[Student] does not participate consistently in songs at circle time." Ex. D34 at 1. That information is particularly confusing in light of Mr. Crouch's adaptive progress report indicating Student had made significant and consistent progress with participation in circle time sufficient to meet the stated goal.

Moreover, Ms. Miedema's progress reporting for Student's second social/emotional goal (requiring him/her to demonstrate the ability to play cooperatively with a peer) is similarly unclear. Again, Ms. Miedema reiterated the April 2017 progress reporting from the prior school year, indicating Student's progress was sufficient to meet the goal at that time, but indicated for this reporting cycle that Student's progress was not sufficient to meet the goal and recommended carrying that goal over onto Student's next IFSP. Similar to her reporting for Student's cognitive goals, Ms. Miedema provided no details explaining the change in progress. Nor does the progress report contain any information on how Student's AG/STOs should be changed to increase progress.

Finally, the final page of Ms. Miedema's September 2017 progress reports contains a brand new goal not present in Student's 2016 IFSP. There was no progress reported on this page. Which is not surprising since there is no evidence in the record that this goal was ever discussed by the team or presented to Parents prior to September 20, 2017. Interestingly, the AG and STOs identified in this progress report are identical to Student's brand new social/emotional goal created at the September 2017 IFSP meeting.

Similar to those issued during the 2016-2017 school year, the District's deficient September 2017 progress reports deprived Parents of the opportunity to evaluate Student's then-current ability toward achieving his/her IFSP goals and objectives and suggest changes to AGs or STOs if they deemed it appropriate to help Student make progress. In this instance, I believe this

deprivation is more evident considering Student's apparent lack of progress and even regression on some of his/her AGs/STOs without explanation from the District or a plan to address those progress deficits. Again, Parents were unable to meaningfully participate in the formulation of or amendment to Student's IFSP that was reasonably calculated to enable Student to make progress appropriate in light of his/her unique circumstances. Moreover, Parents were also unable to participate in the enforcement of Student's IFSP to ensure all required aids and services were provided as specified in the IEP or to determine whether revisions to Student's AG's, STO's, or supplemental aids and services were necessary because the District's deficient, inconsistent, and confusing progress reports deprived them of the ability to monitor and gauge Student's progress toward the goals and objectives in the IFSP.

In addition to the September 2017 progress reports above, the District also issued progress reports for the 2017-2018 school year on March 5, 2018. Those progress reports were preceded by an amended IFSP (addressed below) in February 2017 and followed by the District's ASD evaluation that began in March 2018. As discussed above, Student's September 2017 IFSP reduced his/her AGs significantly, eliminating three of the five previously identified areas of need as well as reducing the number of goals within the remaining areas of need without explanation. Because the sufficiency of the resulting IFSP is addressed above, this discussion is limited to the adequacy of the District's progress reporting. Nonetheless, because there is no evidence in the record demonstrating the extent of the amendments, or lack thereof, to Student's IFSP after the addition of the BSP in February 2018, this order addresses the AGs/STOs stated in the September 2017 IFSP. The District's failure to properly amend and/or provide Parents with a complete copy of the February 2018 amended IFSP is addressed in below in Section II-E.

The March 2018 progress reports for Student's expressive communication and social/emotional AGs/STOs provided less information than those in previous years. The stated criteria in the September 2017 IFSP required Student to demonstrate the ability to accomplish the goals and objectives according to quantitative metrics (9 of 10 opportunities for the expressive communication goals or 80 percent of the time over two weeks for the social/emotional goals). Ex. D36 at 7. In the March 2018 progress reports, Ms. Cole reported that Student was making some progress but clearly was not yet meeting each of the objectives for the stated goals. Ms. Cole indicated the goals should be continued to strengthen Student's skills. Confusingly, Ms. Cole also reported, for each AG in the expressive communication domain, that Student's progress was sufficient to meet the goals. None of the goals indicated that any changes were planned to assist Student in making progress. And, much like the District's prior progress reports, the March 2018 progress reports for the expressive communication goals contained no specific information Parents could use to monitor Student's progress toward his/her goals and objectives.

The District's progress reporting for Student's social/emotional goals and objectives was equally unclear. First, the progress report did not identify the goal or any of the eight objectives as they appeared in Student's September 2017 IFSP. Rather, the District simply provided a typed sheet containing the progress report date followed by eight enumerated narratives that appeared to report Student's progress on the eight enumerated objectives set out in Student's September 2017 IFSP. The March 2018 social/emotional progress report was signed by Ms. Miedema despite the fact that at hearing Mr. Crouch testified he was responsible for five of the

eight objectives listed. According to Mr. Crouch's testimony, he did not include any data related to the percentage of time Student was able to accomplish the enumerated objectives over a two week period. At hearing, Mr. Crouch again acknowledged that Parents would not know the baseline data for Student's AGs independent of District progress reports. Similar to previous reports, each narrative indicated that the objective had not been met and recommended continuation of the goal and all objectives. However, the report then went on to indicate in the next column that Student's progress was sufficient to meet the goals. Ex. D44 at 1-2. The lack of clarity in those progress reports made it difficult, if not impossible, for Parents to monitor Student's progress toward his/her IFSP goals and objectives as stated in the September 2017 IFSP.

Once more, the District's deficient March 2018 progress reports deprived Parents of the opportunity to evaluate Student's then-current ability toward achieving his/her IFSP goals and objectives and suggest changes to AGs or STOs if they deemed it appropriate to help Student make progress.

E. Incomplete IFSP.

On February 14, 2018, the District issued a Notice of IFSP Team Meeting notifying Parents of a meeting scheduled for February 22, 2018 for the purpose of amending Student's September 2017 IFSP by adding a BSP. That BSP was drafted by the District on or about February 16, 2018. On February 22, 2018, the District presented Mother with the pre-drafted BSP as well as a written agreement allowing the District to amend Student's IFSP without convening an IFSP meeting. Mother signed both documents on February 22, 2018.

In its February 22, 2018 Prior Notice of Early Intervention or Early Childhood Special Education Action the District stated the reason for the proposed addition of the BSP was due to Student "exhibiting some behavior that is impacting [his/her] learning, and strategies to address [his/her] behavior need to be included in [his/her] IFSP." Ex. D43. Thereafter, the District issued an amended IFSP for Student revising the September 2017 IFSP. While the September 2017 IFSP contained 11 pages without the new BSP, the February 2018 amended IFSP provided to the Parents contained only four pages. Those four pages were identical to the first four pages of the September 2017 IFSP. Notable, neither the BSP nor the goals and objectives pages were attached to the amended IFSP.

OAR 581-015-2755(3) requires that a school district provide parent(s) with a complete copy of their student's IFSP at no cost to the parent(s). The District failed to do so when it provided Parents with only select pages of Student's amended IFSP. Without a complete copy of the Amended IFSP accurately reflecting the changes made, Parents were unable to monitor Student's progress toward his/her goals and objectives. As reiterated throughout this order, such a deprivation denied Parents the right to meaningfully participate in Student's IFSP development and enforcement. This is particularly evident when considering that Student's IFSP was amended to add behavioral supports to his/her program. Without a complete copy of that IFSP, Parents were deprived of the opportunity to gauge the efficacy of the identified behavioral interventions or to advocate for implementation of those or alternate interventions when Student exhibited challenging behaviors.

III. 2018-2019 school year- Kindergarten at Westside Elementary.

In the 2018-2019 school year, Student moved to kindergarten in the District. Unfortunately, Student's transition was largely unsuccessful and the relationship between Parents and the District rapidly deteriorated. Parents' complaints pertaining to that school year began in May 2018 with the drafting of Student's first IEP while he/she was still attending Head Start and continued through the filing date of the due process complaint. For that school year, Parents assert the District committed numerous substantive and procedural violations resulting in a denial of a FAPE. For Student's kindergarten year, Parents allege deficiencies with the drafting and implementation of his/her IEPs and incorporated documents including the BSP and step-up plan. In addition, Parents allege the District predetermined a change in Student's placement which impermissibly reduced his/her school day and resulted in the District's failure to offer Student an appropriate placement in the least restrictive environment (LRE).

In contrast, the District argues that Student's aggressive behaviors presented a safety risk to Student and others that necessitated his/her removal from the general education classroom. Further, the District argues that Student's behavioral challenges during the first week of school demonstrated that he/she lacked the stamina to participate in a full day of kindergarten and justified its decision to limit Student's school day. Moreover, the District argues that Student's continued behavior challenges after implementation of the abbreviated day schedule support its contention that Student lacked the skills, including stamina, to be placed in either the general education or special education classrooms within the District and therefore justify its decision to sequester Student in an isolated sensory room with one adult IA and no same age peers in order to provide him/her a safe environment in which to learn the skills necessary to be reintegrated into the SLC and/or general education kindergarten classroom.

At hearing, the District spent a significant amount of time addressing Student's challenging behaviors and establishing a record demonstrating that Student's behaviors, when he/she became emotionally dysregulated, presented a safety risk to Student, staff, and other children. Parents did not dispute this evidence and instead maintained arguments, presented to the District throughout the school year, that the District's response to Student's behaviors exacerbated his/her emotional dysregulation, reinforced his/her negative responses to school interventions, and created an aversion to the school environment. Because the preponderant weight of the evidence supports Parents' arguments, this order does not delve too deeply into the scope or frequency of Student's challenging behaviors. Even accepting as true the panoply of challenging and often dangerous behavior demonstrated by Student, accepting the District's arguments at face value would require discounting the inappropriateness of the District's early response to Student's behaviors and the likely impact those responses had on increasing and prolonging his/her challenging behaviors.

As discussed below, I find the District's early failures to draft an appropriate IEP, to properly implement Student's IEP as drafted, and its rush to remove Student from the general education environment resulted in a denial of a FAPE to Student that the District failed to remedy throughout the period in issue. Moreover, I find the District's response to Student's early challenges displayed during the first week of the 2018-2019 school year more likely than not exacerbated and reinforced Student's negative behaviors depriving him/her of educational

opportunities and benefits.

In short, this order determines that the District's flawed responses to Student's challenges drove his/her unsafe behaviors and the District's repeated failure to heed Parents' concerns only served to exacerbate problems trying to control Student's emotional regulation and resulting behaviors.

A. May 2018 IEP

The District convened a meeting in May 2018 to address Student's transition needs and develop an IEP for his/her kindergarten year prior to the end of Student's final year of Head Start. Parents assert the May 2018 IEP was deficient in multiple respects resulting in the denial of a FAPE for Student. Specifically, Parents argue that the AGs and STOs in that IEP were inappropriate and lacked sufficient present level data to allow Parents to gauge Student's progress. In addition, Parents assert that the District failed to conduct an FBA prior to drafting the May 2018 IEP. Parents also claim the District impermissibly removed Student's BSP from the May 2018 IEP and failed to include sufficient supportive services necessary to offer Student a FAPE.

As addressed throughout this order, the IDEA requires school district's to develop an appropriately ambitious IEP reasonably calculated to enable a disabled child to receive educational benefits in light of the child's unique needs and circumstances. As discussed previously, the IDEA contemplates that, by the time a school district convenes an IEP meeting, it has complied with the detailed procedural requirements of locating, identifying, evaluating, and determining as eligible children with disabilities in need of special education and related services. *See* OARs 581-015-2080, and 581-015-2015, through 581-015-2120. Only after compliance with those strict procedural requirements will a school district be adequately prepared to craft an educational plan with content appropriate to meet the substantive requirements of the IDEA. *See* OARs 581-015-2200, 581-015-2205.

a. Lack of accurate present level data for Student.

As with Student's prior IFSPs, Parents again argue the May 2018 IEP was deficient because it lacked any baseline data related to Student's present level of ability while establishing criteria requiring Student to demonstrate progress by accomplishing AGs/STOs according to specified quantitative benchmarks. Similar to their complaints related to the District's progress reporting during the period in issue and Student's prior IFSPs, Parents point out that the May 2018 IEP stated criteria for Student's AGs/STO in quantifiable and measureable terms but failed to include any baseline data for any of the identified goals or objectives related to Student's present level of ability toward reaching the stated criteria. Further, Parents assert that Student's present level data was inaccurate and therefore deprived them of information necessary to determine the appropriateness of the District's proposed educational plan.

Again, the District argues that the level of detail expected by Parents is not required under the IDEA. That argument has been addressed repeatedly above in the discussions pertaining to the District's inadequate progress reports and September 2017 IFSP. To reiterate

briefly, because the District framed the criteria by which Student's progress would be measured in quantitative terms (*e.g.* 80 percent of the time over a two week period or 9 of 10 opportunities measured through data collection, etc.), it was required to inform Parents of Student's progress in similar terms to allow Parents to participate meaningfully in the development of the May 2018 IEP. Without that level of detail, Parents were left to guess at Student's present level of achievement in each area of need. This conclusion finds support in testimony of at least two District witnesses, Ms. Cole and Mr. Crouch, each of whom repeatedly acknowledged that, based on the present levels communicated in Student's IFSPs and progress reports, Parents would need to infer Student's present level of ability or achievement because no quantifiable data was reported by the District.

Pursuant to OAR 581-015-2200(1)(a), the District was required to include information related to Student's present levels of ability in each of the identified areas of need. Without accurate present level information, it is difficult to fathom how Student's IEP team could develop an appropriately ambitious educational program for Student in light of his/her unique needs and circumstances. The vast majority of the District's present level summaries in the May 2018 IEP were imported verbatim from Student's September 2015, 2016, and 2017 IFSPs and contained insufficient information for Parents to determine Student's current level of ability in each goal area. Because the District chose to continue the use of criteria for progress measurement stated in specific percentages, it was required to report Student's present level of ability in the same manner. *See* OAR 581-015-22200(1)(c) (requiring the IEP to include a description of how the child's progress toward meeting the annual goals will be measured.). In this instance, the record demonstrates that the District simply engaged in a cut-and-paste exercise with Student's May 2019 IEP, using present level statements from Student's early years in Head Start. While no doubt expedient and convenient for the District, the use of recycled present level data extending back more than two academic years deprived team members, notably Parents, of necessary information to determine the appropriateness of the SDI and related services proposed in the May 2018 IEP.

It is feasible that a disabled student's present levels in one or more areas of need might remain stagnant over an extended period due to a severe disability. However, the record in this matter does not support such a conclusion and the District does not argue as such. Rather, the District argues that the narrative information contained in successive IFSPs and progress reports demonstrates Student made significant progress in the areas of adaptive skills, expressive and receptive communication skills, and social/emotional skills. In addition, the record demonstrates multiple changes to Student's mobility and related needs. Accordingly, the use of outdated and inaccurate present level information failed to meet the requirements of OAR 581-015-2200(1)(a).

The District's failure to report accurate measureable present level information related to Student's current ability in each area of need contained in his/her IEP deprived the Parents of a meaningful opportunity to participate in the development of an education plan for Student that was reasonably calculated to enable him/her to make progress appropriate in light of his/her unique circumstances. Similar to the September 2017 IFSP, without sufficient information allowing them to gauge Student's present level of ability, Parents were unable to determine the appropriateness of the AGs and STOs or related services contained in the May 2018 IEP and therefore were ill equipped to advocate for alternate or additional AGs and STOs. The evidence

shows, more likely than not, Student was deprived of educational opportunities in the form of SDI and related services designed around appropriate goals and objectives.

b. Inappropriate AGs/STOs

Next, Parents allege the District failed to draft appropriate AGs and STOs in the May 2018 IEP and instead simply imported goals and objectives from previous IFSPs. Accordingly, Parents assert the May 2018 IEP failed to meet the requirements of the IDEA to offer an appropriately ambitious educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

Similar to the requirements for IFSP contents addressed above, OAR 581-015-2200(1)(b) requires that every IEP contain a statement of measurable annual goals designed to meet the needs of a disabled child, resulting from his or her disability, and necessary to allow him or her to access and make progress in the general education curriculum and other educational needs or services.

