BEFORE THE ALASKA DEPARTMENT
OF EDUCATION AND EARLY DEVELOPMENT
SPECIAL EDUCATION DUE PROCESS HEARING OFFICER

IN THE SPECIAL EDUCATION MATTER CONCERNING STUDENT	Due Process Hearing #08-16

FINAL DECISION

I. Introduction

A due process hearing was held in this matter over the course of fifteen days of testimony, on the following dates: September 4, 12, and 19, November 17, 18, 19, 20, 21, 24, and 25, December 10, 11, 15, 16, and 18, 2008. The first three days of hearing were devoted to testimony concerning Parent's motion for a determination that no statute of limitations period should apply to her claims in this matter.[1] The subsequent hearing days were all devoted to testimony regarding the merits of Parent's claims.

Parent initially indicated she wished to have the hearing be open to the public, but prior to the beginning of the "merits phase" Parent opted to close the hearing. Consequently, in order to protect Student's right to confidentiality all references to Student's name, family members' names, and the name of the school

[1]Parent's motion was granted in part by my order of October 22, 2008 (incorporated herein by reference), which extended Alaska's one-year limitations period to allow claims for the period July 1, 2005 through April 21, 2008 (the date of Parent's filing of her amended complaint).

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

Student attends have been redacted from this decision.

The following witnesses testified during the first phase of the hearing regarding the statute of limitations issue: Parent; Lucy Hope, Director of Student Support Services for the Mat-Su Borough School District ("the District" or "MSBSD"); and Linda Eller, Student's special education teacher during the 2002-2003 school year.

The following witnesses testified during the second phase of the hearing regarding the merits of Parent's claims: Parent; Ms. Hope; Shannon Fenton, Student's nominal 2nd grade regular education teacher during school year 2005-2006; Jean Oldham, Student's nominal 3rd grade regular education teacher during school year 2006-2007; Rebecca Williams, Student's nominal 4th grade regular education teacher during school year 2007-2008; Sharon McEntee, a special education assistant who started working with Student in 3rd grade; Tyler Glaser, a special education assistant who started working with Student in the middle of 4th grade; Liza McCafferty, Student's state care coordinator at the Mat-Su Activity & Respite Center ("the MARC"), who has known Student for at least eight years; Cera Leckwald, a speech language pathologist who worked with Student in kindergarten and briefly in summer 2008; Dr. Carol Quirk, an expert on "inclusive education" who at Parent's request observed Student and his program at school in April 2008; Laura Frank, an assistant to Ms. McCafferty who attended a meeting in 2007 with Parent and school staff; Darci Topp, a special education aide who

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

started working with Student in preschool; Katherine Ellsworth (*formerly* Fennell), the principal at Student's elementary school; Brooke Allen, a behavioral consultant who worked with Student and his IEP team during the 2007-2008 school year; Catherine Horton, a behavioral and communications consultant with Pyramid Educational Consultants who worked with Student during the 2006-2007 and 2007-2008 school years; Joe Gerard, the MSBSD school psychologist with responsibility for Student's elementary school; Leigh Ann Woodall, Student's special education teacher during 2nd and 3rd grades and about half of 4th grade (fall 2005 through January 2008); Laurie Knutsen, an MSBSD occupational therapist who worked with Student during the period relevant to this hearing; and Michela Figini-Myers, a behavioral and communications consultant with Pyramid Educational Consultants who worked with Student during the 2005-2006 school year.

II. Decision Timeframe

This hearing took more than a full year to complete, from the date of Parent's original due process complaint filing on February 4, 2008[2] to the issuance of this final decision on March 13, 2009. Numerous extensions were allowed to the 45-day timeframe for due process hearings, per 4 AAC 52.550(f), in both written orders and orally on the record. Both sides requested such extensions

[2] Parent filed her amended due process complaint on April 21, 2008; the District did not contest Parent's filing of her amended complaint and in fact encouraged it.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

throughout the pendency of this matter, and on each occasion I found good cause for the extensions.

The last extension of the hearing timeframe called for the parties to submit their post-hearing briefs by January 22, 2009,[3] with issuance of my final decision by February 1, 2009. The parties essentially agreed that the decision should be issued by this date due to the fact that a second hearing involving Student and the District was set to start on February 2, 2009. [4]

On January 26, after I had reviewed the parties' post-hearing briefs, I convened a status conference and informed the parties of the essential elements of my decision, finding for Parent on the majority of her claims. I did this in order to assist the parties in their preparations for the upcoming second hearing and also in the hope that the parties might be inspired to reach a settlement of their various disputes.[5] Since that date, however, I have received no indication from the parties that a settlement is even a remote possibility.

Due to the large volume of the factual record (3200 pages of transcripts), I was unable to issue a full decision by February 1, 2009. Therefore I issued a "summary decision" (on February 2) so that the parties and the hearing officer for

[3] The formal extension, granted by order of January 9, initially called for submission of the briefs on January 21, but the parties stipulated to file them one day late on January 22.
[4] The second hearing relates to events post-dating April 21, 2008.
[5] On January 27 I provided a verbatim transcript of the status conference to the parties.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

the second hearing could have some guidance as to the issues resolved in this matter, to avoid unnecessary duplication of effort.[6]

Due to my desire to present findings that accurately depict the 34 months of Student's program covered by the hearing, and to the press of other business in my practice, issuance of this Final Decision was delayed until March 13, 2009. This decision supersedes my February 2 Summary Decision and incorporates its essential elements.

III. Burden of Proof

Under 4 AAC 52.550(i)(11), Parent has the burden of proving her claims in this matter by a preponderance of the evidence.

IV. Issues

As noted above, after the first three days of hearing I issued a ruling to the effect that the statute of limitations period would be extended beyond the one-year period allowed under Alaska law, allowing Parent to bring claims covering the period July 1, 2005 through April 21, 2008. Parent raised the following issues[7] in her amended complaint:

> 1. "The MSBSD failed and continues to fail to ensure that [Student] is educated with other children who are non-disabled to the

[6] I pointed out in my summary decision that the principle of *res judicata* should apply as to the matters resolved therein.

[7] This list omits Parent's citations to statutes and regulations.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

maximum extent appropriate. The nature or severity of [Student's] disability is such that education in regular classes with the use of supplemental aids and services can be achieved satisfactorily." Parent's Amended Due Process Complaint, para. 54.

2. "The MSBSD lacks a continuum of alternative placements, including one which would be less restrictive for [Student]." Parent's Amended Due Process Complaint, para. 55.

3. "The MSBSD has failed to determine [Student's] placement annually consistent with the requirements of the least restrictive environment, including the presumption of regular classroom placement. . . . The MSBSD has failed to include a regular classroom teacher in placement determinations and in determinations of appropriate behavioral interventions and supports and other strategies for [Student]." Parent's Amended Due Process Complaint, para. 56.

4. "The MSBSD has failed to ensure that [Student] can participate with non-disabled children in non-academic settings, including meals, recess and other activities." Parent's Amended Due Process Complaint, para. 57.

5. "The MSBSD has failed to even attempt placement of [Student] in a regular education setting in a meaningful way and with supplementary aids and services that would enable him to be educated with non-disabled peers to the maximum extent appropriate." Parent's Amended Due Process Complaint, para. 58.

6. "The MSBSD has failed to provide [Student] with an education in the least restrictive environment. Parent's Amended Due Process Complaint, para. 59.

7. "The MSBSD has wholly failed to provide [Student] with supplemental aids and services to enable him to be educated in the least restrictive environment. Parent's Amended Due Process Complaint, para. 60.

8. "The MSBSD failed to ensure the development and full implementation of an adequate behavioral intervention plan for [Student], resulting in his suspension during 2007-2008 and his

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

restrictive settings." Parent's Amended Due Process Complaint, para. 61.

9. "The MSBSD illegally excluded, suspended or expelled [Student] from January 8 to February 1, 2008 for misbehaviors related to his disabilities." Parent's Amended Due Process Complaint, para. 62.

10. "The MSBSD has failed to provide [Student] with a free and appropriate education as required by the IDEA, and his education has been of a *'de minimus'* nature." Parent's Amended Due Process Complaint, para. 63.

11. "The MSBSD has failed to develop an adequate IEP with measurable goals and objectives and sufficient services to enable [Student] to meet those goals and objectives. . . . This includes an insufficient present level of performance and a statement of measurable annual goals, including academic and functional goals to meet [Student's] needs that result from his disability to enable him to be involved and make progress in the general education curriculum and to meet each of [Student's] other needs." Parent's Amended Due Process Complaint, para. 64.

12. "The MSBSD has failed to make a good faith effort in assisting [Student] to meet his goals and objectives." Parent's Amended Due Process Complaint, para. 65.

13. "The MSBSD has failed to provide [Student] supports and services that are required to assist [Student] to meet his goals under the IEP." Parent's Amended Due Process Complaint, para. 66.

14. "The MSBSD has failed to provide [Student] with ESY services in sufficient scope and duration, including speech therapy, to avoid regression and to maintain skills." Parent's Amended Due Process Complaint, para. 67.

15. "The MSBSD has failed to ensure that [Student] has a meaningful and reliable means of communication, through either PECS or other means, including assistive technology. Parent's Amended Due Process Complaint, para. 68.

16. "The MSBSD has failed to ensure a properly licensed special

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

education teacher and highly qualified teacher. Parent's Amended Due Process Complaint, para. 69.

V. Findings of Fact

A great deal of information was presented by the parties during the fifteen days of hearing (3200 pages of transcript) in this matter, covering a 34-month period of Student's education. Some of the parties' factual presentations were not directly pertinent to the issues raised in Parent's amended complaint, and as a result my findings of fact do not address all of the evidence concerning Student's education over the period covered by the hearing. Set forth below are the findings of fact which are necessary to my rulings on the issues before me.

1. Student was born August 2, 1996 and was 11.8 years old as of Parent's filing of her First Amended Complaint on April 21, 2008.

2. There is no dispute that Student is, and has been at all relevant times, eligible for special education ("SPED") and related services due to his severe autism. As a result of his disability, Student is unable to communicate verbally.

3. There is also no dispute that Student has been diagnosed with mental retardation. The degree of his mental retardation, however, is not certain, due at least in part to the fact that Student is completely non-verbal and therefore his cognitive abilities are difficult to assess.

4. Student has been a lifelong resident of the MSBSD, and attended preschool in the MSBSD.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

5. Parent introduced Student to the Picture Exchange Communication System ("PECS") the summer before his kindergarten year (school year 2003-2004). She had learned about PECS from Ms. Eller, Student's preschool teacher. Parent ordered materials and began the PECS program on her own with Student in the summer of 2003. Hearing Record 1294-1295.[8] From that point forward, Parent and District staff have continued to use the PECS system for teaching and communicating with Student.

6. Parent was employing Ms. Topp as a home-care provider at the time, and Parent collaborated with Ms. Topp on learning the PECS system and starting to implement it with Student. HR 1295. Ms. Topp started working with Student as a District employee before Kindergarten and worked with him until January 2008, the middle of his 4th grade year.

7. Parent had an older child attending Student's elementary school for much of the period relevant to this hearing. Parent volunteered many times at the school, was PTA Vice President during Student's kindergarten year, and PTA President his 1st and 2nd grade year. HR 3007. She was involved in the committee that hired Ms. Woodall as a new SPED teacher, both because she was Student's mother and because she was on the PTA. HR 3009.

8. During the period relevant to this hearing, Student was primarily educated in a self-contained classroom. Until the middle of 3rd grade, Parent

[8] References to the transcript of the hearing record are hereinafter denoted as "HR."

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

understood Student was going to be educated with regular education students with "pull-outs" for one-on-one instruction elsewhere. HR 1301, 1344.

9. In kindergarten, District staff noted their concern in Student's IEP about Student's "biting" and "scratching." D Exh. 1, p. 1304.[9] The team noted that Student "usually bites adults when he has to stop preferred activities." *Id.*

10. Student's kindergarten IEP stated that his placement would be in an "intensive resource program" classroom for 1800 minutes per week. D Exh. 1, p. 1304 (IEP meeting notes). The IEP also stated, however, that Student would be served "in a regular classroom with pull-out service from special education personnel." D Exh. 1, p. 1326.

11. Student's 1st grade IEP was developed on September 29, 2004 (D. Exh. 1, p. 1277) and was amended on January 11, 2005. D Exh. 1, p. 1262. This was the IEP that was in place at the start of the timeframe covered by this hearing, on July 1, 2005, and when Student started 2nd grade in the 2005-2006 school year.

12. The 1st grade IEP provided that Student would receive his education in a "regular education environment with self-contained classroom support." D Exh. 1, p. 1286. Under the heading Curriculum Modifications, the IEP stated that "[a]lternate strategies as well as staff support will be explored by SpEd teacher, aide and teacher in order to make times in regular classroom meaningful and productive." D Exh. 1, p. 1271.

[9] Exhibits are referred to as "D Exh." for the District's exhibits and "P Exh." for Parent's exhibits.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

13. Parent requested and participated in a mediation regarding Student's program in May and June, 2005. HR 1560. School psychologist Gerard participated in the mediation and developed a draft behavioral intervention plan as a result of the mediation. HR 1561.

14. Also resulting from the mediation was a plan to involve consultants from Pyramid Educational Consultants (the designers of the PECS communications system) in Student's program, to assist the team both with implementation of PECS and with Student's behavioral issues. HR 1310.

15. At the time of the spring 2005 mediation, the District did not have in place a reliable mechanism for keeping Parent informed of Student's behavior on a daily basis. HR 1312. Subsequent to the mediation, staff attempted to communicate with Parent regarding Student's behavior through a home-school communication journal.

16. Parent declined to enroll Student for extended school year ("ESY") services for summer 2005, due to her understanding that the District did not have staff who were trained in the PECS system who would be available to work with Student. HR 1318.

17. During 2nd grade, Parent was generally unaware of her option to request a placement that differed from that offered by the IEP team. HR 1321-22.

18. The IEP meeting for 2nd grade took place on September 28, 2005. D Exh. 1, p. 1183. This IEP meeting was "facilitated" by mediators from the Alaska

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

Special Education Mediation Service. HR 1602. The "continuum" of placement options (from least restrictive to most restrictive) was not discussed or explained to Parent at this IEP meeting. HR 1323, 1602-1604, 2081, 2345.

19. The September 2005 IEP stated that Student's placement would be "regular education environment with self contained classroom support," D Exh. 1, p. 1214. The IEP further stated that his program would be "appropriately implemented in the regular education environment with direct service from special education personnel for the entire day." HR 1323; D Exh. 1, p. 1214. During the September 28 meeting the team did not discuss with Parent the fact that this meant Student would not be in the regular education classroom very much in 2nd grade. HR 1324. In fact, Parent understood the placement language to mean that Student would be both in and out of the regular education classroom, and he would get direct services from SPED personnel in both environments. *Id.*

20. Leigh Ann Woodall, Student's SPED teacher in 2nd and 3rd grades and roughly the first half of 4th grade, was the District employee most directly involved with Student and with the development of his IEPs. Ms. Woodall confirmed that throughout the timeframe covered by this hearing, Student never received instruction in the regular ed classroom. HR 2084. In degrees that decreased over the 34-month period, Student was with his regular ed peers for physical education, music, library, recess, snacktime (only during 2nd grade and the first half of 3rd grade), lunch, some special events such as parties, and "every now and then" for

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

art activities. HR 520, 2083-2084.

21. The 2nd grade regular ed teacher, Ms. Fenton, confirmed that she saw Student in her classroom only during snack time, and on three occasions for certain art projects. HR 488-491.

22. Ms. Fenton was never provided information or ideas regarding how to have Student be involved in her 2nd grade regular ed class HR 503-504. She was unaware of any modifications to materials to enable Student to participate in music or library during 2nd grade. HR 506.

23. Ms. Fenton attended Student's fall 2005 IEP meeting, but her participation in Student's IEP development process was nominal at best. She testified that she "pretty much . . . followed the lead teacher, the special education teacher in what [Student's] placement and program should be." HR 503-504.

24. The District's position throughout this hearing was that part of the justification for Student's placement being outside the regular education classroom was a concern for safety, based on Student's behavioral problems, yet "safety" *per se* is not mentioned in Student's 2nd grade IEP. HR 2351.

25. Ms. Woodall explained that the IEP's statement that Student's behavior "impedes his education and the education of others" essentially sets forth the District's safety concerns. HR 2351. She further explained that there was no need to discuss and record in IEP meetings the District's safety concerns, because Student received all of his educational services in the self-contained special ed

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

classroom. HR 2353.

26. Alternatives to Student's placement in the self-contained SPED classroom were not discussed at IEP meetings; it was a "foregone conclusion" that Student would be educated in the self-contained classroom. HR 759-760, 1959-1963, 2353.

27. No planning regarding "inclusion," i.e., how to increase Student's exposure to and interactions with regular education peers, was done at IEP meetings. HR 2884.

28. Student's second grade IEP does not contain objective measures of his current levels of performance. D Exh. 1, pp. 1185-1186. The IEP simply sets forth summary statements of Student's skills in reading, writing, math, self-help, communication, social/emotional skills, in terms that are not objectively measurable.

29. Similarly, none of the annual goals in Student's second grade IEP are objectively written, and therefore none are properly measurable. D Exh. 1, pp. 1189-1209. For example, goal no. 1 states: "[Student] will increase his communication through use of the Picture Exchange Communication System." D Exh. 1, p. 1189. Goal no. 3 states: "[Student] will improve receptive communication skills." D Exh. 1, p. 1194. Goal no. 4 states: "[Student] will improve his expressive communication skills." D Exh. 1, p. 1196. Goal no. 5 states: "[Student] will improve math skills." D Exh. 1, p. 1198. Goal no. 6 states:

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

"[Student] will improve writing skills." D Exh. 1, p. 1199. Goal no. 7 states: "[Student] will improve reading skills." D Exh. 1, p. 1201. Goal no. 8 states: "[Student] will improve social skills." D Exh. 1, p. 1203. None of these goals are objectively measurable.