The record in this matter demonstrates that, in addition to importing Student's present level information from outdated IFSPs, the District imported each of Student's AG's and STOs either verbatim or nearly verbatim for each area of need. For instance, Student's social/emotional AG and STOs in the May 2018 IEP were reproduced verbatim from Student's September 2017 IFSP. Notably, from a review of the IEP, it appears that District personnel who drafted the May 2018 IEP ahead of the meeting did not renumber the STOs from Student's social/emotional AG in the September 2017 IFSP resulting in non-consecutive numbering of each STO (e.g., STO's numbered 2, 3, 5, 6, and 7.). In addition, the evidence reveals that, with the exception of some vague handwritten notations in the AG, all information for Student's expressive communication AGs/STOs in the May 2018 IEP was taken verbatim from his/her September 2017 IFSP. Moreover, the May 2018 IEP added an expressive language AG for Student that was an amalgamation and near verbatim reproduction of the first two STOs from Student's expressive communication goal found in his/her September 2016 IFSP and the fourth STO from Student's social emotional goal as it appeared in his/her September 2017 IFSP. The expressive language goal in the May 2018 IEP contained no STOs. Finally, the May 2018 IEP added a visual motor AG with three STOs that were similar to the components of Student's first STO for the social/emotional AG that appeared in the September 2017 IFSP.

In the context of the evidence in the record, Parents' complaints are well taken. As with the District's use of imported present level statements, the use of recycled AGs/STOs for Student is troubling because it indicates the IEP team was either unaware or unconcerned with Student's true present levels of ability and therefore unlikely aware of the true scope of his/her unique needs and circumstances. The use of recycled AGs and STOs across multiple years indicates the District was deficient either in developing Student's education plan or in monitoring and reporting his/her present levels of ability, or both. In either case, the resulting May 2018 IEP failed to present an accurate statement of measurable annual goals that were specifically designed to meet Student's then-present needs resulting from his/her disability, and necessary to allow him/her to access and make progress in the general education curriculum and other educational needs or services. That failure was a procedural error that may have resulted in a

denial of a FAPE to Student.

As addressed more fully above, to determine if a procedural error resulted in a denial of a FAPE, the ALJ must first determine whether a school district has met the rigorous procedural requirements of the IDEA and/or any analogous state statutes or rules that may impose a greater duty. *Union Sch. Dist.* 15 F.3d at 1524 (9th Cir. 1994). 34 CFR §300.513(a)(2) permits an ALJ to find a denial of FAPE only where procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' right to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefit to the child.

Here, the District failed to meet the procedural requirements of OAR 581-015-2200(1)(b) by using recycled and inappropriate AGs and STOs in Student's May 2018 IEP. That failure resulted in an IEP that failed to meet the appropriately ambitious requirement necessary for every educational program. As such, the May 2018 IEP was not reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances and more likely than not deprived Student of the educational benefit he/she would have obtained through appropriately crafted goals and objectives.

c. Failure to conduct FBA prior to IEP

Parents' next grievance is related to the District's failure to conduct appropriate and timely evaluations of Student and its removal of necessary services from Student's IEP. Specifically, Parents allege the District was required to conduct an FBA of Student prior to the May 2018 IEP and to use that FBA to draft a BSP with appropriate interventions to be included in Student's IEP. This allegation is similar to one raised in objection to the District's implementation of the February 2018 BSP discussed above. However, this allegation is complicated by the fact that, in the May 2018 IEP, the District unilaterally removed Student's BSP. This order addresses the failure to conduct an FBA prior to the May 2018 IEP meeting first and addresses the removal of Student's BSP from the May 2018 IEP in the next section.

As set forth more fully above, OAR 581-015-2181 identifies the requirements for developing BSPs as well as the requirements for conducting an FBA, an integral part of developing a BSP, and requires a school district to conduct an FBA for every student with an IEP whose behavior has placed him/herself, other students, or staff at imminent risk of serious bodily injury. OAR 581-015-2181(2)(a)(B). During the 2017-2018 school year, Student exhibited an increase in inappropriate behaviors that placed him/her, staff, and other students at imminent risk of serious bodily injury, including hitting, kicking, throwing objects in classroom, pushing other kids, and throwing furniture in the classroom. As a result, the District added a BSP to Student's IFSP. At that time, the District failed to conduct an FBA prior to drafting or adding the BSP to his/her IFSP. This order addresses that failure in detail above.

The record in this matter does not indicate that Student's behavior challenges resolved between implementation of the February 2018 BSP and drafting of the May 2018 IEP. Rather, the evidence demonstrates that Student's emotional regulation challenges and the oft resulting aggressive behaviors continued into his/her kindergarten year. As such, OAR 581-015-2181 mandates the development and implementation of a BSP based on a valid FBA.

As addressed previously, OSEP guidance indicates that an FBA, used to determine the nature and extent of special education and related services that a student requires, is an evaluation as defined by the IDEA and its implementing rules and regulations. *See Letter to Christiansen*, 48 IDLER 161 (OSEP 2007). The District was required to comply with the evaluation requirements found in OARs 581-015-2105 to 581-015-2110. Because the District was aware that Student displayed behaviors, related to his/her disability, that required the development of a BSP, The District was therefore obligated to conduct an evaluation of Student in the form of an FBA according to OAR 581-015-2105(3)(a)(B) in order to determine appropriate services, in this case behavioral interventions, to be included in Student's IEP. The District failed to conduct any such FBA until October 2018.

During the 2017-2018 school year, the District determined that Student displayed behaviors that impeded his/her educational performance. The District also determined that those behaviors resulted from Student's disability. Consequently, the District concluded that Student needed behavior intervention services to receive a FAPE and implemented a BSP for Student. Nothing in the record demonstrates that Student's need for behavior interventions services changed. Therefore, as addressed below, the District was required to include those behavior interventions in Student's IEP in order to offer a FAPE. Before it could draft an appropriate BSP, the District was required to conduct an FBA of Student that complied with requirements of OAR 581-015-2181. The District failed to do so.

Because the District failed to conduct an FBA of Student, it lacked sufficient information to determine whether Student continued to need behavior interventions contained in the February 2018 BSP or to determine the appropriate behavior interventions to be included in Student's IEP that would enable him/her to be involved in and progress in the general education curriculum. As such, the May 2018 IEP was not reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances and more likely than not deprived Student of the educational benefit he/she would have obtained from appropriate behavior interventions. This conclusion becomes all too apparent in light of Student's first week of kindergarten, discussed more fully below.

d. Removal of Student's BSP

Parents next argue that the District's May 2018 IEP was deficient because it failed to include supportive services sufficient to offer Student a FAPE. Specifically, Parents allege the District failed to include a BSP containing necessary behavior intervention supports necessary for him/her to participate and make progress in his/her education.

OAR 581-015-2205 identifies team considerations and special factors to be weighed by a student's IEP team in drafting an appropriate educational plan. Among those considerations are the use of positive behavioral interventions for any child whose behavior impedes his or her learning or that of other students. OAR 581-015-2205(3)(a). According to that rule, if the IEP team determines that a child needs a particular device or service (including an intervention) for him or her to receive a FAPE, the IEP team must include a statement to that effect in the child's IEP. OAR 581-015-2205(4). Similarly, the U.S. DOE has stated that, where required to provide

a FAPE to a disabled student, IEP teams must consider and include in the IEP appropriate behavior goals and objectives and other appropriate services and supports for children whose behavior impedes their own learning or the learning of peers. *Questions and Answers on Endrew F. v. Douglas County School District Re-1*, 71 IDLER 68 (ED 2017).

The record demonstrates that, during the 2017-2018 school year, the District determined that aggressive behaviors resulting from Student's challenges with self-regulation due to his/her disability impeded Student's learning and that of peers. As a result, the District developed, albeit inappropriately, and implemented a BSP. The District added that BSP to Student's IFSP in February 2018. Nothing in the record indicates Student's behavioral challenges or difficulties with self-regulation had resolved prior to the May 2018 IEP meeting. As such, the IEP team was required to develop appropriate behavior goals and objectives and other appropriate services and supports for Student. Those services included behavior interventions previously included in the February 2018 BSP.

The District failed to offer Student an educational program reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances because the May 2018 IEP did not address Student's behavior intervention needs. The consequences of that omission manifested themselves almost immediately upon Student's entry to the general education classroom in September 2018. More likely than not, a BSP based on an appropriately conducted FBA would have revealed the scope of Student's self-regulation challenges and resulting behaviors issues. That BSP likely would have identified behavior interventions for Student that allowed District staff to avoid the unfortunate circumstances of his/her transition to kindergarten.

e. Failure to implement Student's IEP, September 2018.

Next, Parents allege the District failed to properly implement material provisions of Student's IEPs during the 2018-2019 school year thereby depriving him/her of a FAPE. The Ninth Circuit Court of Appeal addressed the standard for determining when a school district's failure to implement one or more portions of a disabled child's IEP amounts to a denial of FAPE in *Van Duyn ex rel. v. Baker School Dist.*, 481 F.3d 770 (9th Cir., 2007). In that case, the court held that only a material failure to implement a disabled child's IEP violates the IDEA. The court clarified that "[a] material failure occurs when the services a school provides to a disabled child fall significantly short of the services required by the child's IEP. Minor discrepancies between the services provided and the service called for by the IEP do not give rise to an IDEA violation." *Id.* at 780.

In this matter, Parents assert that the District failed to implement supports necessary for Student to self-regulate his/her emotional state leading to behavioral meltdowns that resulted in his/her removal from the general education environment. Parents further argue that the District's continued failure to utilize appropriate supports during Student's first week of kindergarten reinforced his/her negative behaviors and created an aversion to the school environment. The District, by contrast, argues that Student's behavioral outbursts were caused by overstimulation in an unfamiliar environment and demonstrated his/her lack of stamina necessary to tolerate the general education classroom. According the court in *Van Duyn*, in order to show a denial of

FAPE Parents must demonstrate that the District's failures to adhere to portions of Student's May 2018 IEP resulted in a material failure to implement his/her educational plan. Parents burden in this regard is complicated by the fact that Student's May 2018 IEP was in place for less than one full week of school during the 2018-2019 school year before being amended on September 10 and 11, 2018. Nonetheless, based on the evidence in the record, I agree with Parents.

For the 2018-2019 school year, Student began kindergarten on September 4, 2018. Due to a staggered start for kindergarten students used by the District, Student's second day of school was September 6, 2018. Over the course of those two days, the District determined that Student lacked the requisite stamina to be placed in a general or special education classroom for a full day of instruction.⁴² In response to that determination, the District made the decision to limit Student's school day to no more than two hours per day. Parents' allegations that the District failed to implement material provisions of Student's IEP begin with that first week of his/her kindergarten year. Moreover, because this order determines that the District's subsequent IEP(s) failed to offer Student a FAPE and were continually disputed by Parents, the May 2018 IEP constitutes the last uncontested education plan for Student. The District's failure to implement that IEP extended throughout the remainder of the school year.

Student's first week of school began with two days of behavior challenges on his/her part. The District's response to each incident was to isolate Student in the sensory room and eventually contact Parents to pick up Student early from kindergarten. According to Parents, the District's response to each incident of challenging behavior failed to implement required IEP supports, triggered Student's social/emotional dysregulation by disrupting his/her daily routine, and created an aversion to the school environment that exacerbated Student's challenges at school.

According to Student's general education kindergarten teacher, Student's first day of school started well. Ms. Shaner's testimony indicates that, on that day, Student did not experience behavior challenges until after morning recess. At that time, Student was engaged in a building project as part of his/her independent play. Ms. Shaner organized a class project that required students to take turns working on the project. When it was Student's turn, Ms. Shaner asked Student to work on the project with her. Student resisted and continued to work on his/her building activities. Rather than push Student, Ms. Shaner allowed him/her to continue building and indicated that she would circle back around to Student. After a few minutes, Ms. Shaner again asked Student to participate in the class project. Student again resisted and this time Ms. Shaner persisted. In response, Student picked up the tub of Legos with which he/she had been playing and threw the tub across the room. In response, Ms. Shaner decided to remove Student from the general education classroom to the sensory room attached to Ms. Ferrick's SLC. Student threw a small stool at Ms. Shaner and kicked her multiple times as she attempted to escort him/her from the classroom. Ms. Shaner left the remainder of the kindergarten class under

⁴² At hearing, the District presented testimony indicating that the decision to abbreviate Student's school day was not made until the September 10-11, 2018 IEP meeting. The District also presented testimony indicating Parents, rather than the District, made the decision to limit Student's school day. Based on the preponderant weight of the evidence, I disagree with the District. Those issues are addressed in more detail in Section III B and C of this order.

the supervision of the single IA assigned to another student in her classroom. Ms. Shaner did not offer Student any options or tools to assist him/her with self-regulation prior to removing Student to the sensory room.

Once in the sensory room, Ms. Shaner contacted Mr. Newton to assist with Student's behavior. At hearing, Mr. Newton made much of Student's rapidly escalating aggressive behavior and indicated his belief that Student was a danger to him/herself and others. Perplexingly, Mr. Newton did not reconcile that determination with his decision to wait more than three hours with Student melting down in the sensory room and acting out violently before calling Parents to pick up Student from school.

Throughout the period in issue, the District was aware of Student's ongoing and persistent communication problems, particularly in the area of receptive communication. The District was made aware that Student was diagnosed with autism in 2016. By 2018, the District finally evaluated Student and found him/her eligible under the category of ASD. Student's ECSE IFSPs and progress reports repeatedly identify communication deficits as a primary challenge for him/her. In addition, transitioning from one activity to the next has always presented challenges for Student and the District. The record shows those challenges were increased when Student was asked to transition from a preferred activity. As such, the need for visual communication aids and advanced notice of upcoming transitions was clearly identified as a necessary support in Student's May 2018 IEP. Ms. Shaner failed to implement any such supports for Student on the first day of school. Rather, when Student resisted her initial invitation to participate in a project with her, Ms. Shaner simply allowed him/her to go back to playing with Legos and indicated she would come back to Student later. Based on the record at hearing, it is questionable whether Student, with his/her restricted attention focused on a preferred activity, even heard what Ms. Shaner said at that time. Ms. Shaner failed to use the required visual calendar and timer supports when transitioning Student to a new activity depriving Student of communication supports necessary for him/her to participate in his/her education.

Further, the well-known difficulties Student experienced with transitions was addressed by the IEP team in May 2018. At that time, the IEP team decided Student needed dedicated one-to-one adult support from an IA to assist with all transitions throughout the school day. That decision resulted, at least in part, from Parents' concerns that Student could become aggressive and their expressed desire to make sure everyone was safe. The District arranged for Student to visit Westside and meet his/her teacher as well as Ms. Ferrick and his/her IA. According to the evidence, the only IA Student met over summer was Ms. Rae. The evidence also indicates that Ms. Rae was not available for Student until September 7, 2018. Student had no IA assigned to him/her on the first day of kindergarten. According to Ms. Shaner, she was forced to leave her class under the supervision of the only IA in the class and that individual was assigned to a specific child. At the time of Student's outburst in Ms. Shaner's classroom, there was no IA dedicated to assisting him/her with transitions between activities. Had the District provided Student with a dedicated IA on the first day of school, that individual would have been able to prepare Student to transition to the class project. This assumes that the District would have properly trained the IA to assist Student with transitions between activities. Based on the record, I do not believe that to be an unwarranted assumption. More likely than not, a properly trained

IA would have been better able to assist Student and avoid the behavior escalation that resulted in his/her removal from the classroom. In the event that the IA was unsuccessful, that individual should also have been better equipped to address Student's behavior escalation through implementation of IEP supports such as tangible sensory items (assuming any such items were available) and deep pressure or other sensory stimulation. Of course, this again assumes that the IEP team would have communicated to the IA Ms. Ventura's advice to the team regarding the efficacy of deep pressure bear hugs commonly beneficial for children with autism, especially so for Student. A dedicated IA likely could have come up with at least 10 different interventions to use before relegating Student to the sensory room. The District's failure to provide a dedicated IA to assist Student with transitions in the general education classroom deprived him/her of instructional time for the remainder of the day and directly contributed to the District's decision to abbreviate Student's day.