30. The IEP sets forth objectives for each of Student's annual goals, but it does so without setting out Student's baseline skill level for each of the objectives at the start of the period covered by the IEP. D Exh. 1, pp. 1189-1207. For example, the communication objectives reference a mastery level of 9/10 times, without stating where Student's skill level in this area stood at the start of the IEP period. D Exh. 1, pp. 1189-1196. The same problem is presented in the objectives presented for the other annual goals -- none of them state Student's present level of skill or performance regarding the specified objective.

31. Pursuant to the mediation agreement (see Finding of Fact no. 14 above), consultant Ms. Figini-Myers came to the school to work with Student's team twice during the 2005-2006 school year. HR 1326-1327. The first visit was intended as a "check-up" on Student's progress with PECS communication, and the second was intended for her to work with Student's team regarding his aggressive behaviors. HR 2064-2065, 2958. She met with the IEP team on each occasion, and she recommended a comprehensive behavioral plan be introduced to decrease the occurrence of Student's aggressive behaviors. HR 1327-1328, 2969.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

Her December 2005 report with recommendations for a behavior plan is at D Exh. 25A.

32. On April 5, 2006, Parent wrote to Ms. Hope requesting a change in the programming for Student for his ESY 2006 services. P Exh. 27. Parent proposed using a private provider to provide services for Student over the summer. HR 1337-1341, 1578; P Exh. 27. Subsequently Parent and the District reached an agreement and Student's ESY program was provided by his private respite care agency.

33. The IEP in place when Student began 3rd grade was his 2nd grade IEP. A new IEP was prepared in the fall, dated September 26, 2006. *See* D Exh. 1, pp. 1097-1124.

34. Ms. Oldham was assigned as Student's 3rd grade regular ed teacher. HR 536. Ms. Woodall continued to be Student's SPED teacher.

35. Student was in Ms. Oldham's regular ed classroom only for snack, for roughly fifteen minutes per day. HR 538-539. Ms. Oldham discontinued snacktime just before Christmas, and after that Student did not come into her classroom. HR 540-541.

36. Curriculum decisions for Student were made by the lead teacher, Ms. Woodall. HR 543. No one ever discussed with Ms. Oldham how to modify any of the academic curriculum to allow Student to be included more in the regular ed classroom. HR 547.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

37. Ms. Oldham attended the September 2006 IEP meeting, but her participation in Student's IEP development process was nominal at best. She testified that "the placement decisions were made by the IEP team" and she "was in a supportive role . . . listening more to what they were having to say and their determinations guided what I did or didn't do." HR 542-543.

38. No discussion took place at the September 2006 IEP meeting about trying to include Student in Ms. Oldham's regular ed classroom in areas other than snack. HR 542.

39. Student's 3rd grade IEP, dated September 26, 2006, as with his 2nd grade IEP, addresses present level of performance by simply setting forth summary statements of Student's skills in reading, writing, math, self-help, communication, and social/emotional skills, in terms that are not objectively measurable. D Exh. 1, pp. 1100-1101.

40. The 3rd grade IEP contains annual goals 1-13. D Exh. 1, pp. 1105-1117. As with his 2nd grade IEP, the annual goals are not objectively written and thus are not properly measurable:

> Goal 1: [Student] will experience physical activities through his participation in a regular physical education program. D Exh. 1, p. 1105.
> Goal 2: [Student] will demonstrate an increase in his gross motor development toward an age appropriate level, with verbal cueing, with 100% target achievement. D Exh.1, p. 1106.
> Goal 3: [Student] will increase his independent participation in PE class. D Exh. 1, p. 1107.
> Goal 4: [Student] will increase his communication through use of

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

the Picture Exchange Communication System. D Exh. 1, p. 1108.

Goal 5: [Student] will increase his communication through use of the Picture Exchange Communication System. D Exh. 1, p. 1109.

Goal 6: [Student] will improve receptive communication skills. D Exh. 1, p. 1110.

Goal 7: [Student] will improve his expressive communication skills. D Exh. 1, p. 1111.

Goal 8: [Student] will improve self-help skills. D Exh. 1, p. 1112.

Goal 9: [Student] will improve his sensory motor skills. D Exh. 1, p. 1113.

Goal 10: [Student] will improve math skills. D Exh. 1, p. 1114.

Goal 11: [Student] will improve writing skills. D Exh. 1115.

Goal 12: [Student] will improve reading skills. D Exh. 1116.

Goal 13: [Student] will improve social skills. D Exh. 1117.

None of these goals are objectively measurable.

41. As with the 2nd grade IEP, the 3rd grade IEP sets forth objectives for each of Student's annual goals, but it does so without setting out Student's baseline skill level at the start of the period covered by the IEP. D Exh. 1, pp. 1105-1117. None of the objectives state Student's present level of skill or performance regarding the specified objective.

42. In the fall of 3rd grade (2006-2007), Ms. Horton was the new PECS consultant assisting the IEP team, substituting for Ms. Figini-Myers. Ms. Horton is a speech language pathologist and is trained in the PECS communication system. HR 1336-1337.

43. In October 2006 Ms. Horton issued a report stating that "the team has seen a substantial decrease in contextually inappropriate behaviors" and that "at

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

this time, this is not an area of concern" for Student. HR 1351; D Exh. 26.

44. During 3rd grade, Parent learned from other school parents that Student's name was not on the exchange list for Valentines or Christmas. HR 1361. When Parent inquired of Ms. Woodall and Ms. Topp, she was told Student would have "his own little party" in his self-contained classroom. *Id.*

45. Parent was informed by Ms. Woodall in late February of 3rd grade that snack time had been discontinued, so Student was no longer going into the regular ed classroom at all. HR 1345. At around the same time, she was also informed at a meeting with Ms. Woodall, Ms. Ellsworth (the principal), and Ms. Topp that Student was no longer going to "specials," i.e. PE or music, with his regular ed peers. HR 1345-1347. This meeting was not an IEP meeting. HR 1347. Student's behavior was not cited as a rationale for Student not attending specials with his peers. *Id;* HR 3028; P Exh. 61.

46. Parent had also heard from other parents earlier in the 3rd grade that Student was no longer going to library. HR 3027-3028.

47. Parent never received any Prior Written Notice from the District regarding these decreases in Student's involvement with and exposure to his regular ed peers. HR 2292-2293, 3028.

48. Meeting notes from the February 2007 meeting indicate that staff felt that Student would benefit from attending specials with younger peers. P Exh. 61.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

There is no evidence, however, that the District ever allowed Student to attend specials with younger peers.

49. Student's ESY program for 2007, at the end of 3rd grade, was again staffed by his private respite care provider (the MARC), per agreement between Parent and the District.

50. During the February 2007 meeting (Finding of Fact no. 43 above), staff told Parent that the regular ed teacher for 4th grade, Ms. Williams, would be "more receptive" to Student being in her regular ed classroom for specials. HR 1360-1361. As a result Parent's expectation was that Student would be allowed in the regular ed classroom in 4th grade to a greater degree than he was in 3rd grade. *Id.*

51. Student's third grade IEP (D Exh. 1, pp. 1097-1124) remained in place until his new 4th grade IEP was developed, over the course of two meetings on September 25 and October 9, 2007. D Exh. 1, pp. 1047-1059; P Exh. 18.

52. During the hearing there was confusion caused by the fact that the District's copy of this IEP was incomplete. Parent's Exhibit 18 is the full, accurate copy of Student's IEP for 4th grade. *See* D Exh. 1, pp. 1047-1059; P Exh. 18.

53. At the beginning of 4th grade, Student may have attended some specials with his regular ed peers. HR 2291. Student's IEP, however, did not reflect the amount of time he was expected to attend specials in the regular ed classroom. HR

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

2292-2293. No records were introduced into evidence indicating the amount of Student's attendance at specials in 4th grade.

54. An IEP meeting was held on September 25, 2007, attended by Parent, Ms. McCafferty, Ms. Woodall, principal Ellsworth, and psychologist Gerard, among others. P Exhs. 18, 28. Towards the end of the meeting, after discussion of the IEP and progress reports, the school staff informed Parent that there had recently been some exceptionally inappropriate, aggressive behaviors by Student, and as a result he would no longer be allowed to participate in activities with his peers; he would be in the self-contained classroom by himself. (Prior to this decision, other SPED students had sometimes received services in the self-contained classroom, on the other side of the room from Student). Parent was further informed that Student would no longer be able to participate in Adaptive Physical Education unless Ms. Woodall decided he could do so on a given day (apparently if she felt that Student was having a good day or the gym was not being utilized by other children.) HR 1378-1385; P Exh. 35, p. 556. Student would be allowed to go to recess at the same time as other children, but he would have to use a different door so he wouldn't be in proximity to other children on the way into the building. HR 1384.