In addition, the District was well aware of Student's sensory needs beginning as early as January 2017. The record indicates that, at that time, the District's OT, Mr. Crouch, developed a sensory diet for Student that provided objects and methods for him/her to use during periods of dysregulation (*e.g.*, objects for Student to chew on, the use of heavy work and/or deep pressure hugs, visual supports, and preferred tactile activities). Those items were intended to assist Student in self-regulating his/her emotional state. The requirement for a sensory diet, or menu, to be used across all educational environments was expressly stated in Student's May 2018 IEP. At hearing, Ms. Bertram, the District's OT for Student during the 2018-2019 school year, testified that she did not develop or provide Student's teachers with a sensory menu for Student until sometime in October 2018. Tr. Vol. VI at 1386:21-1387:19. As a result, Ms. Shaner was not provided a sensory menu for Student prior to the first week of school and therefore was unaware of Student's sensory needs and supports. Consequently, she was unable to offer Student options and support him/her in emotional self-regulation in response to Student throwing the tub of Legos. Developing social/emotional skills for self-regulation is an identified IEP goal for Student and directly related to more than one area of need. Failure to provide Student with sensory options more likely than not deprived him/her of the opportunity to participate in the general education classroom and obtain educational instruction and socialization.

Following his/her outburst in class, Student spent the next three and one-half hours in the sensory room with Mr. Newton. At hearing, Mr. Newton indicated that he waited until approximately 12:45 p.m. to call Parents and instruct them to come pick up Student from school. At the time Father arrived at school, Mr. Newton advised him that Student was brought into the sensory room dysregulated and remained there, still dysregulated, until Father arrived.⁴³

Unfortunately, Student's second day of kindergarten was less successful than his/her first. Due to the District's staggered start for kindergarten, Student did not attend school on September 5, 2018. Upon entering the general education classroom on September 6, 2018, Student hung his/her backpack and coat as he/she was taught in Head Start. Ms. Shaner preferred for students to use cubbies to store items and told Student to put his/her backpack in the assigned

⁴³ The District's inappropriate response to Student's outbursts on the first day of school more likely than not would have been avoided had the District conducted an FBA for Student and included an appropriate BSP in the May 2018 IEP. The deficiencies in the IEP in that respect were manifest in the District's inadequate response to Student's behavior challenges on September 4, 2018.

compartment. Student became upset and kicked an IA standing near him. As a result, Student was removed to the sensory room after approximately 10 minutes in Ms. Shaner's classroom.

The record in this case is replete with evidence indicating that routines are important for children with autism generally and critical for Student to maintain his/her emotional regulation. The importance of District staff adhering to Student's established routines, as well as the need for them to allow him/her to develop his/her own new routines in kindergarten, was communicated to the IEP team by Student's ECSE teacher and providers at the May 2018 meeting. The evidence also reflects that ECSE staff spent significant amounts of time working with Student teaching him/her to follow classroom routines; specifically, to hang his/her coat and backpack upon entering the classroom. According to the evidence, that was a routine engrained in Student while attending Head Start. Ms. Shaner's preference for Student to adhere to her classroom routine, rather than Student's own routine, more likely than not created a disruption to his/her routine that triggered the episode of emotional dysregulation and resulting outburst.

Again, the record is devoid of any evidence indicating that, before deciding to eject Student from the general education classroom, Ms. Shaner attempted to provide Student with any supports identified in the May 2018 IEP to assist Student with emotional or behavior regulation. Student was offered no visual supports or advanced notice of a change in his/her routine. Additionally, because Ms. Bertram had not developed the required sensory menu identified in Student's May 2018 IEP, Ms. Shaner was unable to provide any self-stimulation tools that might have assisted Student in regulating his/her emotional state. Moreover, had Ms. Rae or another dedicated IA been available to Student on the morning of September 6, 2018, he or she would presumably been able to assist Student with his/her transition into the classroom. More likely than not, that individual, properly trained to address Student's unique needs, would have been able to ease Student into the change in his/her routine or at least would have been able to identify the change as a likely behavior trigger and respond to Student's escalation accordingly. Of course, much of this is speculation because the District used no interventions or supports with Student and instead ejected him/her from the general education classroom approximately 10 minutes into his/her second day of kindergarten.

Following the in class outburst, Student was again escorted to the sensory room and Mr. Newton was again summoned to intervene. Student remained in the sensory room from approximately 8:00 a.m. until Mr. Newton contacted Parents at approximately noon to pick up Student early from school. Rather than respond to Student's challenging behaviors using the supports identified in Student's IEP, or those outlined in the previous BSP contained in the February 2018 IFSP, the District elected to remove Student from the general education environment and isolate him/her in the sensory room. The District elected to keep Student isolated in that room for several hours while he/she was emotionally dysregulated before contacting Parents.

When Parents arrived to pick up Student from school on September 6, 2018, they observed Legos and balls from a small play pit strewn about the room and various other toys spread across the entirety of the room. Parents also observed Mr. Newton and two other adults standing around Student each holding a large play mat to corner Student into a corner of the room. Parents observed the adults using the mats to form a triangular wall around Student who was seated on the floor in a pseudo-fetal position sobbing. According to Father, Student

appeared cornered like a wild animal. When he approached and sat on the floor next to Student, her/she curled up in Father's lap and continued to cry. Parents worked to calm Student and then attempted to engage him/her in cleaning up the mess in the sensory room. According to Parents, it was important to show Student that his/her actions had consequences and that he/she was responsible for cleaning up the disarray in the room. District staff intervened, insisted they would clean up the mess, and handed Parent Student's belongings so they could take him/her home.

Student's third day of school was Friday, September 7, 2018. On that day, the school bus did not arrive to take Student despite the IEP requirement that the District provide transportation to and from school each day. When Mother contacted the bus barn to inquire about Student's transportation, she was informed that the bus barn had been advised by the District not to pick up Student until further notice. Therefore, Parents were required to drive Student to school. Upon arriving at school, Parents met with Mr. Newton and Ms. Ferrick who informed them that Student's school day was being shortened to four hours effective immediately and that they needed to pick him/her up at 11:00 a.m. following lunch. Mr. Newton and Ms. Ferrick indicated that the change would allow Student to adjust to the demands that kindergarten placed on him/her. On September 7, 2018, Student did not spend any time in the general education classroom.

When Father arrived at 11:00 a.m. on September 7, 2018 to pick up Student, he observed Dr. Copeland and Katie Rae escorting Student back from the lunch room. The adults were each holding one of Student's arms while he/she protested saying he/she wanted to go to recess with peers. Dr. Copeland and Ms. Rae said that was not an option and Father explained to Student that he/she had to leave school and was not permitted to stay for recess. Student became upset because he/she wanted to stay at school. By abbreviating Student's school day and excluding him/her from the kindergarten classroom on September 7, 2018, the District failed to implement Student's agreed upon placement in the general education environment at least 80 percent of the day. According to the record, kindergarten in the District typically lasts about seven and one-half hours per day. Student was allowed to attend school for only four hours depriving him/her of at least three hours of instruction and socialization as required by his/her IEP.

Student's May IEP was both procedurally and substantively deficient. The District failed to conduct an FBA of Student despite an abundance of information indicating Student experienced emotional dysregulation and could act out aggressively. In addition, the District failed to include a BSP in Student's May 2018 IEP despite the determination that Student's violent behavior warranted a BSP just three months earlier. These deficiencies resulted in a denial of a FAPE to Student during the 2018-2019 school year because they resulted in a denial of educational opportunities and benefits in the form of supports that more likely than not would have allowed Student to remain in the general education classroom and access his/her education. In addition, Student would have received the benefit of peer socialization and modeling while in the general education classroom. Over the course of Student's first two days of kindergarten, he/she was removed from the general education classroom and placed in the sensory room for extended periods of time without access to same age peers and then sent home from school early on three consecutive days. More likely than not, the District's flawed response to Student's outbursts caused, or at the very least exacerbated, his/her dysregulation and aggressive behavior

by failing to use the necessary visual supports, choice options, and established routines identified in Student's IEP. A preponderance of the evidence supports a finding that the District's response to Student's challenging behaviors created an aversion to the school environment at Westside and reinforced Student's negative behaviors by allowing him/her to avoid school by acting out.

As discussed below, Student's outbursts and aggressive behavior over his/her first two days at school were the basis for the District's decision to alter Student's placement and amend his/her IEP. A preponderance of the evidence indicates Student's outbursts and aggressive behavior resulted from the District's failure to properly implement Student's May 2018 IEP. While flawed, the May 2018 IEP still included necessary supports for Student to make a successful transition to kindergarten. Those supports, if properly implemented, more likely than not would have allowed Student to participate in the general education classroom more than 80 percent of the school day. As such, the failure to provide necessary IEP supports to Student over September 4 and 6, 2018 was a material failure to implement Student's IEP that denied Student a FAPE. Because the District fundamentally altered Student's IEP and further abbreviated his/her school day following Student's first week of school and did not offer Student a more appropriate educational plan than that contained in the May 2018 IEP, the District's failure to implement Student's IEP were ongoing throughout the 2018-2019 school year.

B. September 11, 2018 IEP

This order now turns to the seminal event of the parties deteriorating relationship. Following the first week of the 2018-2019 school year, the District convened an IEP meeting to address Student's placement. Parents' complaints encompass the District's decision to call the September 2018 IEP meeting, the composition of that meeting, and the District's refusal to consider their input, as well as the contents of the resulting IEP. Specifically, Parents assert the District impermissibly decided to reduce Student's school day, predetermined his/her placement prior to the meeting, convened the IEP meeting without required team members, altered Student's SDI and supportive services without justification, and ultimately failed to provide Student with an appropriate placement in the LRE.

At hearing, the District presented testimony indicating that the decision to abbreviate Student's school day to no more than two hours per day was made by the IEP team on September 10 and 11, 2018. Further, the District asserted at hearing that it was Parents rather than District personnel who proposed shortening Student's school day. I find that testimony both unpersuasive and in direct contradiction to Parents' testimony, contemporaneous documents, and the District's own IEP meeting notes.

For instance, at hearing the District claims it was Student's inability to tolerate a full day of school in the general education classroom during the first week of school that drove the IEP team's conclusion that he/she lacked the requisite stamina to attend a full day of school. Further, the District asserted that no decision to amend Student's school day was proposed by the District prior to September 10, 2018 following Student unsuccessful first week at school. Those assertions are directly contradicted by text messages sent by Ms. Ferrick, Student's case manager, on September 5, 2018, alluding to an upcoming meeting to be held on September 6, 2018. In those messages, Ms. Ferrick indicated that she and Mr. Newton had contacted the

school psychologist, Mr. Stone, who was responsible for making determinations on behalf of the District regarding reduced school days for disabled students. September 5, 2018 was not a school day for Student. Ms. Ferrick's messages support Parents' contention that the District unilaterally made the decision to reduce Student's school day following his/her first day at school. In response, Mother exchanged several messages with Ms. Ferrick expressing Parents' frustrations regarding Student's experience on the first day of school and the fact that Student was in a completely foreign environment and not placed in a kindergarten class with any of his/her familiar peer from Head Start. Mother also asked if Student was being provided with the necessary supports identified in his/her IEP. Ms. Ferrick's response to Mother's concerns read, "[t]here is a protocol I have to follow. I understand what you are going through. You are not the first family to face this." Ex. S123 at 10. Following that exchange, Ms. Ferrick again communicated with Mother via text message indicating that Mr. Stone would not be able to attend the planned meeting but indicated that Mr. Newton had spoken with Mr. Stone. Ms. Ferrick also advised Mother that, "[i]f you are not happy with the outcome of the meeting you need to talk to the psychologist yourself." S123 at 13. For some unknown reason, the September 6, 2018 meeting did not occur. Nonetheless, the record shows that on the morning of September 7, 2018, Mr. Newton and Ms. Ferrick informed Parents that the District had unilaterally decided to shorten Student's school day to four hours. According to the evidence, Parents were required to pick up Student at 11:00 a.m. each day starting on that date.

In addition, the record demonstrates that, at the September 2018 IEP meeting, Parents vehemently disagreed with the proposition to limit Student's school day and expressed concerns regarding his/her academic and socialization needs. Parents repeatedly expressed their desire to have Student attend a full day of school as well as their belief that insufficient time had passed for the District to make an accurate determination regarding Student's placement. Ex. D65.

As addressed more fully below, a preponderance of the evidence supports Parents' position that the District unilaterally made the decision to amend Student's IEP, particularly with regard to his/her placement, prior to the end of the first week of school. Where the parties' evidence conflicts, this order gives more weight to Parents' evidence with regard to the events surrounding Student's first week of school and the IEP meetings held on September 10 and 11, 2018.

a. Improperly constituted IEP meeting.

The District convened an IEP meeting on September 10 and 11, 2018 to address Student's behavior challenges and the District's decision to reduce his/her school day. The September 10, 2018 meeting was divided into a morning and afternoon session. On the morning of September 10, 2018, the meeting was attended by Parents, Mr. Newton, Mr. Stone, Dr. Copeland, Ms. Ferrick, Ms. Shaner, and Ms. Chance. Ms. Shaner was the only individual at the meeting who was then employed and working as a general education teacher. According to Ms. Ferrick, Mr. Stone was the individual at the meeting with authority to address reduced school day schedules.

On September 7, 2018, the District had unilaterally abbreviated Student's school day from approximately seven and a half to four hours per day. At the IEP meeting on the morning

of September 10, 2018, the District informed Parents that Student's school day would again be reduced, this time from four hours per day to two. The District indicated Parents could decide whether Student would begin at the assigned start time for general education kindergarten or two hours later at approximately 9:30 a.m. The details of Parents' disputes with the District with regard to the September 2018 IEP and placement decision are addressed below. For the purposes of this discussion, it is sufficient to say Parents and the District team members were unable to agree on Student's placement or the specifics of Student's IEP. On that morning, Parents expressed their desire to have Student at school full time. Parents requested time to consider the options, limited as they were, presented by the District. The District agreed to reconvene the IEP meeting at 2:40 p.m. that same day.

Parents again attended the afternoon meeting. However, neither Ms. Shaner nor Mr. Stone attended the second part of the IEP meeting. Ms. Shaner was Student's only general education teacher present at the September 2018 IEP meeting. Mr. Stone was the school psychologist responsible for making determinations regarding abbreviated school days within the District. Parents did not sign a written excusal for either IEP team member.⁴⁴

When the meeting reconvened on the afternoon of September 10, 2018, Parents again tried to convince the District to allow Student to attend school for more than two hours per day. The District refused to consider any option other than a two hour school day for Student and again reiterated that Parents could choose between a 7:30 a.m. start time and a 9:30 a.m. start time. Mr. Newton again asked Parents to choose what time Student's new school schedule would begin. Because Parents were still unable to decide which option was best for Student, they again requested some time to consider the options presented by the District. The District agreed and advised Parents that they would need to notify Mr. Newton of their decision by 8:00 p.m. that evening. Parents did so and the IEP meeting resumed on September 11, 2018 to finalize Student's IEP as well as a new BSP and step-up plan, addressed in detail below.

On September 11, 2018, Mother attended the IEP meeting on behalf of Parents. Ms. Ferrick, Ms. Chance, and Dr. Copeland also attended. Ms. Shaner, Mr. Stone, and Mr. Newton did not attend the IEP meeting on that day. Parents did not sign a written excusal for any of these team members. On that date, District team members presented Mother with a draft IEP dated September 10, 2018 as well as the BSP and step-up plan. Mother signed the September IEP on September 11, 2018. Neither Mr. Stone nor Mr. Newton signed the IEP.

Parents assert that the District failed to convene properly constituted IEP meetings on the afternoon of September 10, 2018 or on September 11, 2018. OAR 581-015-2210⁴⁵ identifies the required IEP team members in Oregon and provides, in part:

(1) School districts must ensure that the IEP Team for each child with a disability includes the following participants:

⁴⁴ At the outset of the meeting on September 10, 2018, Mr. Stone was designated as the District representative. Sometime later, an unidentified individual crossed out Mr. Stone's name and designated Dr. Copeland as the District represented by drawing an arrow on the September 11, 2018 IEP. (Ex. D60 at 2.)

⁴⁵ See also 34 C.F.R. §300.321.

(a) One or both of the child's parents, except as provided in OAR 581-015-2195;

(b) The child where appropriate;

(c) *At least one regular education teacher of the child, if the child is or may be participating in the regular education environment, consistent with section (4) of this rule;*

(d) At least one special education teacher of the child or, if appropriate, at least one special education provider of the child;

(e) *A representative of the school district * * * who is:*

(A) Qualified to provide, or supervise the provision of, specially designed instruction;

(B) Knowledgeable about the general education curriculum;

(C) Knowledgeable about district resources; and

(D) *Authorized to commit district resources and ensure that services set out in the IEP will be provided.*

* * * * *

(g) Other individuals, including related services personnel as appropriate, invited by:

(A) The parent, whom the parent determines to have knowledge or special expertise regarding the child; or

(B) The school district, whom the school district determines to have knowledge or special expertise regarding the child[.]

* * * * *

(3) IEP team attendance:

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

(b) A member of the IEP team described in subsection (1)(c) through (1)(f) may

be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of curriculum or related services, if:

- (A) The parent and school district consent in writing to the excusal; and
 - (B) The member submits, in writing to the parent and the IEP team, input into the development of the IEP before the meeting.
- (4) *The regular education teacher of the child must participate as a member of the IEP team*, to the extent appropriate, in the development, review, and revision of the child's IEP, including assisting in the determination of:
- (a) Supplementary aids and services, program modifications and supports for school personnel that will be provided for the child; and
 - (b) Appropriate positive behavioral interventions and supports, and other strategies for the child.

(Emphasis added.)

The evidence in the record supports Parents' contention that the three meetings held over the course of September 10 and 11, 2018 were all part of the same IEP meeting for Student. The evidence reflects that the purpose of the meeting was to address amendments to Student's educational program including the addition of supports (including a BSP, safety plan, and step-up plan), amendments to his/her SDI, and a change in placement for Student. At the time of that meeting, Student was assigned to the general education kindergarten class taught by Ms. Shaner. In addition, prior to the meeting Ms. Ferrick, on behalf of the District, communicated to Parents that Mr. Stone was the individual responsible for making abbreviated school day determinations on behalf of the District.⁴⁶ Parents attended the September 10 and 11, 2018 IEP meetings with the understanding that Mr. Stone was the designated District representative authorized to make placement determinations on behalf of the District.

The uncontroverted evidence in the record demonstrates that Student's IEP was not finalized at the morning meeting on September 10, 2018 because Parents disagreed with the District's proposal to reduce Student's school day and place him/her in the sensory room away from same age peers for the majority of his/her school day. At the September 10, 2018 meeting, the District proposed the addition of a BSP for Student which contained multiple behavior interventions meant to address Student's aggressive behavior and emotional dysregulation. In addition, the District also proposed adding a step-up plan, designed to monitor Student's

⁴⁶ At the time of those communications, Ms. Ferrick advised Parents that if they disagreed with Mr. Stone's recommendations, conveyed to them by Mr. Newton at an anticipated September 6, 2018 meeting, they would need to speak directly with Mr. Stone on their own. The September 6, 2018 meeting did not occur and Mr. Stone was able to attend the meeting convened on the morning of September 10, 2018. Nothing in the record indicates Mr. Stone's role or authority changed between the time of Ms. Ferrick's statements to Parents and the September 10, 2018 meeting.

aggression and measure when he/she was able to tolerate increases to his/her school schedule. At hearing, Dr. Copeland testified that Student's BSP was contained in multiple documents, including the step-up plan because it also contained behavior interventions for Student. Neither the BSP nor the step-up plan were complete until after the afternoon meeting on September 10, 2018.

Because the purposes of the September 10 and 11, 2018 IEP meetings included the discussion and determination of supplementary aids and services, program modifications, positive behavioral interventions, and other strategies for Student, the District was required to have his/her only general education teacher present for the entirety of the meeting under OAR 581-015-2210(1)(c), and (4) unless Parents and the District agreed to excuse that team member in writing. Parents never agreed to excuse Ms. Shaner from attending the September 10 or 11 meetings. At hearing, the District argued that Mr. Newton was a licensed general education teacher and therefore satisfied the requirements of the rule. That argument is unpersuasive. The language of the relevant rule does not permit the attendance of *any* licensed general education teacher. Instead, the language specifically requires that the team include at least one regular education teacher "*of the child.*" OAR 581-015-2210(1)(c). Ms. Newton was the Principal of Westside. While it is true that he holds a valid Oregon teaching license, according to his testimony, he has never served as a regular education teacher in the District. As such, he was not a regular education teacher of Student at the time of the September 2018 EIP meetings. Because Student was assigned to a regular education kindergarten class, Ms. Shaner was the only regular education teacher at Westside who could satisfy the requirement of the relevant rule. Based on Ms. Shaner's absence, the District failed to ensure all required team members were present at the September 10 and 11, 2018 IEP meetings.

Additionally, Parents object to Mr. Stone's absence from the afternoon meeting on September 10, 2018 as well as the September 11, 2018 meeting. Parents' objections are based on their understanding that Mr. Stone was the District representative authorized to make decisions regarding Student's IEP and to commit District resources as necessary. Based on Ms. Ferrick's statements to Parents regarding Mr. Stone's authority to make placement decisions and the unwillingness of District team members to discuss alternate options in Mr. Stone's absence, I agree with Parents that his/her attendance was required under OAR 581-015-2210(1)(e). There is insufficient evidence in the record to establish that any other team member was authorized to make placement decisions at that meeting. Again, Parents never signed a written agreement to excuse Mr. Stone from the September 2018 EIP meetings.

Parents have demonstrated that the IEP meetings held on the afternoon or September 10 and the morning of September 11, 2018 lacked two required District team members. The next question to be addressed is whether those procedural errors resulted in a denial of FAPE to Student. I conclude that they did. The District convened a September 10, 2018 IEP meeting with the intention of notifying Parents of changes to Student's IEP and placement determination. Unfortunately for the District, Parents did not quickly agree to the unilateral changes proposed by the District. As a result, the meeting took much longer than anticipated and had to be continued twice. The record demonstrates that those continuances were a result of Parents' disagreement with the proposed abbreviation to Student's school day and his/her isolated placement in the sensory room without peer interaction. According to the record, Parents and the

District were still not in agreement at the end of the afternoon meeting on September 10, 2018. The record demonstrates that on the afternoon of September 10, 2018 Parents attempted to convince the IEP team members in attendance to permit Student to attend school longer than two hours per day and advocated for placement in the SLC rather than the sensory room. Parents were entitled to present those concerns and to advocate for a more appropriate placement to Student's entire IEP team.

By omitting two of the required IEP team members, the District deprived Parents of the opportunity to meaningfully participate in the development of Student's IEP and a new placement decision made in September 2018. Parents were deprived of the opportunity to address their concerns both with the designated District representative and with Student's general education teacher and to receive input from those individuals with regard to their concerns. As a result Student's IEP team was deprived of the opportunity to fully consider the concerns raised by Parents with regard to Student's educational program and placement. As discussed more fully below, the resulting IEP more likely than not deprived Student of significant educational benefits in the form of access to the general education classroom and curriculum and socialization with same age peers. A preponderance of the evidence indicates the District's procedural errors denied Student a FAPE during the 2018-2019 school year.

b. Inaccurate present level data

Parents also complain that the District provided incomplete and inaccurate present level data in Student's September 2018 IEP which, according to Parents, deprived them of information necessary to gauge and monitor Student's progress. As a result, Parents assert the District deprived them of the opportunity to meaningfully participate in the development of Student's IEP.

The present levels of academic achievement and functional performance information in the September 2018 IEP was reproduced verbatim from the May 2018 IEP with regard to Student's cognitive, adaptive, sensory processing, gross motor, visual motor, and communication skills. The sufficiency of those present level statements has been addressed previously in this order and will not be taken up again in this analysis. Nothing in the record demonstrates that those present level statements more accurately reflected Student's academic and functional skills after the first week of school than they did in May 2018.

Nonetheless, the September 2018 IEP also contained an updated narrative paragraph dated September 10, 2018. That update bears some discussion in light of Parents' allegation. That updated information regarding Student's behaviors during the first week of school does not match with observations, reports, and testimony from Parents and the general education teacher. Specifically, contrary to the findings in this order, the September 2018 IEP indicates that, during his/her first day of school, Student needed extensive prompting from his/her IA. As addressed above, the District had no IA in the general education classroom for Student. Moreover, Ms. Shaner testified that she, rather than an IA, engaged Student on that date. Additionally, the present level update indicates Student was removed after 45 minutes in the classroom. Ms. Shaner's testimony clearly indicated that Student was at school for approximately two hours and had successfully participated in class and recess prior to the incident for which he/she was

removed. The District's update also indicates that, on the second day Student attended school, he/she entered the classroom threw his/her backpack on the ground and kicked an IA. While that statement is technically correct, it omits critical information regarding events that preceded Student's behavior outbursts. For instance, nothing in the District's updated information addresses the lack of IEP-required visual and sensory supports in the general education classroom, the lack of a dedicated IA to assist Student with transitions between activities (also required by Student's IEP), or the disruption to Student's ingrained routine on the second day of class. Further, it is misleading because it fails to identify the District's response, or lack thereof, to Student's behavior. As a result, the updated present level information exaggerates the nature and spontaneity of Student's emotional dysregulation and aggressive behaviors.

That present level information was used by the IEP team in drafting Student's September 2018 IEP and making a placement determination for him/her. None of Student's IEP team members other than Ms. Shaner were present in the general education classroom on September 4 and 6, 2018. Ms. Shaner was not present for the entirety of the IEP meeting. Notably, Ms. Shaner did not attend the afternoon portion of the September 10, 2018 meeting or the continuation meeting on September 11, 2018 when the draft IEP was presented to Parents. Similarly, Mr. Stone attended only the morning portion of the September 10, 2018 meeting. However, based on the evidence in the record, Ms. Shaner and Mr. Stone both reviewed and signed Student's September 2018 IEP. A preponderance of the evidence demonstrates that the District's inaccurate and incomplete present level information was relied upon, at least in part, by some members of Student's IEP team and yet was unavailable to Parents at the only meeting where all members were present.

The above discussion demonstrates that the District failed to include accurate present level data in Student's September 2018 IEP as required by OAR 581-015-2815(3)(a). Nevertheless, as set forth repeatedly throughout this order, not every procedural violation results in a denial of a FAPE. In this instance, Parents must show that the lack of accurate present level data resulted in a loss of educational opportunity for Student, seriously infringed upon their right to participate in the development of Student's IEP, or resulted in a deprivation of educational benefit to Student. Based on the record before me, I conclude that Parents have met their burden.

The inaccurate present level update deprived the team of antecedent information as well as responsive data necessary for the team to determine the most appropriate educational program for Student. According to the record, Parents were not presented with the district amended IEP during the morning meeting on September 10, 2018. As discussed above, that was the only meeting that was properly constituted with all required IEP team members in attendance. The evidence in the record indicates Parents vehemently disagreed with the district's unilateral decision to abbreviate Student's school day. Parents also made repeated inquiries into the district's use of supports during the first week of school. More likely than not, if presented with updated present level information at the morning Parents would have offered significant input. At the very least Parents would have been provided the opportunity to advocate for more accurate present level data in the IEP. Parents' right to participate meaningfully in the development and enforcement of Student's IEP was also seriously infringed because they were deprived of the opportunity to discuss and challenge this information at a properly convened IEP team meeting.

c. Failure to consider Parents concerns and predetermination of Student's placement.

Next, Parents take issue with the District's refusal to consider any options for Student's educational placement, at the September 2018 IEP meeting, other than allowing him/her to attend school two hours a day in the sensory room. Parents argue that the District's predetermination of Student's placement seriously infringed on their right to meaningfully participate in the development of Student's IEP.

Predetermination is a procedural violation of the IDEA that deprives parents of the opportunity to meaningfully participate in their child's IEP. School districts must ensure that parents are provided an opportunity to participate in each IEP team meeting. 34 C.F.R. §300.322; OARs 581-015-2190(1), and 581-015-2205(1)(b). In addition, a disabled student's placement must be based on his or her IEP. 34 C.F.R. §300.116(b)(2); OAR 581-015-2250(1)(a) through (c). Predetermination of a disabled student's placement can deny him or her a FAPE. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004). According to the Ninth Circuit, "[p]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." *H.B. v. Las Virgenes Unified School Dist.*, 107 LRP 37880, 239 Fed. Appx. 342 (9th Cir. 2007). Similarly, where a school district independently developed a proposed IEP that would place the disabled child in a pre-existing and predetermined program without considering any other options, the court found the school district failed to provide parents a meaningful opportunity to participate in the IEP process. The court reasoned that school districts are required to conduct a meaningful IEP meeting rather than simply holding a *pro forma* meeting. *Target Range*, 960 F.2d at 1485.

Following Student's tumultuous first week of kindergarten, the District convened an IEP team meeting on the morning of Monday, September 10, 2018. On that morning, Parents were informed by the District that Student's school day would be reduced to two hours and during that two hours Student would be placed in the sensory room with an IA where he/she could learn the skills and develop the stamina to tolerate a longer day of instruction. It is undisputed that, on that morning and throughout the two meetings that followed for the development of Student's September 2018 IEP, the District did not present Parents with any options other than two hours per day in the sensory room. Instead, the District presented its amended placement decision to Parents and asked them to select what time Student's school day would begin. Moreover, the uncontested evidence in the record demonstrates that District personnel present at the meeting refused to discuss or consider options proposed by Parents to allow Student to attend the longer day of instruction and obtain socialization with same age peers. Specifically, Parents' requests for a longer school day and/or for placement in the SLC to be with same age peers were dismissed rather than discussed by the IEP team. According to the evidence, each of Parents attempts to discuss alternate placements for Student were met with repeated instructions by Mr. Newton for Parents to select a morning start time for Student's school day. The evidence reflects the only option Parents were presented with at the September 10, 2018 IEP meeting was a single choice between a 7:30 or 9:30 a.m. start to Student's school day.

The District argues that the entire IEP team, including Parents, agreed to Student's abbreviated school day at the September 2018 IEP meetings. Even a cursory review of the record reveals that assertion is simply untrue. In addition, at hearing District witnesses repeatedly asserted that Student lacked the stamina for a full day of general education kindergarten. According to the District witnesses, that determination resulted from staff observations of Student's emotional dysregulation and aggressive behaviors. According to the District, Student's behavioral outbursts each occurred within the first two hours of his/her school day supporting the conclusion that he/she lacked the stamina to attend school beyond two hours. The flawed and incomplete reasoning applied by the District in this instance cannot be overstated. Moreover, based on the record, I find the District's stated reason for selecting two hours per day unpersuasive. Finally, assuming *arguendo* that Student lacked stamina for the general education classroom, that conclusion does not justify the District's predetermination of Student's educational placement and refusal to discuss alternate placement options during the September 2018 IEP meetings. The District's justifications for abbreviating Student's school day and unilaterally altering his/her placement are addressed more fully in Section III C below.

The record in this matter abounds with evidence that, as of September 10 and 11, 2018, Parents disagreed with the District's decision to shorten Student's school day as well as its decision to remove Student from the general education classroom and isolate him/her in the sensory room with an IA for two hours per day. At hearing, District personnel acknowledged that the meeting was extended twice because the team was unable to agree on Student's educational program due to Parents' unwillingness to acquiesce to the District's proposed placement. A review of the meeting notes reflects that, while the meeting was extended twice to allow Parents time to consider which proposed start time was best for Student, the team refused to discuss or consider any options for Student to attend school other than the two hour school day presented by the District.

The record is devoid of any evidence that the IEP team considered any option that may have allowed Student to remain at school for the entirety of the academic day (such as a special education/general education hybrid placement or even full time placement in the special education classroom) that would allow Student to benefit from the non-academic aspects and socialization benefits inherent in being at school with same aged peers. The District's refusal to consider any option for Student's placement other than the predetermined placement presented by the District seriously infringed on Parents' right to meaningfully participate in the development of Student's September 2018 IEP in violation of 34 C.F.R. §300.322; OARs 581-015-2190(1), and 581-015-2205(1)(b) and constitutes a denial of FAPE during the 2018-2019 school year.

d. Increased SDI without additional assessments

Parents also complain that the District unilaterally altered Student's SDI without first conducting any assessments or evaluations of Student. According to the September 2018 IEP, the District increased Student's SDI in the social emotional domain from 60 minutes per week, in the May 2018 IEP, to 60 minutes per day in September 2018. Parents argue that the District was required to conduct appropriate assessments of Student before determining the suitability of any change in SDI.