55. At this IEP meeting Ms. Woodall said that Student was having significant aggressive behaviors and that a different behavioral consultant was needed, other than from Pyramid. HR 1379. Parent was "astounded" by this turn

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

of events. P Exh. 28, p. 486. Being told that Student was experiencing significant behavioral problems was a surprise to Parent, and she didn't understand why staff wouldn't call the Pyramid consultants who had already worked with the team, and ask for help. HR 1380. Staff informed Parent at this meeting that they were worried about the safety of Student's peers and staff. HR 1380-81.

56. It appeared to Parent at the meeting that the principal had already discussed these issues with Ms. Hope, giving Parent the impression that everyone knew about it but Parent. HR 1382. I find that the decisions concerning reductions in Student's exposure to his regular ed peers had been made before the meeting, without IEP team participation.

57. The September 25 meeting took place about four weeks after school had started. Parent had not been told from the start of school until this meeting that Student was having significant aggressive behaviors. HR 1381. She was aware that Student had engaged in what she characterized as "small" behaviors, but nothing extreme or significantly exceeding the types of behaviors he had engaged in during prior years. HR 1382.

58. During the September 25 meeting, Ms. McCafferty inquired about the behavior plan that was supposed to have been developed after the May 2005 mediation. She was told by staff that there was not a copy of the plan at the school for staff to review and work from. HR 775-776, 792-793.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

59. Parent was not told prior to the September 25 meeting, nor at the meeting, that Student had hurt another child; at the meeting she was only told of general safety concerns. HR 1385. Parent had received a home-school journal communication sheet in August 2007 indicating that Student had a "meltdown" after recess, but no one had spoken to her about it that day when she picked Student up, so it didn't seem to her that it was different than other behaviors they had seen before from Student. HR 1365-66; P Exh. 36A, p. 571.

60. Ms. McCafferty reviewed the home-school journal and the behaviors described therein did not appear to her to be "of much consequence" as recorded in that document. P Exh. 35, p. 556.

61. The September 25 meeting was ended at Ms. McCafferty's suggestion, as she thought it best to stop and reconvene after giving Parent time to think about the issues that had been raised regarding Student's behavior. HR 1385-86.

62. The IEP meeting was reconvened on October 9, 2007 at which time the IEP was completed. P Exh. 18, p. 431.

63. During 4th grade, Student was never in Ms. William's regular ed class for instruction; the one activity she could recall him being present for in 4th grade was Valentine's Day. HR 559. Ms. Williams was unsure whether Student attended music, PE or library with his regular ed peers. *Id.* Ms. Williams believed that Student sometimes ate lunch in the cafeteria and went to recess with his peers. HR 559-560. Ms. Woodall had met with Ms. Williams the previous spring and

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

told her Student would be coming to her classroom for socialization, if he "was able to;" this was a decision that would be made by Ms. Woodall. HR 562. Apparently no record was kept regarding which specials, if any, Student attended with his peers during 4th grade.

64. Student typically ate his lunch with his peers throughout 2nd and 3rd grades, as well as at the beginning of 4th grade. HR 2234-2235. At some point in 4th grade that practice was changed and Student ate his lunch away from his peers, in the self-contained classroom. HR 2235.

65. Notwithstanding the decisions discussed during the September 25 IEP meeting, the District did not provide Parent a Prior Written Notice concerning the reduction of inclusion of Student with his regular ed peers in 4th grade. There is no dispute that there was a reduction in the amount of time Student spent with regular ed peers during 4th grade, and this reduction that was not reflected in Student's IEP or in any Prior Written Notice. HR 2292-2293, 2885-2887.

66. Student's 4th grade IEP, as with his 2nd and 3rd grade IEPs, addresses present level of performance by simply setting forth summary statements of Student's skills in reading, writing, math, self-help, communication, and social/emotional skills, in terms that are not objectively measurable. D Exh. 1, pp. 1049-1050.

67. The 4th grade IEP contains annual goals 1-15. P Exh. 18, pp. 438-453.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

As with his 3rd grade IEP, the annual goals are not specifically objectively written and thus are not properly measurable:

Goal 1: [Student] will experience physical activities through his participation in a regular physical education program. P Exh. 18, p. 438.
Goal 2: [Student] will demonstrate an increase in his gross motor development toward an age appropriate level with verbal cueing, with 100% target achievement. P Exh. 18, p. 440.
Goal 3: [Student] will increase his independent participation in PE class. P Exh. 18, p. 441.
Goal 4: [Student] will increase his communication through use of the Picture Exchange Communication System. P Exh. 18, p. 442.
Goal 5: [Student] will increase his communication through use of the Picture Exchange Communication System. P Exh. 18, p. 443.
Goal 6: [Student] will improve receptive communication skills. P Exh. 18, p. 444.
Goal 7: [Student] will improve his expressive communication skills. P Exh. 18, p. 445.
Goal 8. [Student] will improve self help skills. P Exh. 18, p. 446.
Goal 9: [Student] will improve his sensory motor skills. P Exh. 18, p. 447.
Goal 10: [Student] will improve math skills. P Exh. 18, p. 448.
Goal 11: [Student] will improve writing skills. P Exh. 18, p. 449.
Goal 12: [Student] will improve reading skills. P Exh. 18, p. 450.
Goal 13: [Student] will improve social skills. P Exh. 18, p. 451.
Goal 14: [Student] will increase his independent persistence with school/job tasks. P Exh. 18, p. 452.
Goal 15: [Student] will develop independent life skills. P Exh. 18, p. 453.

None of these goals are objectively measurable.

68. As with the 3rd grade IEP, the 4th grade IEP sets forth objectives for each of Student's annual goals, but it does so without setting out Student's baseline skill level at the start of the period covered by the IEP. P Exh. 18, pp. 438-453. None of the objectives state Student's present level of skill or performance regarding the specified objective.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

69. Student's 4th grade IEP, under annual goal no. 7 regarding expressive communication skills, included an objective that Student "will become familiarized with a voice output device, such as a Dynavox, and demonstrate the ability to push the buttons in a meaningful way." HR 1369; P Exh. 18, p. 445. This IEP was made effective on October 9, 2007; yet Student had not been provided with a Dynavox by the date of Parent's filing of her amended complaint, April 21, 2008. HR 1370, 2828-2830.

70. During the October 9 continuation IEP meeting, Parent and staff discussed both the idea of bringing in a new behavioral consultant and the planned, continuing assistance from Pyramid regarding Student's behavioral issues. HR 1388. A two-day on-site consult was already scheduled with Pyramid for late November. *Id.*

71. At that time Parent was unclear as to what behavior plan, if any, was being used by staff, as she had been informed that there was no behavior plan at the school for staff to work from; she believed the plan was probably derived from the recommendations made by consultant Figini-Myers in December 2005. HR 1389. Ms. Woodall informed her the behavior plan was at the District office, so she went there to obtain a copy. The plan she was given was the draft written by psychologist Gerard after the May 2005 mediation. HR 1389-1390.

72. On October 15, 2007 Parent wrote to Pyramid consultant Horton, expressing her concern about Student's aggressive behaviors and asking for

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

assistance with the behavioral issues in advance of the scheduled November on-site visit. P Exh. 29, 491; HR 1420-1421.

73. On October 16, 2007, Parent met with Ms. Ellsworth about a behavior incident that occurred between Student and a peer on the playground during recess on October 15. P Exh. 30; HR 1422-1423. At that time, Ms. Ellsworth informed Parent that Student would have a 20 minute recess in the morning and a 20 minute recess in the afternoon, but he would not be allowed to take that recess with peers; he would have recess by himself. P Exh. 30. Parent understood this was to be "temporary" but expressed concern that this decision was made outside of the IEP team process. P Exh. 30.

74. Ms. Woodall followed up on this subject with an email to Parent on October 16, reiterating Ms. Ellsworth's decision that Student would be participating "in recess away from his peers." P Exh. 29, pg. 490.

75. Parent attended another meeting on October 17, 2007 that she had requested in order to clarify exactly what Student's behavior plan consisted of at that point. Also attending were Ms. Woodall, Ms. Ellsworth, Mr. Gerard, and Ms. McCafferty's administrative assistant Ms. Frank (Ms. McCafferty was unable to attend). During the meeting the participants reviewed the behavioral recommendations from Ms. Figini-Myers in 2005. HR 1394-1395. Ms. Woodall indicated that the team had been following those recommendations, they just hadn't been implemented into a formal plan. *Id.* The meeting was considered an

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

"IEP amendment meeting," and the team agreed to adopt an updated behavioral plan "to reflect current strategies used [that were] were recommended by PECS consultants in 2005." D Exh. 1, p. 1043.

76. Telephone consultations with Pyramid consultant Ms. Horton took place on October 24 and November 12, 2007. D Exhs. 27, 28. Ms. Horton had viewed videos provided by the school between October 24 and November 12 and had seen inconsistencies in how staff reacted to Student's negative or aggressive behaviors. Consequently, she made recommendations concerning creation of a reactive behavior plan that would allow for consistency in staff responses. HR 1406; D Exh. 28.