OAR 581-015-2000 provides definitions proceedings alleging a denial of FAPE in Oregon and provides, 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.

(Emphasis added.)

In this matter, Student was evaluated and found eligible for special education under the category of ASD in April 2018. At that time, Dr. Copeland conducted several assessments of Student’s emotional and cognitive abilities. The results were reviewed and considered by Student’s IEP team in May 2018 when his/her IEP for the 2018-2019 school year was developed. At that time, as with prior years, Student was identified as needing SDI and related services in the social/emotional domain.

At hearing, it was undisputed that the District altered Student’s SDI in the social/emotional domain without first conducting assessments to determine the appropriateness of that increased SDI. Nonetheless, Parents point to no specific legal requirement mandating school districts to conduct a new assessment each time a disabled student’s SDI in an already identified area of need is adjusted at an IEP meeting. To prevail on their claim, Parents must show that the District’s change in Student’s SDI constituted a procedural violation and that violation resulted in a denial of a FAPE to Student. Parents’ task is complicated because, in September 2018, the District increased, rather than decreased, SDI for Student in an undisputed area of need.

In this instance, Parents have not met their burden. Parents did not identify any legal requirement that the District conduct additional assessments before increasing Student’s SDI for

a previously identified need. Moreover, Parents failed to demonstrate the District's decision to increase Student's social/emotional SDI resulted in the loss of educational opportunities for Student, seriously infringed on Parents' opportunity to participate in the development of Student's IEP, or resulted in a deprivation of educational benefit for Student. It may be that an increase in SDI for Student in a single area of need resulted in a reduction either in SDI in one or more other domains or a reduction in general education instruction time. Nonetheless, in this instance the record reflects no such deficiencies caused by the District's increase in social/emotional SDI for Student. Additionally, Parents did not show that the increase in social/emotional SDI was not appropriate to address Student's unique needs. Consequently, the record reflects no denial of FAPE to Student based on the increased SDI.

e. Added BSP and step-up plan without FBA

Parents' complaint also alleges the District failed to conduct an FBA for Student prior to drafting and implementing the September 2018 BSP and step-up plan for Student. The evidence pertaining to this allegation is largely undisputed.

Following Student's challenging first week of kindergarten at Westside, the District convened an IEP meeting on September 10 and 11, 2018 to address changes to Student's educational program in response to aggressive behaviors and outbursts in the general education classroom and the sensory room. In addition to changing Student's placement through an abbreviated school day and assignment to the sensory room, the District added a BSP, school safety plan, and step-up plan to his/her IEP. According to the evidence at hearing, District staff believed those added supports were necessary to keep Student and others safe in the school environment.

Again, in their haste to develop and implement a BSP to address Student's challenging behaviors, the District failed to conduct an FBA. As addressed in detail above, OAR 581-015-2181(2)(a) requires the District to perform an FBA and develop a BSP within 45 days of obtaining parental consent. Similar to its approach in February 2018, the District failed to seek consent for an FBA and simply developed and presented the BSP to Parents in September 2018. Consistent with this order's determination above, the resulting BSP was deficient because the District failed to comply with OAR 581-015-2181(3)(a) by ensuring the BSP was based on an FBA conducted by a qualified person.

As addressed in detail above, the District was required to perform an evaluation, in the form of an FBA, to determine, to the greatest extent possible, the reasons for Student's behavior and *only then* developed a BSP based on the properly conducted FBA to address his/her inappropriate and aggressive behavior. As addressed previously, a BSP, when determined necessary, is a required component of Student's or IEP. The District failed to comply with the procedural requirements of the statute and rules in developing the September 2018 BSP. At hearing, Mr. Newton testified that the District did not conduct an FBA prior to drafting and implementing the September 2018 BSP because the IEP team "did not see the need * * *." Tr. Vol. II at 380:23-381:2. Pursuant to OAR 581-015-2105, it is the District who bears responsibility for identifying and properly evaluating students. The District's approach to FBAs throughout Student's education demonstrate an incomplete understanding of the statutory and

regulatory requirements pertaining to evaluations and assessments under the IDEA. The District's failure to conduct an FBA prior to drafting the September 2018 BSP again denied Parents the right to meaningfully participate in Student's educational program because they were deprived of the right to provide input and, if they disagreed with the results of the District's FBA, the right to seek an independent evaluation during the period in issue. Consequently, Student was deprived of educational benefit in the form of alternate and, more likely than not, more appropriate BSP. According to the record, that deprivation lasted until at least October 15, 2018 when the District finally conducted its first FBA for Student.⁴⁷

C. Failure to provide Student an appropriate placement in the LRE.

Next, Parents alleges the District failed to provide Student with an appropriate placement during relevant portions of the 2018-2019 school year by shortening his/her school day without considering other options and without adequate justification after Student attended less than one week of kindergarten. 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.

(Emphasis added.)

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

⁴⁷ Following the October 2018 FBA, the District completed a new BSP for Student. Nonetheless, a review of that BSP reveals that, in response to the FBA, the District made no alterations to Student's behavior interventions other than adding the option of letting him/her act as a helper in Ms. Ferrick's classroom. This order determines that the District's denied Student a FAPE based on its failure to offer him/her a placement in the least restrictive environment. Because this order also finds that the District did not remedy the denial of FAPE by offering a suitable placement during the entirety of the 2018-2019 school year, it is unnecessary to address the impact of the District's October FBA on the provision of FAPE.

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.

(Emphasis added.)

In May 2018, Student's IEP team met to address Student's transition needs and develop his/her IEP for the 2018-2019 school year. At that time, the IEP team was aware of Student's unique needs and circumstances as a child with autism. In addition, the team was aware of Student's social/emotional, adaptive, and communication challenges. The team was also aware that Student experienced difficulty transitioning between activities that such transitions could trigger episodes of dysregulation for him/her. As evidenced by the addition of a BSP to Student's IFSP in February 2018, the IEP team was also aware that, during periods of dysregulation, Student could act out aggressively and strike adult staff members. Moreover, the record reflects that Student's ECSE team addressed his/her sensory needs with the incoming IEP team. Those needs included the use of clear visual timers and prompts to assist Student in successfully transitioning between activities. The team also addressed Student's need for self-stimulation tools, such as chew toys, to assist him/her in regulating his/her emotional state. In addition, the team addressed Student's need for, as well as the efficacy of, deep pressure holds during periods of dysregulation. The team also addressed the crucial importance of allowing Student to participate in certain ingrained routines as well as the importance of allowing Student to develop his/her own new routines in the kindergarten environment. Student's head start team cautioned IEP team members against disrupting Student's established routines as such disruptions would likely cause a student to melt down or become dysregulated and an increase the likelihood of aggressive behavior from Student. It is against this backdrop that the District's decision to abbreviate Student's day in September 2018 and isolate him/her in the sensory room with an IA must be evaluated.

As discussed previously, the District's decisions cannot be judged in hindsight but instead must be evaluated according to the snapshot rule. In applying the snapshot rule, this tribunal must determine whether the District's actions were reasonable considering the facts known by the District when the decision was made. *See Adams*, 195 F.3d at 1149.

At the time of the September 2018 IEP meeting the District possessed several facts regarding Student's unique needs and behavioral challenges as a child with autism. Among those were Student's difficulties with communication, emotional regulation, and transitions between activities. In addition, the District was aware of Student's need to follow certain routines throughout his/her school day. In fact, the District carried over nearly all of Student's supportive services (with the exception of the February 2018 BSP) in his/her IFSP to the May 2018 IEP.⁴⁸ Those supports included visual timers, advanced warning and preparation for changes in his/her routine, a sensory menu, and a dedicated one-to-one IA to assist Student with all transitions throughout the day. According to Student's May 2018 IEP team, he/she was capable of attending a full day of instruction in the general education classroom with that basic

⁴⁸ The May 2018 IEP was the operative education program at the time Student began attending kindergarten and was available to the team as of September 2018.

floor of supports in place. The District's autism specialist, Dr. Copeland, also attended the May 2018 IEP meeting. As the District's specialist in autism, Dr. Copeland knew, or should have known, that providing a preferred outcome (e.g., leaving school early) in response to a non-preferred behavior (i.e., lashing out aggressively at staff or peers) had a high likelihood of reinforcing non-preferred behavior in the future. Such is the snapshot available for evaluating the District's placement decision.

Under the IDEA, a school district provides FAPE to a student if the offered program, including placement, "(1) addresses the child's unique needs, (2) provides adequate support services so the child can take advantage of the educational opportunities, and (3) is in accord with the [IEP]." *Capistrano Unified Sch. Dist. v. Wartenberg ex rel. Wartenberg*, 59 F.3d 884, 893 (9th Cir. 1995), citing *Rowley*, 458 U.S. at 188-189. In collaboration with the parents, a school district must make a threshold determination as to what special education and related services a disabled student needs and then must determine whether those needs can be met within the matrix of a general education classroom *with the provision of supplementary aids and services*. *Oberti v. Bd. of Educ.*, 801 F.Supp. 1392, 1401 (D.N.J. 1992), *aff'd*, 995 F.2d 1204 (3^d Cir. 1993). Courts have also opined, "[t]he preference or presumption in favor of inclusion will not be rebutted unless the school district shows either that the child's disabilities are so severe that he or she will receive little or no benefit from inclusion; that he or she is 'so disruptive as to significantly impair the education of other children' in the class; or that the cost of providing an inclusive education 'will significantly affect other children in the district.'" *Oberti*, 801 F.Supp. at 1402, citing, *Board of Education, Sacramento City Unified School District v. Holland*, 786 F.Supp. 874, 877-78 (E.D.Cal. 1992). Thus, at hearing, school districts carry the burden of justifying challenged placements. 801 F.Supp at 1402, citing, *Davis v. District of Columbia Board of Education*, 530 F.Supp. 1209, 1211-12 (D.D.C.1982); and *Lascari v. Board of Education of the Ramapo Indian Hills Regional High School District*, 116 N.J. 30, 44, 560 A.2d 1180, 1188 (1989). The Ninth Circuit Court of Appeals has adopted a four-factor balancing test to determine whether a school district's placement of a disabled student meets the requirements of the IDEA. Specifically, that test requires courts to consider (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the disabled student may have] on the teacher and children in the regular class; and (4) the costs of mainstreaming [the disabled student]. *Sacramento City Unified School Dist., Bd. of Educ. v. Rachel H. by and through Holland*, 14 F.3d 1398, 1404 (9th Cir. 1994).

At hearing, the District repeatedly argued that Student's outbursts and violent behavior demonstrated that he/she lacked the stamina to attend a full day of kindergarten in the general education setting. The District argued that Student's dysregulation and aggressive behavior created safety issues for Student, staff, and other children. In addition, the District reasoned that, because he/she could not tolerate a full day of instruction in the general education classroom, Student also lacked the stamina to tolerate a full day of education in the SLC. According to the District's arguments, the only appropriate placement was an abbreviated school day of no more than two hours in the sensory room with an IA. I disagree.

The District's logic with regard to Student's "stamina" appears based on an incorrect or incomplete set of facts. Specifically, while the District's assertion that Student could not tolerate more than two hours in the kindergarten classroom before being ejected for aggressive behavior

find support in the present level information contained in the September 2018 IEP, it was directly contradicted by the determination of Student's IEP and transition team in May 2018 as well as direct testimony of Student's general education teacher Ms. Shaner.

At hearing, Ms. Shaner testified that Student's first morning of kindergarten was largely successful until after morning recess which occurred more than two hours after the start of the school. According to the District's narrative in Student's IEP, Student did not attend class longer than 45 minutes on either day during his/her first week of kindergarten. Moreover, the District's assumptions with regard to Student's stamina appear to disregard any antecedent behavior on the part of District staff or other students in the general education classroom. According to the evidence, each episode of emotional dysregulation and aggressive behavior from Student on September 4 and 6, 2018 was preceded by improper transition strategies employed by District personnel, specifically Ms. Shaner. Further, the District's conclusion regarding Student's stamina does not account for the District's failure to implement any of the required IEP supports to address Student's emotional dysregulation before he/she escalated to aggressive outbursts or after to assist him/her in regulating his/her own behavior once he/she became dysregulated. Similarly, the District's hasty conclusion regarding Student's stamina for the general education classroom fails to consider the negative impact of hours of isolation in the sensory room during that first week or the reinforcing effect that being permitted to leave school early likely had on Student's challenging behaviors.

A stark contradiction to the District's determination regarding Student's stamina for classroom instruction appears in his/her experience at Head Start and with outside providers during the years preceding his/her transition to kindergarten at Westside and following his/her removal from Westside in January 2019. There is abundant evidence in the record demonstrating the successful use of transition and support strategies used in both environments prior and subsequent to the 2018-2019 school year. Importantly, at Student's May 2018 IEP team meeting, Student's Head Start teacher, Ms. Ventura, addressed Student's increasing emotional dysregulation and resulting aggressive behaviors and identified for the team the efficacy of sensory supports such as deep pressure holds/hugs and self-stimulation tools such as chew toys for Student. Ms. Ventura specifically pointed out for the team that those strategies were implemented to successfully keep Student regulated and/or help him/her restore proper emotional regulation and return to classroom activities, rather than removing him/her from class or sending him/her home early. According to the evidence, Student was never sent home early from Head Start despite behaviors determined to be severe enough that the District implemented a BSP for Student.

The record demonstrates that, while Student exhibited challenging behaviors across all environments, supports identified in his/her IEP were effective in assisting Student with transitions and emotional regulation prior to beginning school at Westside. In addition, there is ample evidence in the record reflecting efforts on the part of Head Start staff to impart the importance of sensory supports, such as those found in Student's sensory menu developed by Mr. Crouch and employed with success by Ms. Ventura, on Student's IEP team at Westside. Unfortunately for Student, that advice appears to have fallen on deaf ears during his/her first week of kindergarten.

During the first week of the 2018-2019 school year, Ms. Bertram failed to create a sensory menu for Student until October 2018. As such, Ms. Shaner did not have that resource at her disposal during the first week of kindergarten. Moreover, that required support was not available to Student's IEP team as of September 10 and 11, 2018. At the September meeting, Parents attempted to address the appropriate use of supports and engage the IEP team in a discussion of what supports were used during the first week of school prior to sending Student to the sensory room. District personnel refused to discuss any issues with Parents other than the abbreviated school day and implementation of the District's new written plans to address Student's behaviors.

Under the IDEA, the District was responsible for ensuring Student, as a child with a disability, is educated with children who are not disabled, and special classes, separate schooling, or other removal from the regular educational environment occurred only if the nature or severity of Student's disability was such that education in the general education classroom with the use of supplementary aids and services could not be achieved satisfactorily. It is not enough that the District provided for supplementary aids and services in the IEP. District personnel must also implement the IEP by using those supports to assist Student in accessing his/her education. The District failed to do so on either September 4 or 6, 2018 before removing Student to the sensory room. Accordingly, the District's opinion regarding Student's stamina for the general education environment was not based on the severity of his/her disability in the light of available supports and services. Accordingly, any consideration of the effect Student had on the general education teacher or classroom failed to account for the lack of proper implementation of IEP supports. Therefore, any conclusions drawn by the District in that regard were flawed. The District's failure to adequately implement Student's IEP does not justify an inappropriate placement for Student when his/her behaviors proved to be more than the general education teacher was prepared or willing to tolerate.

In addition, testimony from Mr. Newton and Mr. Carloss draw into question the District's motivation for selecting two hours per day as the limit of Student's stamina. Specifically, at hearing testimony from both witnesses revealed that the District's decision was designed to keep Student on campus for the minimum required hours to satisfy ADM accounting metrics and avoid eligibility for home tutoring under the District's 10-hour per week policy. (*e.g.*, Tr. Vol. XI at 2336:22-2338:7.) Specifically, despite the assertion that Student could not demonstrate sufficient stamina to be at school longer than about 45 minutes without displaying behavior issues during his/her first week of school, the District never proposed a minimal school day of anything less than two hours (*i.e.*, one hour or 90 minutes per day). Rather, the District's chosen placement put Student in the sensory room for twice the amount of time he/she was allegedly able to tolerate school, thereby all but guaranteeing, according to the District's stamina argument, that he/she would experience emotional regulation problems at school. In addition, the District's outright refusal to discuss alternate lengths to Student's school day at the September IEP meeting supports the conclusion that the District designed Student's placement to permit him/her on campus for the least amount of time necessary to be able to count his/her attendance.