77. Ms. Horton then spent three days observing and consulting with Student's team onsite on November 26-28, 2007. Her subsequent report noted the "majority of his programming occurs within the special education classroom, where [he] is the only student;" she further noted that "[c]urrently, [Student] has limited exposure to peer interactions" as a result of "aggressive behaviors that were directed towards peers." D Exh. 29, p. 1; HR 1407. At this point in time, Parent did not know of any incidents of aggressive behaviors towards peers other than the October 15 incident on the playground. HR 1407-1408.

78. On January 8, 2008 Student was suspended from school. P Exh. 23, p. 478. Parent received a phone call that morning from Ms. Ellsworth and was told that Student had been suspended and needed to be picked up as soon as possible.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

HR 1429. Ms. Ellsworth told her only that Student had been aggressive toward a staff member but provided no details. HR 1429. Parent arrived to sign Student out at the office and Ms. Ellsworth handed her the suspension letter in an envelope, but she did not discuss it with her. HR 1430. The letter indicated that Student had broken the skin on a staff member's ear and hand and that he was being suspended for two and a half days. P Exh. 23, p. 478. Parent's view was that there had been "small behaviors" like that before, so Parent couldn't understand how a scratch warranted a suspension. HR 1431. Parent was told by Ms. Ellsworth the staff "couldn't take it any more," so she had to suspend Student. *Id.* After reviewing the letter Parent called and left Ms. Ellsworth a message, stating her disagreement with the suspension; she never received a return call from Ms. Ellsworth. HR 1460-1461.

79. On January 10, 2008 Parent attended a meeting with Ms. Hope, Ms. McCafferty, and an advocate from Disability Law Center to discuss the suspension. HR 1433. There was discussion of the lack of an updated behavior plan since the 2005 PECS consultation. HR 1433-1434. There was also discussion about when Student would return to school; Ms. Ellsworth's letter had indicated he could return on January 11, as the suspension was for two and a half days. HR 1434.

80. On January 11, Parent received a copy of a behavior intervention plan that had been developed by the Pyramid consultant Ms. Horton, dated January 9,

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

2008. P Exh. 19; HR 1437-1438. In the plan Ms. Horton went through what should happen step by step if Student's behavior reached a crisis. HR 1437. Ms. Woodall put a copy of the plan in Student's backpack and it came home with him on January 11. HR 1438.

81. On the morning of January 11, 2008, the day Student returned from his first suspension, he was suspended again, this time for one and a half days. Parent received a call from the school right after dropping Student off, and she was informed that he was being suspended again. HR 1439. Ms. Fenton gave her the suspension letter, as Ms. Ellsworth wasn't on-site at that time; the letter stated Student was suspended because he "demonstrated aggressive behavior toward a staff member." P Exh. 24; HR 1440. Ms. Fenton didn't tell Parent what Student had done, nor did she say toward whom Student had "demonstrated aggressive behavior" or when it occurred. HR 1441.

82. Parent called Ms. Woodall after the 2nd suspension to discuss the incident; she could only recall being told that Student had been involved in an incident of aggression with Ms. Woodall and Ms. Topp. HR 1441.

83. Parent never received an incident report or other written description of the incidents for either the 1st or 2nd suspension, nor was she ever told who the "object" of Student's aggression was in the 1st incident. HR 1441-1442. During the hearing, witness testimony and review of workers comp reports and behavior data log notes allowed the parties to finally determine that the 1st incident involved

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

aggressive behavior towards Ms. Topp, but the facts of the actual incident itself could not be recalled or pinpointed. HR 1257, 1259-1260, 1266-1269, 2930-2933.

84. The home-school journal did not include any descriptions of either the 1st or 2nd suspension incidents.

85. At the January 10 meeting with Ms. Hope to discuss the 1st suspension, Ms. Hope had referred Parent to behavioral consultant Brooke Allen from the agency Alaska Family Services. HR 1442-1443, 1454-1455. Parent contacted Ms. Allen on January 15, after the 2nd suspension had been imposed, to ask for her assistance. HR 1455.

86. Ms. Allen developed a "re-entry plan" for Student. Ms. Allen and Parent went to the school to meet with Ms. Ellsworth, to discuss getting Student back into school. HR 1794-1795. While Parent was in another room making photocopies for Ms. Allen of all of the Pyramid reports and other documents pertaining to Student, Ms. Allen and Ms. Ellsworth met and discussed the re-entry plan. HR 1794. They told Parent that Student would be allowed back to school if Parent agreed to the plan. HR 1446-1447. Ms. Ellsworth later provided the written re-entry plan to Parent. HR 1447. The plan called for Student to be allowed to come back to school "in half an hour a day increments," increasing by a half hour each day until January 29, when there was a mediation or facilitated IEP meeting already scheduled between the parties. HR 1447, 1775.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

87. Parent firmly believed that the only way for Student to be allowed back into school was for her to agree to the re-entry plan. HR 1450-1451, 1773-1774, 1797-1798. Student's IEP team had no involvement in the development of the re-entry plan. HR 2331. The re-entry plan was not presented to Student's IEP team because Ms. Ellsworth's "number one concern was student safety." HR 2581-2582. The re-entry plan would not have gone into effect absent Ms. Ellsworth's approval. HR 2579-2580.

88. Although District witnesses testified that Student could have returned to school after the 2nd suspension even if Parent did not agree to the re-entry plan, the totality of the circumstances leads me to find that Parent's agreement to the re-entry plan was a condition imposed by the District to Student being allowed back into school without being subjected to another relatively immediate suspension.

89. The re-entry plan stated that it was "subject to change due to Student's behavior." P Exh. 25. This meant that Ms. Ellsworth could change the schedule if Student's inappropriate behaviors increased. HR 1451. In fact Ms. Ellsworth "docked" Student, probably for half an hour, due to a behavioral incident during the period covered by the re-entry plan. HR 1466 -1468. No records were introduced into evidence to document this "docking."

90. Other than being "docked" a half hour, Student apparently attended school on the dates and for the times set forth in the re-entry plan (with the exception of January 29, when Parent kept him at home because she was attending

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

mediation and it was too difficult to arrange for transportation for Student to attend an abbreviated school day). HR 1466-1468. Unfortunately the District maintained no records that record exactly how much time Student attended school during the re-entry plan period. In fact, school attendance records show him attending school full time during that period (other than January 29). Ms. Woodall and Ms. Ellsworth testified that he was considered to be attending on a "modified school day" or "abbreviated school day" basis, and therefore it was appropriate for the records to reflect full-time attendance, even though there is no dispute that he was at school for only half an hour to three and a half hours per day. HR 2297-2304, 2333-2334, 2560-2564, 2568-2572.

91. There is no dispute that Student did not understand what a suspension was or that he was being punished for his behavior; Student undoubtedly viewed the suspensions as just a few days off from school. HR 1432, 1998-1999, 2241-2242.

92. Parent never received any oral or written notice or description of the evidence supporting the charges regarding either suspension, other than the initial suspension letters. HR 1458-1459.

93. A review of the home-school communication journal during the hearing did not reveal any entries that could be confirmed to be descriptions of the incidents giving rise to the suspensions. Based on this absence of records I find

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

that the District never adequately informed Parent of the specific facts giving rise to either suspension, until the hearing.

94. The District never performed a "manifestation review" to determine whether the behaviors giving rise to the suspensions were related to Student's disability. HR 1464. In fact, it is not disputed that these behaviors were related to Student's disability. HR 2606 (Ellsworth testimony).

95. The planned mediation took place on January 29, 2008. HR 1770. Training of staff called for by the mediation agreement took place on January 30 and January 31. *Id.* Student resumed attending school full time on February 1; Parent kept him out of school on January 30-31 because all of the staff were attending training. HR 1770-1771.

96. The mediation agreement provided that the team agreed to implement a behavior intervention plan addendum that had been prepared by Ms. Allen. HR 1778. The agreement also provided that staff would notify Parent in writing within 24 hours of any aggressive behaviors by Student that resulted in physical injury. P Exh. 26; HR 1779.

97. Parent filed her original due process complaint on February 4, 2008, out of a concern that Student would be suspended again and miss more time in school. HR 1781.

98. Parent filed her amended due process complaint on April 21, 2008.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

99. Student was first tested by neuropsychologist Dr. Fuller in 2005 (*see* P Exh. 21), then again in May 2008. She has diagnosed him as having severe autism, disruptive behavior disorder, and mild mental retardation. P Exh. 37.

100. School psychologist Gerard has been a member of Student's IEP team throughout the period covered by this hearing. Since at least as early as 2005 he has held the view that Student has moderate mental retardation. HR 1927, 1952. Mr. Gerard took this view into consideration in working with the IEP team in developing goals for Student. HR 1934. Mr. Gerard, however, never informed Parent or the IEP team of this view. HR 1927. The first time Parent learned of Mr. Gerard's opinion that Student has moderate mental retardation was at the hearing. HR 3041.

101. Student's IEPs during the period covered by this hearing have included the following annual goals and objectives regarding social skills and interaction:

> (a) **January 2005 IEP**: Annual goal 3: [Student] will improve social interaction;
> Objective 3.1: [Student] will respond to a introductory and exit greeting by waving and shift gaze with the communication partner in 8 out of 10 trials;
> Objective 3.2: [Student] will exhibit at least one communicative exchange with peers and adults using a [PECS] sentence strip, per interaction, with 80% accuracy. D Exh. 1, p. 1266.
>
> (b) **September 2005 IEP**: Annual Goal 8: [Student] will improve social skills;
> Objective: [Student] will participate daily with a peer in an extra-curricular/non-academic [sic] for 2-3 minutes with adult facilitation. D Exh. 1, p. 1203.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

(c) **September 2006 IEP**: Annual Goal 13: [Student] will improve social skills;
Objective: [Student] will participate daily with a peer in an extra-curricular/non-academic activity for 5-10 minutes with adult facilitation. D Exh. 1, p. 1117.

(d) **October 2007 IEP**: Annual Goal 13: [Student] will improve social skills;
Objective 1: [Student] will participate daily with a peer in an extra-curricular/non-academic activity for 5-10 minutes with adult facilitation.
Objective 2: [Student] will develop understanding of the happy, sad and angry emotional states by labeling the emotion with a picture icon, with 80% accuracy.
P Exh. 18, p. 451.

102. As described in my findings above, Student's program has included use of the PECS system for communication. The PECS program is structured in phases. When Student was in kindergarten, well before the relevant period of this hearing, he was working on phase 2. Staff realized during the consultation visit by Ms. Figini-Myers in the fall of 2nd grade that Student's PECS skills had apparently regressed, so staff re-taught the early phases to bring Student up to working on phase 3. HR 1206-1208, 1698. By the fall of 3rd grade he had mastered phase 3 and was working on portions of phases 4 and 5. HR 1698-1700. The Pyramid consultant reported that Student had mastered phase 5 by November 2007. *See* D Exh. 29, p. 1 (Pyramid report November 2007).

103. Student had obtained a vocabulary of approximately 200 words (expressive and receptive vocabulary) using the PECS system during the period

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

covered by this hearing. HR 2091-2093 (Woodall testimony). Student had not, however, attained the ability to communicate "no," to refuse or decline an offer or request, despite staff efforts to work with him on that skill. HR 2259-2260, 2455, 2961, 2968.

104. There is no dispute that Student has engaged in aggressive behaviors towards staff, and to a lesser extent towards other students, during the period relevant to this hearing. These behaviors have sometimes led to injuries to staff, mostly consisting of scratches or bites, and rarely of hair being pulled out. Staff have adopted the practice of wearing protective gear on their forearms and generally wearing clothing that minimizes exposed skin, to protect against scratching, pinching and biting, and also of wearing their hair up in order to prevent Student from grabbing onto and pulling their hair. HR 672-673, 684, 1493-1494, 2037, 2040-2041.

105. Ms. Woodall testified that Student engaged in biting, scratching, kicking, and pulling of hair on a "daily" basis. HR 2028-2032, 2036. I find her testimony credible.

106. Ms. Woodall testified that Student engaged in aggressive behavior towards peers "on rare occasions" in 3rd grade, including an incident of putting another student in a chokehold and scratching, and another occasion of attempting to bite another student. HR 2039. Ms. Woodall's testimony about these incidents was credible.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

107. Ms. Topp testified that she has been "scratched, bit and marked up" by Student "hundreds" of times during the years she has worked with Student in school. HR 1269. Although her numerical estimate may be exaggerated, I find her testimony credible to the extent that Student's aggressive behavior was not infrequent and often resulted in minor injuries to staff.

108. In the fall of 2007, District staff observed that Student's aggression seemed to take on a new intensity. Staff further believed that his behavior had changed in the sense that Student seemed to be intending to harm them when trying to bite or scratch. HR 2280, 2503. Staff also observed that Student seemed to be directing his aggression more towards peers than in prior years. HR 1520. These changes are what prompted the reductions in Student's exposure to regular ed peers that were imposed after the September 25, 2007 IEP meeting.

109. Whether Student can form an intention to harm is a matter that is disputed by the parties. Ms. Woodall felt fairly certain that her observation of intentionality was accurate. The District, however, presented no expert testimony on the question. Parent's inclusion expert, Dr. Quirk, testified that she doubted that Student could form such an intention. HR 2985. Dr. Quirk opined that Student's aggressive behaviors were more likely a form of attempted communication, or an expression of frustration over an inability to communicate. HR 2985, 3001. Whether or not Student could form an intention to harm, however, is relevant only to the extent that staff's views on the question clearly

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

influenced their decision-making regarding Student's exposure to his regular ed peers in the 2007-2008 school year.

110. Ms. Ellsworth testified about three incidents of aggression by Student towards his peers in the fall of 2007. She did not witness these incidents, but learned of them when staff reported them to her. The incidents took place on August 30, September 20, and September 25, 2007. The August 30 incident took place on the playground, when Student grabbed a kindergarten student by the shoulders and attempted to bite him on the cheek; staff were able to separate them before Student could break the skin. HR 1508-1509; P Exh. 36A, p. 8. The September 20 incident took place in the self-contained classroom, where Student was sitting with a 5th grader, a regular ed peer "buddy" who was working with Student with the PECS system; without warning, Student turned to the peer and attempted to bite him on the cheek, but did not injure him. HR 1511-1514; P Exh. 36A, p. 20. The September 25 incident also took place in the self-contained classroom, when Student was chasing staff (a common occurrence of aggressive behavior with staff) and then "turned towards a peer." Staff were able to intercede to prevent injury to the peer. HR 1515-1519; P Exh. 36A, p. 23.

111. Although Ms. Ellsworth's testimony about these incidents is hearsay, it is based on reports made to her by staff as part of established District procedures, and it is corroborated to some extent by the home-school journal

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

pages cited above. Her testimony, therefore, is reliable, and establishes that the incidents in question did take place.

112. In addition to the peer incidents discussed in Ms. Ellsworth's testimony, the October 15, 2007 incident mentioned in Findings no. 72 and no. 76 also occurred. Special ed aide Sharon McEntee testified about this incident which took place at recess; Student grabbed another student around the neck and attempted to bite him on the cheek. HR 677, 682. The other student was not injured. *Id.*, D Exh. 18, p. 29.

113. All four of the above-referenced peer incidents are described in the home-school communication journal, but the details and apparent intensity of some of the incidents is not conveyed by the journal. For example, one would not necessarily know from reading that Student had "turned towards" another student that he was acting aggressively towards that student. P Exh. 36A, p. 23. It was only through the testimony of Ms. Ellsworth and Ms. McEntee that one could grasp the full dimensions of the incidents.

114. Ms. Topp experienced an intense incident of aggressive behavior by Student on the playground in early September 2007, when Student grabbed hold of her hair and she was unable to get him to release her. Rather than struggle with Student on the playground in front of other Students, she walked with him into the building, half bent over while he maintained a tight grip on her hair. Once inside she was able to deescalate Student's behavior and release herself from Student's

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

grip with the assistance of another staff person. HR 1270-1274, 2946-2947. Ms. Topp required chiropractic care for her neck as a result of this incident. HR 2947.

115. Ms. Topp characterized this incident as "very violent, very physical," also describing it as "very extreme, very aggressive and very dangerous to my well-being." HR 1270, 1275-1275. During the incident, while Student was gripping her hair and trying to kick her, he was also "trying with all his might to bite [her] cheek." HR 1274-275. Ms. Topp had "no doubt that had he been able to, he would have taken a chunk out of [her]" by biting. *Id.* She testified that this incident caused her to be "very concerned not only with my own safety, but for the safety of the child." HR 1270.

116. The District never informed Parent of this early September 2007 incident with Ms. Topp through the home-school journal or the IEP team. The first time Parent learned of this incident was at the hearing when Ms. Topp testified. HR 1275.

117. The only clear documentation in the record of the September 2007 incident with Ms. Topp was a workers' comp report form that Ms. Topp filled out with Ms. Ellsworth after the incident. D Exh. 32; HR 2946-2947. The home-school journal that was intended to be the means for communicating with Parent about Student's behavior (*see* HR 1498) contained no description of this incident.

118. District administration required that workers' comp reports be filled

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

out by staff if Student's aggressive behavior caused a break in the skin or a "serious" or "substantial" injury. HR 1263, 1492-1493, 2035, 2928-2929.

119. The District apparently considered the workers' comp reports to be confidential, however, and as a result they were not provided to Parent until during the late stages of this hearing, and only after repeated requests from both Parent and the Hearing Officer.

120. As noted in Finding no. 95 above, after the January 2008 mediation the District was required to have staff fill out behavior log forms for any incident involving Student where a person's skin was broken or they otherwise incurred a physical injury, with the written forms to be provided to Parent within 24 hours of the incident in question. HR 1497. This requirement, however, was not in effect before February 2008. Prior to that, the District relied on the home-school journal to communicate with Parent regarding aggressive behavior by Student. HR. 1497-1498.