In addition, at a follow-up meeting on September 18, 2018, Parents requested a home tutor to supplement Student's instructional time because the District still refused to consider any

option for attendance over two hours per day. Mr. Newton testified at hearing that Parents' request for a home tutor was denied because Student did not qualify for home tutoring under the District's policy. When pressed, Mr. Newton testified that the District does not approve home tutoring for any Student who is receiving at least 10 hours per week of instruction. Mr. Newton reasoned that, according to District policy, 10 hours per week of individual instruction was equivalent to a full week of regular classroom instruction and, therefore, Student would not qualify for supplemental tutoring services. Similarly, Ms. Carloss testified that the 10 hour per week limitation was derived from ADM [Average Daily Membership] accounting which considers the minimum amount of time a student must attend school each week in order for the District to obtain educational funding.

Based on the court opinions addressed above, the District bears the burden of justifying its decision to reduce Student's school day and his/her removal from the general education setting in order to overcome the presumption in favor of inclusion, to the greatest extent possible, in the general education setting. In evaluating the propriety of the District's chosen placement, this tribunal must consider the educational benefits of placing Student in a general education class full-time, the non-academic benefits of that placement, the effect Student might or did have on the teacher and children in the general education class, as well the costs of mainstreaming Student and, based on those considerations. In this instance, the District failed to meet its burden to justify removing Student from the general education environment.

a. Educational benefit of placement in the general education classroom.

The record demonstrates that Student is a bright and inquisitive child who enjoys building. According to the record, Student also enjoys certain academic subjects including math. At hearing, the parties disagreed on the extent to which Student could participate in the general education curriculum during the 2018-2019 school year. Nonetheless, the evidence in the record fails to establish that, when properly regulated and supported, Student is unable to participate in academics with same age peers. To the contrary, the record demonstrates that, while attending Head Start and receiving ECSE services, Student made significant progress with his/her cognitive, adaptive, and communication skills, as well as his/her social/emotional skills. The evidence offered by the District shows Student was able to learn letters, numbers and counting, shapes, colors, sorting, use of classroom tools (scissors, writing implements, etc.), and other academic skills prior to the 2018-2019 school year. In addition, the evidence shows Student was able to successfully learn classroom routines at Head Start when properly supported. As such, this order operates under the assumption that, more likely than not, Student is capable of accessing and participating in the general education curriculum when provided with proper services and supports.

At hearing and throughout the 2018-2019 school year, Parents repeatedly disputed the District's September 2018 placement decision because they were concerned that Student's academic progress would fall behind his/he same age peers. As of May 2018, Student's IEP and transition team members believed he/she could be educated in the general education classroom with same age peers with proper support and selected an appropriate placement that put Student in the general education classroom for at least 80 percent of his/her school day. After two partial days of behavior issues with Student, the Westside IEP team members decided that

determination, made by Parents and educators with multiple years of experience with Student, was in error and decided to remove him/her completely from the general education environment.

Based on the evidence in the record, the educational benefits of placing Student in the general education classroom are very similar if not identical to those experienced by his/her non-disabled peers. When properly supported in the general education setting, Student is capable to engaging in academic work. Even if Student was not able to engage in grade-level academic work in some subjects, he/she is still capable of learning and obtaining academic benefit by advancing from grade to grade with appropriate services and supports. Because this tribunal has rejected the District's proffered arguments regarding Student's stamina, there is little evidence in record demonstrating Student could not engage in academic work with same age peers in the general education environment given the proper instruction and support.

At hearing, the District failed to show Student was incapable of realizing educational benefit from placement in the general education environment, due to his/her disability, when provided with the proper supports. Student's IEP identified several academic AGs and STOs for him/her to work on in within the matrix of the general education classroom. Because the District failed to properly implement the supports required by Student's IEP, it deprived his/her IEP members with valuable information regarding his/her response to behavior interventions that would allow the team to accurately weigh the likely education benefit of mainstreaming Student versus a more restrictive placement. Based on the evidence in the record, Student more likely than not would have received significant education benefit from a placement in the general education environment with appropriate supports and services.

b. Non-academic benefit of placement in the general education environment.

The record also reveals that Student received non-academic benefits from inclusion in a classroom with same age peers. Those benefits included peer modeling, socialization and cooperative play, among others. The District's IFSP progress reports make repeated references to Student's preference for parallel play (playing next to other children without engaging them in cooperative play) as well as indications that he/she was learning to engage in more cooperative play, turn-taking, and sharing of toys. In addition, Student's prior AGs and STOs focused heavily on engaging Student in conversations with teachers and peers, teaching him/her to respond to his/her name, and developing skills for Student to gain attention from adults and peers when seeking assistance. These socialization and communication skills were repeatedly included in Student's IFSPs and IEP.

During the September 2018 IEP meeting, Parents expressed concerns regarding the limited and isolated nature of the District's chosen placement. Parents did not believe Student would obtain socialization benefits in the sensory room with an IA similar to those available through exposure to same age peers in the general education classroom. Based on the record, Student's IEP team agreed with Parents during the May 2018 IEP meeting and rejected a placement that would have placed Student in the general education classroom for less than 20 percent of his/her school day. The team rejected that placement because "[Student] is in need of learning communication and behavior skills in the general education classroom." Ex. D60 at 18. It is evident that Student's IEP team recognized in May 2018 the non-academic benefits of

educating him/her within the matrix of the general education classroom. Considering the limited amount of experience the staff at Westside had with Student prior to deciding to limit his/her school day and remove him/her from the general education classroom, the District's arguments regarding Student perceived stamina do not outweigh the observed benefits of inclusion in the general education classroom.

c. Effect Student may have on the general education teacher and other students.

Based on the District's evidence at hearing, the impact Student had or may have had on the general education teacher and classroom may have received the greatest amount of consideration from the District when determining Student's placement. Unfortunately, as discussed throughout this order, that consideration was flawed because it did not take into account the District's failure to use required supports for Student in the general education classroom and because it was based on an extremely limited amount of observation data regarding Student's behavior.

There is no shortage of evidence in the record demonstrating Student's aggressive and violent tendencies upon dysregulation. The undisputed evidence in the record demonstrates that during the first week of school Student's emotional dysregulation resulted in aggressive outbursts toward Miss Shaner and a classroom IA assigned to another student in the general education setting. The evidence also reflects that on the two occasions that Student was present in the general education classroom for that week his/her aggressive outbursts included throwing items within the classroom in close proximity to other students. Moreover, the evidence demonstrates that, once isolated in the sensory room with Mr. Newton, Student's aggressive behavior escalated and resulted in the District contacting Parents to pick up Student from school early each day.

According to the District, Student's aggressive outbursts and violent behavior created safety concerns both for him/herself, staff, and other students in the general education classroom. It is undisputed that Student's behavior presented disruptions in Shaner's classroom on September 4 and 6, 2018. The District appears to have considered the negative effects of such disruptions on Miss Shaner and other students in her general education classroom. Nonetheless, any such consideration was flawed because it failed to take into account the District's failure to provide and utilize required IEP supports to assist Student with emotional regulation and address challenging behaviors if and when they arose.

A preponderance of the evidence indicates that Student was capable of being educated within the general education classroom during 2018-2019 school year if provided with proper supports and services. A preponderance of the evidence also reflects that the District failed to provide those necessary services and supports in the general education classroom during the first week of Student's kindergarten year. While there is no doubt Student's emotional outbursts and aggressive behavior in the general education classroom was distracting to other students and required Miss Shaner to take time away from the classroom to address Student, the District's responsibility for those emotional outbursts and aggressive behaviors cannot be ignored. Likewise, it would be inappropriate to consider Student's outbursts in the sensory room because those behaviors occurred only after Student was allowed to become dysregulated without being

offered appropriate supports. As such, they had no effect on Student's general education teacher or other children in the general education classroom.

There is no doubt from the record that the kindergarten environment at Westside differed significantly from that at Head Start. For instance, Student's school day increased from four hours at Head Start to seven and one-half hours at Westside. In addition, the class size increased from approximately 12 students at Head Start to more than 20 Students at Westside. Further, the record reflects that kindergarten at Westside involved significantly more transitions between activities than Student's classroom at Head Start. Each of these changes presented potential triggers for Student's challenging behavior and emotional dysregulation. Student's IEP and transition team recognized these potential triggers and attempted to plan accordingly with the inclusion of sensory supports, close adult supervision, and advanced warning/preparation for changes to Student's schedule within the May 2018 IEP. More likely than not, with those supports in place and properly implemented by the District, Student's negative impact on the general education teacher or classroom would have been minimal.

By contrast, placement of Student in the general education classroom could result in numerous positive impacts in the areas of equity, inclusion, and tolerance. As a child with autism, Student observes his/her environment and processes sensory information differently than his/her nondisabled peers. Nonetheless, Student's disability and processing challenges should not lead to the assumption that he/she is capable of achieving less than his/her same age peers. According to the record, Student enjoyed math and excelled in activities such as building or disassembling and reassembling items. The evidence in this case suggests that Student's skills in these areas were equal to or even exceeded his/her same aged nondisabled peers. A placement in the general education classroom provides Student's peers and general education teacher with opportunities to learn about and appreciate his/her strengths as well as challenges.

d. Costs of mainstreaming Student.

The final consideration in determining the appropriateness of the District's chosen placement is the cost of mainstreaming Student in the general education setting. In May 2018, the IEP team identified several direct in consultation supports, SDI, and related services necessary for Student to participate in his/her educational program. At that time, the District did not identify that any of the supports or services in Student's IEP were cost prohibitive. Those supports included the provision of sensory items as well as a one-to-one IA to assist Student throughout the day in the general education classroom. Alterations to Student's IEP in September 2018 did not significantly alter the substance of Student's required services and supports. Rather, the only notable cost difference between Student's May 2018 placement and that selected by the District in September 2018 would likely have been the number of hours for which Student's IA was employed.

At hearing, the District did not argue or present evidence indicating the costs of educating Student within the matrix of the general education classroom was either cost prohibitive or more costly than placing Student with a full time IA in the sensory room. A preponderance of the evidence indicates the cost of mainstreaming Student was not significantly greater than the costs associated with the September 2018 placement selected by the District. As such, this factor

weighs in favor of a placement in the general education classroom to the greatest extent possible.

At hearing, the District failed to provide any evidence that Student's disabilities generally, or his/her increased support needs specifically, were so severe that he/she would receive little or no benefit from inclusion in a full day program, whether in the general or special education settings. The overwhelming weight of the evidence indicates that District staff failed to consider concerns expressed by Parents and ECSE staff regarding Student's behavior challenges and triggers. As a result, District staff were simply unprepared to address Student's unique needs as a child with autism. The District failed to put forth evidence sufficient to justify the placement decisions in the September 2018 IEP. Thus, the District failed to establish Student could not be educated within the general education classroom setting with the provision of supplementary aids and services identified in his/her May 2018 IEP. The District failed to offer Student a placement in the LRE during the 2018-2019 school year and therefore denied him/her a FAPE during the relevant portions of that year; *to wit*, September 10, 2018 through the end of the academic year in June 2018 despite Parents' removal of Student from the District's kindergarten program in January.

D. Step-up plan and bi-weekly meetings.

At the September 2018 IEP meeting, the District implemented a step-up plan that identified criteria necessary to increase Student's school day. According to the step-up plan, the team would meet every two weeks to review Student's progress toward controlling physical aggression and other undesirable behaviors and determine whether his/her school day could be increased. The step-up plan also indicated that, if Student failed to make progress during the preceding two weeks, the team would make changes to the plan accordingly.

At hearing, the parties spent a significant amount of time addressing each individual step-up plan and biweekly meeting either to identify Student's lack of progress during the 2018-2019 school year or the District's lack of response to Student's continued behavioral challenges during that period. The step-up plan was developed and implemented as part of the district's inappropriate placement addressed above. Nonetheless, a brief discussion of the step up plan meetings is appropriate because of they reveal Parents' ongoing frustration with Student's placement as well as the district continued denial of FAPE during the 2018-2019 school year.

Between September 10, 2018 and January 7, 2019, District convened nine separate step up plan meetings. Out of those nine meetings, Student received three incremental increases of 30 minutes each. The District did not decide to increase Student's time at school for the first time under the step-up plan until its fifth meeting held on November 5, 2018. Student did not receive his/her next increase until December 13, 2018. The District increased Student's time at school for a third and final time following his/her return from winter break on January 7, 2019. Following the final increase, student attended school for a total of three and one-half hours per day.

Parents attended each of the step up plan meetings with Dr. Copeland and other District staff members. In each of those meetings, Parents repeatedly expressed their frustration with Student's lack of progress in the general education environment and toward his/her IEP goals.

Parents also continued to express their belief that the lack of peer interaction and isolation in the sensory room with Ms. Rae were reinforcing Student's undesirable behaviors and emotional dysregulation. Each time Parents raised these concerns, District personnel reiterated that Student would not be allowed to increase his/her time at school until he/she met the protocol or criteria outlined in the step-up plan.

On October 15, 2018, Parents met with District personnel for a step up plan meeting as well as an IEP meeting requested by Parents. Parents had requested Student's IA, Ms. Rae, be invited to the meeting because she was the individual who worked most directly with Student. The District refused Parents' request. Parents expressed concerns that Student would not be allowed to attend a full day of school by the end of the academic year. Father was upset about the lack of progress in Student's education and the accumulation of missed educational time imposed by the abbreviated day. At one point, Ms. Shaner's frustrations apparently got the better of her and she asked Parents why they chose to send Student to Westside instead of Student's neighborhood school, May Street. Father responded by indicating that Parents had asked for Student to attend May Street, but the District denied that request. At the meeting, the District elected to make no changes to Student's IEP and refused to increase his/her time at school.

On October 22, 2018, Parents met with the District to review Student's progress on the step up plan. At that time, the District determined Student's time at school would not be increased due to a lack of progress. Parents suggested additional strategies for assisting Student and informed the District that Student had been participating in ABA therapy through a local community agency. Parents expressed their belief that ABA was helping Student and requested similar services be provided at Westside. In response, Dr. Copeland informed Parents that the District did not offer ABA and expressed her belief that ABA therapy was only done in the home. Also during that meeting, the District presented the first FBA completed for Student along with what purported to be a revised BSP for Student. That BSP offered no new information or strategies from the old BSP other than the suggestion that Student be allowed to act as a classroom helper.

The evidence in the record pertaining to the step-up plan meetings demonstrates that the District failed to remedy its inappropriate placement determination at any time prior to Parents' January 24, 2019 decision to remove Student from school. Accordingly, the district continued to deny Student a FAPE throughout that period (September through January).

E. Use of restraint and seclusion.

Parents also argue the District improperly restrained Student on multiple occasions during the 2018-2019 school year. Parents' Post-Hearing Brief at 57-58. ORS 339.285 provides definitions applicable to the provisions governing the use of restraint and/or seclusion in public education programs and provides, in part:

As used in ORS 339.285 to 339.303:

(1) "Public education program" means a program in this state that:

(a) Is for students in early childhood education, elementary school or secondary school;

(b) Is under the jurisdiction of a school district, an education service district or another educational institution or program; and

(c) Receives, or serves students who receive, support in any form from any program supported, directly or indirectly, with funds appropriated to the Department of Education.

(2)(a) “Restraint” means the restriction of a student’s actions or movements by holding the student *or* using pressure or other means.

(b) “Restraint” does not include:

(A) Holding a student’s hand or arm to escort the student safely and without the use of force from one area to another;

(B) Assisting a student to complete a task if the student does not resist the physical contact; or

(C) Providing reasonable intervention with the minimal exertion of force necessary if the intervention does not include a restraint prohibited under ORS 339.288 and the intervention is necessary to:

* * * * *

(ii) Interrupt a student’s impulsive behavior that threatens the student’s immediate safety, including running in front of a vehicle or climbing on unsafe structures or objects; or

(iii) Effectively protect oneself or another from an assault, injury or sexual contact with the minimum physical contact necessary for protection.