121. Based on my review and comparison of the home-school journal (*see* P Exh. 36A, the 2007-2008 home-school communication journal), the workers' comp reports and staff testimony regarding aggressive behaviors by Student, I find that the District failed to adequately keep Parent informed regarding Student's behavioral issues and related problems at school, including the incidents of aggression that occurred between Student and his peers.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

122. District staff and administrators had a concern about the safety of Student's peers in connection with Student's inappropriate and aggressive behaviors. Their concern clearly was legitimate.

123. Parent's inclusion expert, Dr. Quirk, testified at length and in detail about how inclusion of Student and his educational program can be accomplished in the regular ed classroom. *See, e.g.,* HR 897-903. She further testified that greater inclusion can be accomplished, even taking into account Student's apparently intensified behaviors, apparently increased directing of those behaviors towards peers in the 4th grade, and the reports of apparent "intentionality" in his aggressive behaviors. HR 2985-2986. School psychologist Gerard did not disagree, testifying that that he believed Student can be "mainstreamed," i.e., being taught at least some of his special ed curriculum with his regular ed peers. HR 1955. I find Dr. Quirk's testimony on the question of increasing Student's inclusion to be credible and persuasive.

V. Conclusions of Law

This section of my decision will separately address each of the issues raised in Parent's April 2008 amended complaint. Having reviewed the evidence and heard the testimony of the witnesses, IT IS HEREBY ORDERED that Parent's claims and allegations are resolved as follows:

> 1. "The MSBSD failed and continues to fail to ensure that [Student] is educated with other children who are non-disabled to the

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

> maximum extent appropriate. The nature or severity of [Student's] disability is such that education in regular classes with the use of supplemental aids and services can be achieved satisfactorily." Parent's Amended Due Complaint, para. 54.

This is a claim for failure to educate Student in the "least restrictive environment" ("LRE"). The requirement that Student be educated in the LRE is one of the most fundamental elements of special education law under the IDEA, state law and related regulations. It is set forth succinctly in federal law as follows: "Each public agency must ensure that . . . to the maximum extent appropriate, children with disabilities . . . are educated with children who are non-disabled." 34 CFR 300.114(a)(2)(i). Similarly, state law provides that "[a] child with a disability must be placed in the least restrictive environment that can provide a FAPE for the child, in conformance with the requirements of 34 CFR 300.114(a)(2). . .." 4 AAC 52.170(a).

I find that Parent met her burden on both her general claim that the District has violated its LRE obligations as to Student, and on the more specific claim that Student can be educated in regular education classes to a greater degree than has been accomplished during the period covered by Parent's amended complaint.

I do not wish to trivialize the District's health and safety concerns arising from Student's aggressive behaviors and related difficulties. However, notwithstanding those concerns, the District failed to attempt to meet its LRE obligations in a systematic or well-considered manner. There was no evidence of

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

any serious attempt by the District to determine how Student could be included with other children to a greater degree. On the contrary, the evidence showed that the question of increasing Student's inclusion with regular ed peers was given short shrift in his IEPs and was not seriously addressed through the IEP process. In fact, the level of his exposure to regular ed peers was significantly reduced during the 34 months at issue here. And more importantly, when decisions were made to reduce Student's inclusion with regular ed peers, particularly in the fall of 2007, those decisions were made without the participation of the IEP team.

This ruling should not be read as a negative reflection on the good faith of District staff or on the level of effort expended by them on Student's behalf. Clearly the staff were committed to Student's education and worked very hard, in good faith, to try to have him receive a meaningful educational benefit from his program. It appears, however, that staff became so involved in dealing with Student's difficult behaviors on an ongoing, day-to-day basis, that they simply didn't or couldn't consider how to increase his exposure to regular ed peers.

The District's arguments on this issue, presented both during the hearing and in the District's post-hearing brief, focused a great deal on Parent's testimony that she understood Student's placement to be primarily in the regular ed classroom. The District argued that because Parent must have really understood that the placement was in the self-contained classroom, Parent should not now be heard to complain about it. *See* District's Post-Hearing Brief at 20-23. Assuming,

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

arguendo, that Parent really did understand the nature of the placement at the time, her past perceptions of the placement are irrelevant to this question; the District's efforts to meet its obligations to properly place Student in the LRE must stand - or not - on their own merits. The District simply did not meet these obligations.

The District also argues that Parent "admitted" that a more restrictive placement would be appropriate for Student, via a comment made by her counsel at the start of a resolution meeting prior to the hearing. Ms. Hope testified that Parent's counsel told her that "I can't believe you don't have this kid in a residential program." HR 2831-2832. The District asserts that this comment constitutes an admission by Parent, via her counsel, "that a more restrictive placement is actually indicated for [Student], rather than a less restrictive placement." *See* District's Post-Hearing Brief at 24.

In making this argument, the District cites Beaulieu v. Elliott, 434 P.2d 665, 669 (Alaska 1967) for the proposition that an admission by counsel can be binding on the client. That case, however, involved a very detailed admission by counsel in a personal injury case regarding the extent of the client's injuries, with the admission being made during the course of trial. Obviously such an admission is highly distinguishable from the apparently off-hand comment made by counsel herein, on her way into a resolution meeting. Knowing Parent's counsel, and taking into account Parent's strenuous arguments concerning the LRE issue throughout the hearing, I believe it's most likely that counsel's comment was

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

meant to be sarcastic or tongue in cheek, and I accord it no weight. In any event, I find the District's argument on this issue to be without merit.[10]

The District further argues that Student's needs for program modification can more reasonably be provided in the self-contained classroom. *See* District's Post-Hearing Brief at 24-25. This argument, however, ignores the primary fact that the District has never seriously examined the issue through the IEP team process. If the team had done so, had attempted the modifications deemed necessary to allow Student to benefit from the curriculum, and had then found that the modifications were not feasible and that Student simply was not benefiting from the program, I might be reaching a different result. There is no evidence, however, that the team has ever attempted to undergo this process.

The District also argues that Student's behavior places other students at too great a risk to allow a less restrictive placement. *See* District's Post-Hearing Brief at 25-29. There is no doubt that Student's behavioral issues may place other students or staff at risk, absent proper behavioral intervention planning. Such planning, however, is part of the systematic, planful approach recommended by Dr. Quirk and by Ms. Allen.[11]

Again, I do not intend to minimize or trivialize the potential impact of

[10] Because I give no weight to the comment made by Parent's counsel at the resolution meeting, I need not resolve the Parent's objection to Ms. Hope's testimony on this point, to the effect that discussions at resolution meetings should be treated as confidential settlement discussions.

[11] The District has mischaracterized Ms. Allen's testimony on this issue, asserting that she testified that the current level of inclusion is "reasonable." *See* District's Post-Hearing Brief at 30. In fact Ms. Allen testified similarly to Dr. Quirk, stating that inclusion could be accomplished if done gradually and planfully. HR 1672-1673.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

Student's behavior on peers. The District, however, has never seriously attempted to take the steps necessary to try to accomplish greater inclusion of Student. Such steps are mandated by the IDEA and state law. If the effort is undertaken in a serious, gradual, and planful manner, the risks to peers can be minimized. In fact, Dr. Quirk opined that Student's inclusion with regular ed peers, if done properly, may result in decreased aggressive behaviors. This is because his aggression may be the result of frustration at his inability to communicate, and his communication skills may be increased by being educated to a greater degree in the presence of peers.

The District lastly argues that inclusion is merely a "method" of providing services and that the IDEA does not dictate the use of specific educational methods. *See* District's Post-Hearing Brief at 30-31. This argument completely misconstrues the nature of the LRE requirement and is without merit. LRE is not an educational method, it is a mandate for placement of disabled children with their regular ed peers to the greatest extent possible. The mandate requires the District to make a serious effort to accomplish inclusion, especially in circumstances such as those presented here where Student was being educated in almost complete isolation from any other children, and he presumably still is being educated in such isolation because the trend was heading in the wrong direction at the end of the 34-month period in question.

Finally, however, to the extent that Parent's first claim in her amended

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

complaint implies a broader allegation that education of Student entirely in regular ed classes can be achieved satisfactorily, I find that Parent did not meet her burden of proving such a claim. Parent did not present sufficient evidence to allow me to find that Student can be in the regular ed classroom 100% of the time. It remains to be seen whether this can be accomplished, given Student's disabilities and his very significant needs for program modification, behavioral planning, etc. The District, however, needs to make the effort to accomplish more inclusion through an LRE placement, and then it and Parent can find out how great a degree of inclusion with regular ed peers can be accomplished.

> 2. "The MSBSD lacks a continuum of alternative placements, including one which would be less restrictive for [Student]." Parent's Amended Due Complaint, para. 55.

I find that Parent did not meet her burden of proving this allegation at hearing. Parent did not present evidence that the District did not have available the less restrictive placements on the continuum. Rather, the evidence pointed to the District's failure to attempt to accomplish greater inclusion. Therefore, I find for the District on this issue.