(3)(a) “Seclusion” means the involuntary confinement of a student *alone* in a room from which the student is physically prevented from leaving.

(b) “Seclusion” does not include the removal of a student for a short period of time to provide the student with an opportunity to regain self-control if the student is in a setting from which the student is not physically prevented from leaving.

(4) “Serious bodily injury” means any significant impairment of the physical condition of a person, as determined by qualified medical personnel, whether self-inflicted or inflicted by someone else

In addition, ORS 339.288 identifies prohibitions on the use of certain restraints in public education programs and provides, in part:

(1) The use of the following types of restraint on a student in a public education program is prohibited:

* * * * *

(e) Any restraint that involves the intentional and nonincidental use of a solid object, including a wall or the floor, to impede a student's movement, unless the restraint is necessary to prevent an imminent life-threatening injury or to gain control of a weapon.

Finally, OAR 581-021-0570 identifies the complaint procedure outlined by the Oregon Department of Education with regard to improper use of restraint and or seclusion and provides, in part:

(1) An organization or an individual may file a complaint alleging that a public education program is violating or has violated a provision of ORS 339.285 to 339.303 or OAR 581-021-0550 to 581-021-0566. If the public education program is a school district, the organization or individual and the school district shall follow the school district's complaint procedure established under OAR 581-022-2370.

(2) A complainant may appeal a final decision by a school district to the Department of Education as provided in OAR 581-002-0001 to OAR 581-002-0023 by:

(a) Mailing a complaint appeal to the Department of Education, or

(b) Submitting a complaint appeal through the Department of Education's website.

In their closing brief, Parents argue that the District engaged in impermissible use of restraint and failed to follow appropriate restraint reporting procedures. As an example, Parents cite to an incident where Father arrived at school and observed Dr. Copeland and Ms. Rae walking Student to the bus by holding his/her arms while Student protested and attempted to go to recess. Without addressing the merits of Parents' claims, I find that this due process proceeding under the provisions of the IDEA is not the proper mechanism for raising such a claim. As such, I believe addressing Parents' complaint of improper restraint is beyond the scope of authority vested in this tribunal by the IDEA and its implementing regulations as well as the corresponding state statutes and administrative rules.

As Parents acknowledge in their closing brief, the language of the statute and rules above provide no independent relief under the IDEA or its corresponding regulation or state administrative rules. Rather, the statute outlines a complaint procedure, independent of the IDEA, first addressed to the offending school district with an appeal directly to the Oregon

Department of Education. The statute implementing administrative rules contains no right to a hearing before the OAH. To create such a right using the due process provisions of the IDEA would obviate the complaint procedures outlined above and create a hearing right where the legislature expressed no intent to do so. Such is beyond the authority of this tribunal.

Accordingly, I find there is no relief this tribunal can grant under the relevant statute and administrative rules. Therefore, this order does not address the merits of Parents' claim.

F. The District did not provide Parents with false information or inaccurate records

Next, Parents argue the District provided them with false information (Post-Hearing Brief at 58) and inaccurate records (Post-Hearing Brief at 60) resulting in a denial of Parents' opportunity to meaningfully participate in the development and implementation of Student's IEP.

Parents' claims of false information from the District center on one or more incidents in which Student was allegedly sent home early due to behavior. Parents argue that the District's failure to notify Parents that Student was being released from school earlier than his/her scheduled end deprived them of information regarding Student's behavior. In this instance, I disagree.

The record at hearing demonstrates only anecdotal evidence of such instances and, in fact, identifies only one specific incident. Ex. S161. According to the record, on that date Ms. Whitecotton brought Student home several minutes before his/her scheduled release time. When asked why by Parents, Ms. Whitecotton responded that staff sometimes brought Student to the bus earlier than 11:00 (his/her scheduled release time on the date in question). Ms. Whitecotton made no reference to staff communicating behavioral issues on that date or of any such behaviors observed by her. In addition, the record is devoid of any other reference to Student being released earlier without notification to the Parents. Accordingly, I find no basis to determine that Ms. Whitecotton's third-hand account of why Student was released early supports the conclusion that the District deliberately withheld information or provided false information regarding Student's behavior at school.

Parents' claims pertaining to inaccurate records focus on Student's daily behavior logs developed by Dr. Copeland and Ms. Ferrick to track Student's aggressive behavior. Parents assert that those behavior logs were inconsistent, incomplete, and at times contradictory. While I agree with Parents' characterization of many of the logs introduced into the record, I cannot agree that the District's use of those logs constitutes a procedural or substantive violation of the IDEA.

As an initial matter, it is important to note that the behavior logs referred to throughout this proceeding were a tool implemented by the District to collect data related to Student's step-up plan. As discussed above, that plan was improperly implemented and therefore the data collection logs supporting the use of that plan are largely irrelevant to these proceedings. Moreover, the IDEA provides no obligation for a school district to provide parents of a disabled student with daily progress reporting or data collection information. Rather, as discussed throughout this order, the District's obligations related to progress reporting are largely self-

imposed during the creation of a student's IEP. Here, Student's IEP created no daily or weekly reporting obligation.

In addition, a review of the behavior logs used during the period in issue demonstrates that they are essentially useless to anyone outside the District. *See* Ex. D104. This is because those logs tracked a limited universe of information (occurrences of physical aggression) and failed to account for other information (triggers for the aggressive behavior or interventions used to redirect Student). Further, the manner in which the District chose to record that data, by using tic marks or "+" symbols provides only quantitative data regarding the number of occurrences. Importantly, those logs largely omit any narrative information pertaining to what happened prior to, during, or after Student's challenging behaviors.

I find the behavior logs used by the District were nothing more than data tracking tools used by Student's team to attempt to catalog his/her challenging behaviors and were intended to be used by personnel at Westside. The District's provision of those documents to Parents were provided as a courtesy by the District. Therefore, the lack of consistency or qualitative value in those documents does not constitute a violation of the IDEA because those documents were not necessary for Parents to meaningfully participate in the development or implementation of Student's IEP.

G. January 2019 behavior incidents and removal from school.

Between September 11, 2018 and January 2019, Student continued to attend Westside on an abbreviated schedule according to the placement imposed by the District. As addressed above, Student's school day was increased at three of the nine step-up meetings held during that period and by January 2019 Student was attending school for a total of three and one-half hours per day. On January 7, 2019, following winter break, the District granted what would be the final increase in Student's school day for the 2018-2019 school year. At that time, the District reported to Parents that the prior two weeks had gone very well with regard to Student's behaviors. In addition, beginning in early January 2019, Student began to return to the general education kindergarten class for math instruction. Nonetheless, Student remained isolated in the sensory room with Ms. Rae for the majority of his/her day. Despite the addition of a BSP to Student's IEP, Ms. Shaner was not provided a copy of the BSP or any training on its implementation prior to Student returning to her classroom for math.

In late January 2019, Student experienced three consecutive days of challenging behaviors that caused concern for Parents. On January 22, 2019, Student engaged in physical aggression toward a peer who took a toy that Student wanted while in the general education class. On that same date, Student lashed out aggressively toward an adult staff member who attempted to intervene in the altercation. According to the District, the incident lasted approximately one minute. Later that same day, Student resisted returning to class after lunchtime recess. Student hit and kicked an adult staff member who tried to encourage him/her to return to class. Student was placed in the sensory room. After approximately 15 minutes, Student was able to return to a properly regulated state. Nonetheless, Student was not allowed to return to the general education class. Instead, Student remained in the sensory room for the remainder of his/her school day. The following day, at approximately 9:30 a.m., Student refused

to clean up a project he/she was working on and transition to a scheduled academic task. On that occasion, Student began throwing toys and behaving aggressively toward adult staff. Mr. Ferrick called Mr. Newton to come to the sensory room with Student. Mr. Newton called Parents at 9:55 and asked them to pick up Student from school. Finally, at about 8:45 a.m. on January 24, 2019, Student hit and kicked an adult staff member during circle time in the general education classroom. Parents were called at 8:50 a.m. to pick Student up from school. According to the record, Student was not offered behavior interventions or supports to help him/her address the episode of dysregulation.

In response to several days of behavior issues, Parents reached out to the District on January 24, 2019 via email. In that email, Father expressed his concerns that Student was experiencing renewed behavior outbursts without any triggers identified by the District. Parents advised the District that they would be keeping Student home for a few days to allow his/her IEP team to come up with a plan to address the recent behavior outbursts and identify triggers for Student's undesirable behavior. Parents requested a written plan as soon as possible so that they could return Student to school and resume his/her education. In response, Mr. Newton sent Parents an email indicating the District was prepared to implement Student's IEP and BSP as they were written. Mr. Newton also communicated his belief that Student was making progress toward his/her IEP goals as of that date.

Parents disagreed with the District's position and each responded to Mr. Newton's email independently on January 25, 2019. Father's email expressed his belief that Student's current IEP, including the step-up plan and BSP, were not working because the District was again having to call Parents daily to pick up Student early from school due to behavior issues. Father expressed concerns that something (either personnel or environmental) had changed resulting in an increase in dysregulation and behavior challenges for Student. Father asked for clarification from Mr. Newton on how the District intended to respond to address the recent uptick in Student's behavior incidents.

Mother's response on that same date was more direct and revealed Parents continued frustration with the District's chosen response to Student's challenges. Mother expressed her belief that Student was being rewarded to acting out as well as her concern that the District's response of sending him/her home early was reinforcing Student's negative behaviors. Mother also expressed her opinion that the continued isolation in the sensory room for the majority of Student's day, with only brief peer interactions, was contributing to his/her emotional dysregulation and aggressive outbursts. Mother communicated to the District her belief that being returned to the sensory room after being allowed to interact with peers in the general education classroom and recess was increasing Student's aversive response to school. At that time, Mother also expressed her frustration with the inconsistent progress observed under the District's chosen plan while outside providers were consistently seeing improvement in Student's social and emotional responses. Finally, Mother expressed her confusion regarding why the District's expert in autism was unable to come up with a plan to meet Student's needs in school. Mother asked Mr. Newton to notify Parents once the District had a plan in writing to address the recent behavior changes in Student. Mother advised Mr. Newton that Parents would be keeping Student home in order to provide supplemental learning until the District developed the plan Parents requested. Mr. Newton responded on January 28, 2019 by sending Parent a

stand-ready letter reiterating the District's willingness to implement Student's IEP as written. Parents did not return Student to school in the District after January 24, 2019.

Between January and April 2019, following their removal of Student from Westside, Parents attempted to supplement Student's education using educational materials they had purchased. In mid-April, 2019, Parents began the process of enrolling Student in a private institution, Horizon Christian School. Student attended Horizon for about one hour per day between April 15 and May 3, 2019. In May 2019, Student also began attending an art class at Horizon on Tuesdays and Thursdays. Student continued to attend Horizon under this limited schedule through the end of the 2018-2019 school year.

The District did not convene an IEP meeting for Student between January 24, 2019 and March 8, 2019. Similarly, during that period, the District did not offer any placement for Student other than the abbreviated school day in the sensory room. As discussed above, that placement denied Student a FAPE.

H. March 2019 IEP.

Parents next objected to the District's March 2019 IEP because they allege the program offered by the District impermissibly removed necessary supports and services and failed to offer Student a placement in the least restrictive environment. As such, according to Parents, the March 2019 IEP failed to offer Student a FAPE.

On March 8, 2019, the District convened an IEP meeting for Student. Father attended the meeting along with Ms. Bertram, Ms. Shaner, Ms. Ferrick, Ms. Carloss, Dr. Copeland, Ms. Chance, and Mr. Newton. At that time, the team reviewed Student's progress prior to January 24, 2019. Dr. Copeland asked about Parents' concerns, to which Father replied that their concerns had been shared previously. At that meeting, the District provided Father with a copy of Student's draft March 8, 2019 IEP, the step-up plan, and BSP. Father advised the District team members that he would like to review with Mother and Ms. Ferrick asked him to contact Mr. Newton after Parents had a chance to review the information so the District could schedule a follow up IEP meeting. Upon reviewing the proposed IEP, Parents determined that it maintained the objectionable placement in the sensory room on the abbreviated schedule. In addition, Parents found the IEP deficient because it removed necessary supports and services. Parents rejected the March 2019 IEP because they believed it failed to offer Student a FAPE. I agree.

The record reveals that, in the March 2019 IEP, the District made several unilateral changes to Student's IEP including the removal of social stories, updated daily schedules, and warnings, preparation, and reminders for change in routine previously deemed necessary accommodations for Student. In addition, Student's previous accommodations for providing built-in choice, and requiring the use of clear, direct, concise language when communicating with Student were removed by the District. The District also removed Student's sensory menu, adult support for transitions, and CPI trained one-to-one IA from the IEP. Moreover, the District removed Student's direct PT and OT consultation services and school safety plan from the IEP.

In addition, the District made several alterations to Student's AGs and STOs in the May

2019 IEP. Those changes included adding new communication and visual motor AGs as well as math and language arts AGs and STOs. The District also added SDI in the areas of math and language arts without any indication that Student needed SDI in those subject areas. The District also reduced Student's fine/visual motor SDI from 60 minutes per week to 10 minutes per week and reduced his/her social/emotional SDI from 60 minutes per day to 60 minutes per week. Moreover, the BSP provided with the March 2019 IEP removed deep pressure holds for Student to help him/her regulate behavior.

At hearing, District staff could not provide any explanation for the changes to Student's AGs and STOs. With regard to the removal of accommodations from Student's March 2019 IEP, Student's case manager, Ms. Ferrick, testified that she believed Student would be assigned to her classroom and she considered the removed accommodations to be standard in her class and therefore unnecessary to include in the IEP.

Because the March 2019 IEP continued to deny Student an appropriate placement in the LRE, the District failed to offer Student a FAPE through that proposed program. In addition, the unilateral changes and removal of supports and accommodations previously determined necessary for Student, without supporting data, only served to reduce the appropriateness of the educational program offered by the District. Moreover, Ms. Ferrick's testimony at hearing regarding the use of standard accommodations minimizes the individual nature of the proposed educational program. Importantly, the omission of necessary accommodations violates the requirements of OAR 581-015-2200(1). In addition, the District failed to demonstrate that the proposed changes were responsive to Student's needs resulting from his/her disability. Finally, the District continued to disregard concerns repeatedly expressed by Parents regarding Student's lack of academic instruction and peer socialization

The District failed to offer Student an educational program, including placement in the least restrictive environment, that provided a FAPE between September 10, 2018 and the end of the period in issue.

IV. Remedies requested.

As set forth throughout this order, the District engaged in systematic procedural errors that denied Student a FAPE during the period in issue. In addition, this order identifies multiple substantive violations of the IDEA that resulted in a denial of FAPE during the period in issue. Parents seek several remedies for these violations including compensatory education, evaluations of Student in all areas of suspected disability, a facilitated IEP, training for District staff, reimbursement for educational expenses, and reimbursement for attorney's fees and costs associated with bringing this due process action. As a result of the District's failure to comply with the procedural and substantive requirements of the IDEA, Student has been denied educational opportunities and has been deprived of educational benefit for which he/she is entitled to compensation as addressed below.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. 20 U.S.C. § 1415(i)(1)(C)(iii); *see School Committee of the Town of Burlington, Massachusetts v. Dept. of Education*, 471 U.S. 359, 369

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

In this case, Parents appear to have been forthcoming with information and have participated in Student's IEP process to the greatest extent possible even when they were unable to participate together. Parents were persistent and diligent in expressing concerns regarding Student's placement and lack of progress and open to discussion any available options with the District. Parents routinely attempted to engage the District in discussions with providers at Head Start as well as Student's private providers in order to find strategies and solutions for Student's in-school challenges. Parent has not concealed any information requested by the District. Nor have Parents ever refused special education or related services for Student during the period in issue. The District, by contrast, repeatedly infringed upon Parents' right to participate in the development and enforcement of Student's IEP and repeatedly discouraged Parents from pursuing eligibility and/or services for Student, denied supportive and other services (tutoring, ABA therapy), and failed to properly implement Student's IEP. Moreover, the District routinely adopted a response to Student's behavior challenges that, more likely than not, reinforced his/her negative behaviors.

A. *Compensatory education.*

Under the IDEA's equitable relief provision, compensatory education services can be awarded as appropriate to remedy a denial of FAPE by a school district. 20 U.S.C. §1415(i)(2)(C)(iii) (the court shall grant such relief as the court determines appropriate based on a preponderance of the evidence). *Eugene Sch. Dist.*, 115 LRP 22900 (SEA OR 2015). Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F3d 1489, 1496-97 (9th Cir.1994); see also *Park*, 464 F3d 1025 (9th Cir. 2006).

As set forth throughout this order, to be appropriately educated within the meaning of the IDEA, a school district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F* 137 S.Ct. at 999 (2017). Where a school district "knows or should know that a child has an inappropriate IEP or is not receiving more than a *de minimis* educational benefit [it] must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3rd Cir.), cert. denied, 519 U.S. 866 (1996). Here, the District's special education teachers, who also served as Student's case managers, knew that Student's IEPs did not contain appropriate AGs and STOs and lacked

appropriate baseline data on most of the stated AGs necessary to allow Parent to participate in the implementation and enforcement of Student's IEPs. Further, Student's special education teacher for both fourth and fifth grades spent little or no time delivering SDI to Student. Accordingly, the District is required to provide compensatory education for those periods.

In addition, the Ninth Circuit has recently reiterated that procedural violations may justify an award of compensatory education. In addressing a school district's procedural violations that resulted in a deficient IEP, the Ninth Circuit stated, "[t]hese procedural violations deprived [the parent] of her right to participate in the IEP process and made it impossible for her to enforce the IEP and evaluate whether the services [the student] received were adequate. At the very least, plaintiffs are entitled to have the District draft a proper IEP and receive compensatory education to place [the student] in the same position [he] would have occupied but for the school district's violations of [the] IDEA." *Antelope Valley*, 858 F.3d at 1201, citing *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011)(internal citations omitted). In this matter, Parents were repeatedly denied the opportunity to participate meaningfully in the IEP formulation and enforcement processes when the District refused to consider concerns raised by Parents, routinely carried over present level data and AGs/STOs in Student's IFSPs and IEPs, failed to provide appropriate progress reports to Parents, and unilaterally predetermined Student's placement.

In this case, Student was denied a FAPE during the entirety of the period in issue. Nonetheless, Student is not entitled to compensatory education for the entirety of that period because the record fails to clearly establish a deprivation compensable, or calculable, during the 2016-2017 or 2017-2018 school years while Student attended Head Start. That is not to say that the District's denial of FAPE is not compensable during those years. Rather, because the record is devoid of any evidence showing a quantifiable deprivation of education or services during those years, this order does not award compensatory education for the denial of FAPE in the 2016-2017 or 2017-2018 school years. Based on deficient IEPs and inappropriate placement that failed to offer placement in the LRE, Student was denied appropriate SDI and related services tailored to his/her unique needs and in light of his/her circumstances. As such, the District denied Student a FAPE and must provide compensatory education to "place [the student] in the same position [he/she] would have occupied but for the school district's violations of [the] IDEA." 858 F.3d at 1201. Student is entitled to compensatory education to make up for the denial of FAPE the entirety of the 2018-2019 school year.

Calculation of the amount of hours necessary to place Student in the same position he/she would have occupied but for the District's violations is complicated by to the extensive deprivation coupled with inadequate evidence in the record regarding Student's current ability to tolerate instruction beyond the typical school day. According to the evidence in the record, Student was deprived of a FAPE from September 2018 through about mid-June 2019. Accounting for non-instruction days (weekends, holidays, winter and spring breaks), this order assumes approximately 180 instruction days for that period. This order also assumes a typical kindergarten school day does not include instruction for a full seven and one-half hours. Rather, this order applies a modest estimate of five hours of instruction per school day in kindergarten. Multiplying the number of instructional days by the hours of instruction per day results in the conclusion that Student was deprived approximately 900 hours of instruction during the 2018-

2019 school year (180 x 5 = 900). Broken down further into equivalent minutes reveals Student is due approximately 54,000 minutes of education (900 x 60 = 54,000). Of those 54,000 minutes, Student was deprived 4,680 minutes of SDI during the 2018-2019 school year.⁴⁹ In addition, Student was deprived of 540 total minutes of related services in PT, OT, and ASD. Accordingly, Student is entitled to 54,000 minutes of compensatory education, 5,220 of which include SDI and related services.

The District is responsible for delivering the above compensatory education beginning with the start of the 2020-2021 school year. Compensatory education must be delivered before the start of the 2021-2022 school year. The District shall distribute the compensatory education appropriately across all calendar months, including summer months between those two school years. This schedule may be extended for a reasonable period to accommodate Student's tolerance so long as Parents are in agreement with the proposed extension. The distribution of Student's compensatory education should be addressed as part of the facilitated IEP meeting ordered below.

B. Evaluations in all areas of suspected disability.

Next, Parents ask this tribunal to order the District to conduct appropriate evaluations of Student in all areas of suspected disability, including assessing Student's needs in occupational therapy, functional behavior assessment, behavior support plan, Applied Behavior Analysis, cognitive skills, social/emotional skills, adult support, classroom/school skills, and communication. Parents' list is a bit perplexing in light of the due process complaint and the evidence at hearing, which fail to allege or demonstrate deficiencies with the District's assessments. Other elements in Parents' list simply fall outside the areas appropriate for evaluation. For instance, it is unclear what a BSP evaluation would entail as a BSP is a supportive service based on an FBA. Moreover, ABA is a service provided to disabled children, rather than an area of suspected disability. It is unclear how the District would evaluate Student for eligibility for ABA, other than to evaluate Student under a disability category for which ABA is beneficial, such as ASD. The District previously evaluated and found Student eligible under the category of ASD. ABA is a methodology that a District may or may not choose to utilize.

As addressed in detail above, the District had an obligation to evaluate Student in all areas of suspected disability under the IDEA. As a part of that obligation, the District was required to evaluate and assess Student's needs including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. OAR 251-015-2110(4)(c). According to the evidence, the District has fulfilled its obligation, albeit belatedly, to evaluate Student in all areas of suspected disability.

Nonetheless, as identified above, an FBA conducted for the purposes of developing a BSP is also an evaluation. Student's need for a BSP is addressed throughout this order. According to the evidence, the only BSP based on an FBA was drafted in October 2018. Student has not attended Westside, or any school in the District, since January 2019. Between that time

⁴⁹ 4680 minutes of SDI was calculated by converting Student's weekly minutes per week to the yearly equivalent and totaling the SDI for visual motor, communication, and behavior/social/emotional identified in the May 2018 IEP.

and the date of hearing, Student has engaged in ABA therapy with private providers. As such, Student's behavior challenges and triggers have likely changed significantly since the District's FBA. Therefore, the District is ordered to conduct an FBA to determine the extent of and current triggers for Student's aggressive behaviors and to draft an appropriate BSP to assist him/her in controlling such outbursts. That FBA must be conducted within 15 school days of this order unless Parents agree to extend that time.

C. Facilitated IEP.

Next, Parents ask this tribunal to order a facilitated IEP meeting to develop an appropriate IEP with accurate and adequate present level information necessary to allow them to participate in the development and enforcement of Student's IEP. Based on the record, none of Student's IFSPs/IEPs during the period in issue have been appropriate for Student under the IDEA and the FAPE standard set forth by the Court in *Andrew F.* In each instance, the District has failed to develop an IFSP/IEP that was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances. As addressed throughout this order, the District failed to include accurate baseline data related to Student's present levels of academic and functional performance or related to his/her progress toward the AGs and STOs in his/her IFSPs and IEPs. District also failed to provide appropriate SDI to Student during the 2018-2019 school year.

The District is ordered to convene an independently facilitated IEP meeting, within 45 days of this order, to draft an appropriate IEP, with SDI and related services, for Student in all areas appropriate for Student's needs, unless Parents agrees in writing to extend the IEP meeting to a later date. The facilitator shall be one acceptable to both parties and shall be paid by the District. If the parties are unable to agree on a facilitator, each party shall retain their preferred facilitator, at District expense, to meet solely for the purposes of selecting a neutral third party facilitator.

In addition, the evidence in the record demonstrates that Student was provided an inappropriate placement during the 2018-2019 school year because the District failed to consider educating him/her in the general education environment to the maximum extent possible. The District's arbitrary and capricious selection of two hours per day for Student's placement indicates that District personnel failed to consider Student's placement according to the factors established by the Ninth Circuit in *Rachel H.* In addition, the District's decision to relegate Student to an isolated sensory room, accompanied by a single adult IA, with little to no peer interaction strongly suggests that the District was far more concerned with minimizing disruptions caused by Student's behavior and less focused on educating Student. Accordingly, at the facilitated IEP meeting ordered herein, the District is ordered to consider Student's placement in light of the factors set forth in this order and determine the maximum extent to which Student can be educated in the general education setting with appropriate supports and services.

Finally, at the facilitated IEP meeting, the parties are order to address Parents' requests for ABA therapy at school. Typically, questions of methodology are outside the realm of expertise of this tribunal and as such are left to a school district to determine. Nonetheless, in this case it is clear that the District's preferred methodology has repeatedly fallen short of

providing adequate support for Student. It is also clear from the record that Student has experienced positive results from ABA therapy and has achieved at least some success in controlling emotional regulation and reducing inappropriate responses. Accordingly, the IEP facilitator should hear input from both parties, including any experts invited to the meeting, and evaluate the appropriateness of ABA therapy at school.

In the interim, it is worth noting that the last uncontested IEP to offer Student an appropriate placement in the least restrictive environment was the May 2018 IEP. That IEP determined the appropriate placement for Student was at least 80 percent of the school day in the general education environment. In addition, that IEP did not limit Student's time at school. As such, until a new IEP is developed in conformance with this order, Student's May 2018 IEP placement shall be maintained. *See Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396 (9th Cir. 1994).

D. Training for District staff.

Parents next argues that the District's lack of appropriate training during the period in issue led to a denial of FAPE for Student. As a consequence, Parent asks for staff training in the following areas: eligibility [determination] procedures; evaluation procedures; development and implementation of IEPs; conducting FBAs; developing and implementing BSPs; appropriate placement determinations [LRE]; and parental rights to participate under the IDEA. Parents' Post-Hearing Brief at 98.

The deficiencies in Student's IFSPs and IEPs and systemic procedural failures within the District are evidenced throughout this order. Parents' requests are extensive. Nonetheless, I find them to be appropriate because the problems within the District appear pervasive and widespread. The evidence in the record shows that District staff were overwhelmed and unprepared for Student's unique needs as he/she transitioned to kindergarten. Much of that lack of preparation was due to a failure to appropriately address Student's needs when the District became aware, or at least suspected, those needs while Student was at Head Start. The District's practice of carrying-over AGs/STOs and present level data from year to year also contributed to deficiencies in Student's IFSPs and IEPs. Additionally, the record demonstrates that, within the District, there is a fundamental misunderstanding on how and when to develop and implement BSPs in relation to conducting an FBA.

This tribunal declines Parents' invitation to order training for all District staff because the record does not reflect the problems identified are pervasive throughout other District schools or facilities. Rather, this tribunal's order is limited to District personnel within Head Start and Westside, as well as District office personnel, that have or will participated in Student's education program (either in development or implementation). Each of those individuals shall participate in no less than four hours of training in each of the identified areas by the end of the 2020-2021 school year. That training should be conducted by a provider not directly employed by the District and should not be an individual subject to this order (e.g., Dr. Copeland or Ms. Ferrick).

E. Reimbursement for educational costs incurred.

Parents also claim the District is responsible for reimbursing expenses incurred by Parents to supplement Student's deficient educational program. In this regard, Parents claim eligibility for reimbursement of direct expenses for educational materials used in the home as well as tuition reimbursement for Horizon Christian School. For the reasons discussed below, Parents' failed to meet their burden to establish eligibility for educational expenses and tuition reimbursement.

a. Supplemental expenses.

At hearing, Parents presented documentation purporting to identify educational expenses incurred by Parents in providing supplemental education to Student during the 2018-2019 school year. Ex. S237; Tr. Vol. XIV at 2959:18-2960:11. According to those documents, Parents incurred over \$3,000 in out-of-pocket expenses in their attempt to supplement Student's education as a result of the District's denial of FAPE. Ex. S237 at 129-133.

Unfortunately, Parents' documentary evidence is vague and best. Many of the receipts do not clearly identify the item or service purchased. Moreover, the record fails to establish how these items were used in Student's education and, more importantly, the appropriateness of each item for his/her education. Many items appear to be duplicated without any explanation why multiples of the same item were necessary or appropriate for Student. *See e.g.*, Ex. S237 at 4-6, 17, 18, and 37. Other purchases appear to cover household items such as a cheese spreader (*Id.* at 23) as well as several sets of Legos. In short, the record is insufficient to demonstrate that the expenses outlined in Parents' 133 page document were necessary and appropriate for Student's education during the period in issue. As such, this tribunal cannot order the District to reimburse Parents for such purchases.

b. Horizon Christian School tuition.

In January 2019, Parents removed Student from school because they determined that the District's chosen placement and behavior interventions were inappropriate and denied Student a FAPE. In April 2019, Parents enrolled Student in Horizon Christian School on a limited basis. 20 USC 1412(a)(10)(C) provides for the payment of private school tuition when a parent unilaterally enrolls their child without consent or referral from the school district and provides, in relevant part:

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

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 elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

* * * * *

(iv) Exception Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—

(I) shall not be reduced or denied for failure to provide such notice if—

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child[.]

(Bold in original.)

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.

(Emphasis added.)

In order for Parents to obtain reimbursement for a unilateral reimbursement in a private school setting, they must establish that the educational program offered by the District was deficient *and* that the private school placement was more appropriate than that offered by the District. *See Gagliardo v. Arlington Central School Dist.*, 489 F.3d 105 (2nd Cir. 2007) (finding that the parents' placement of a disabled child at a school that lacked special education services was not appropriate despite evidence that the child made academic progress while enrolled at that school.); *Mr. I v. Maine School Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007) (holding that the parents could not obtain reimbursement for placement when the private school failed to offer at least some element of special education services in which public school placement was deficient.); and *Berger v. Medina City School District*, 348 F.3d 513, 523 (6th Cir. 2003) (holding a unilateral private placement cannot be regarded as proper under the IDEA if it does not provide some element of special education services in which the public school placement was deficient.).

According to Parents' evidence at hearing, they did not enroll Student in Horizon for any educational services until mid-April 2019. Tr. Vol. XIV at 3025:12-15. The record reflects Student attended Horizon, on a limited basis, between April and the end of the 2018-2019 school year. Parents filed this due process complaint on March 20, 2019. As such, Student's time at Horizon and any claim for reimbursement of tuition for that program falls outside the period in issue. For that reason, this order does not address the merits of Parents' claim for reimbursement of Horizon tuition.

F. Reimbursements for attorney's fees and costs.

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

ORDER

The District denied Student a FAPE during the entirety of the period in issue and is hereby ordered to evaluate Student, convene a facilitated IEP, calculate and provide compensatory education, and train staff as required by this order.

Joe L. Allen

Senior Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

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

ENTERED at Salem, Oregon this 2nd day of July, 2020, with copies mailed to:

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

CERTIFICATE OF MAILING

On July 2, 2020 I mailed the foregoing Final Order in OAH Case No. 2019-ABC-02585 to the following parties.

By: Certified Mail

Parent(s) of Student
1560 3rd St
Hood River OR 97031

Diane Wiscarson, Attorney at Law
Wiscarson Law
3330 NW Yeon Ave, Ste 240
Portland OR 97210

Dan Goldman, Superintendent
Hood River County School District
1011 Eugene St
Hood River OR 97031

Rich Cohn-lee, Attorney at Law
The Hungerford Law Firm LLP
PO Box 3010
Oregon City OR 97045

Joel Hungerford, Attorney at Law
The Hungerford Law Firm LLP
PO Box 3010
Oregon City OR 97045

BY ELECTRONIC MAIL:

Mike Franklin, Legal Specialist
Department of Education
255 Capitol Street NE
Salem, OR 97310-0203

Lucy M Garcia
Hearing Coordinator
Office of Administrative Hearings