> 3. "The MSBSD has failed to determine [Student's] placement annually consistent with the requirements of the least restrictive environment, including the presumption of regular classroom placement. . . . The MSBSD has failed to include a regular classroom teacher in placement determinations and in determinations of appropriate behavioral interventions and supports and other strategies for [Student]." Parent's Amended Due Complaint, para. 56.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

I find for Parent on this claim. This is a critical procedural violation. As discussed under claim no. 1 above, and noted in Findings nos. 18, 26, 38, 45, 47 and 56 (among others), the District essentially "predetermined" Student's placement in the self-contained classroom where Student has been educated during the 34-months in question. The special education teacher, Ms. Woodall, was the person most relied upon by other District personnel to guide the IEP team regarding Student's placement within the LRE continuum, and she testified that his placement in the self-contained classroom was a "foregone conclusion." In addition, the other evidence presented regarding the lack of discussion of placement and LRE issues at IEP meetings clearly corroborates Ms. Woodall's statement. Furthermore, there is no dispute that the regular education teachers to whom Student was nominally assigned had no real or substantive participation in the development of Student's IEPs -- this also constitutes a procedural violation of the IDEA.

Such procedural violations under the IDEA can be as significant as substantive violations. Notably, the Ninth Circuit has found procedural violations in a district's failure to have a child's regular ed teacher participate in a decision to move the child to a more restrictive placement. M.L. v. Federal Way Sch. Dist., 394 F. 3d 634, 644 (9th Cir. 2005).

I find an additional, significant procedural violation in the District's failures

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

to provide Prior Written Notice concerning the gradual lessening of Student's exposure to his regular ed peers. As discussed above, this process resulted in Student essentially being educated in nearly complete isolation from other students in his school, whether in the classroom, at recess, at lunch, or at special events. The lack of notice to Parent of these gradual changes significantly interfered with Parent's ability to meaningfully participate in Student's IEP processes. *See* M.P. v. Anchorage School Dist., 45 IDELR 253 (Alaska Superior Court 2006) (Prior Written Notice is one of the more important protections afforded disabled children under the IDEA); W.G. v. Target Range Sch. Dist. no. 23, 960 F. 2d 1479, 1484 (9th Cir. 1992) (procedural inadequacies that seriously infringe on parent's opportunity to participate in IEP formulation process result in denial of FAPE); M.L. v. Federal Way Sch. Dist., 394 F. 3d at 653 (same).

On a related note I also find a procedural violation in the failure of the school psychologist to inform Parent of his opinion that Student is moderately mentally retarded. Such information should have been shared with the IEP team and with Parent, and the failure to do so interfered with Parent's ability to meaningfully participate. *See* Amanda J. v. Clark Co. Sch. Dist., 260 F.3d 1106 (9th Cir. 2001).

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

4. "The MSBSD has failed to ensure that [Student] can participate with non-disabled children in non-academic settings, including meals, recess and other activities." Parent's Amended Due Complaint, para. 57.

I find for Parent on this claim (see discussion of claims no. 2 and 3 above).

This claim is another manifestation of the LRE violations analyzed above, and the same result applies.

5. "The MSBSD has failed to even attempt placement of [Student] in a regular education setting in a meaningful way and with supplementary aids and services that would enable him to be educated with non-disabled peers to the maximum extent appropriate." Parent's Amended Due Complaint, para. 58.

I find for Parent on this claim (see discussion of issues no. 2 and 3 above).

Again, this claim sets forth Parent's LRE claim in a slightly different manner, focusing on the District's failure to attempt an LRE placement, but the result is the same. There was no evidence of any serious attempt by the team to look at greater inclusion or increased exposure to peers for Student.

6. "The MSBSD has failed to provide [Student] with an education in the least restrictive environment. Parent's Amended Due Complaint, para. 59.

I find for Parent on this claim (see discussion of issues no. 2 and 3above).

This is another claim setting forth Parent's basic LRE claim, with the same result.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

7. "The MSBSD has wholly failed to provide [Student] with supplemental aids and services to enable him to be educated in the least restrictive environment. Parent's Amended Due Complaint, para. 60.

I find for Parent on this claim (see discussion of issues no. 2 and 3above), with the exception that Parent did not meet her burden of proving up her characterization that the District "wholly" failed in this regard; the District did make some efforts to provide supplemental aids and services in this context (*e.g.*, by having regular ed peer "buddies" work with Student on PECS).

8. "The MSBSD failed to ensure the development and full implementation of an adequate behavioral intervention plan for [Student], resulting in his suspension during 2007-2008 and his restrictive settings." Parent's Amended Due Process Complaint, para. 61.

I find for Parent on her claim regarding the District's implementation of Student's behavior plan, primarily relating to problems at the beginning of fourth grade, in the fall of 2007. At that time Student's behavior was deteriorating, and yet the testimony indicated that a copy of the actual behavior plan was not available at the school for staff to consult. The testimony also supported the conclusion that the behavior plan had not been finalized. *See, e.g.,* Finding no. 75 above. Staff could hardly implement a behavior intervention plan for someone with such difficult behavioral challenges as Student if the plan was in an incomplete, draft form, sitting in a drawer at the District offices.

I further find for Parent on the causation aspect of this claim, i.e., that the

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

failure to properly implement the behavior plan contributed to Student's suspensions and the reduction in his exposure to peers. Student's team clearly was caught unawares by the changes in Student's behavior in the fall and early winter of 2007-2008. Better implementation of the behavior plan would at the very least have put staff in a better position to react to these changes.

I also find, however, that Parent did not meet her burden of proving that the content of the plan was deficient, and therefore find for the District on that issue. Once the plan was finalized and put into action, its content was reasonably calculated to address Student's behavioral issues. Those steps took place very late in the game, however, so that the evidence is unclear as to the actual impact of of the plan on Student's deteriorating behavior.

> 9. "The MSBSD illegally excluded, suspended or expelled [Student] from January 8 to February 1, 2008 for misbehaviors related to his disabilities." Parent's Amended Due Process Complaint, para. 62.

Student was suspended twice in early January, 2008, for a total of four days, and then was allowed to gradually come back to school pursuant to the re-entry plan. In total, Student was out of school for greater than 10 days, but no manifestation determination was ever conducted by the District. Unfortunately the District did not maintain records of the precise number of hours Student attended school during the implementation of the re-entry plan. Even more surprising, the District also failed to maintain records that would have allowed Parent to know

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

exactly what was Student's behavior that gave rise to the suspensions.[12]

Based on my finding that the re-entry plan was imposed by the District as a condition to Student coming back to school (Finding no. 88), I find for Parent on this claim. Parent met her burden of proving that Student's attendance at school after the suspensions was conditioned on her agreement to the re-entry plan. Thus the re-entry plan constituted a continuation of the suspensions that in total exceeded the total number of days of suspension allowed under the IDEA without a manifestation determination.

I have no doubt that had the District conducted a manifestation determination, it would have found that Student's behaviors giving rise to the suspensions were a manifestation of his disability. Given the admission by Ms. Ellsworth to that effect (Finding no. 64), I will make that finding at this time.

> 10. "The MSBSD has failed to provide [Student] with a free and appropriate education as required by the IDEA, and his education has been of a *'de minimus'* nature." Parent's Amended Due Process Complaint, para. 63.

I find for Parent on the District's procedural violation in not adequately setting forth Student's Present Levels of Educational Performance ("PLEPs") in his IEP, resulting in an inability to accurately assess Student's progress on his IEP goals, and in stating annual goals and objectives in terms that are not objectively

[12] As discussed in Findings nos. 83, 84 and 93, it was not until the hearing that the parties were able to roughly determine the facts underlying the suspensions.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

measurable. The IDEA clearly requires that IEPs include goals and objectives that are objectively measurable. 20 U.S.C. §1414(d)(A)(i); 34 CFR 300.320. My findings regarding the content of Student's goals and objectives in each of his IEPs, as well as regarding the imprecise descriptions of his PLEPs, mandate a ruling for Parent on this aspect of this claim.

I further find for Parent on the District's substantive failure to provide FAPE as to the social elements of Student's education. *See* Finding no. 101 above. This ruling is related to my LRE rulings above, in the sense that not only has Student been educated in isolation from his regular ed peers, but the social elements of his IEP provide *de minimus* services towards developing Student's social skills. In combination, the two violations could lead to tragic results for an autistic child whose primary deficits are in "difficulty with communication skills and difficulty with social interactions." HR 899 (Quirk testimony). For these reasons, Dr. Quirk described the social elements of Student's 2007 IEP as "shameful" in their minimal attention to social interaction between Student and his peers. HR 898-899; P Exh. 16, p. 421. Although her characterization may be overly judgmental, I cannot disagree with her view that the objective of 5 minutes of unspecified daily "participation" with a peer is *de minimus* and inadequate.

However, I find that Parent did not meet her burden of proving that Student's overall education "has been . . . *de minimus*." This allegation is focused on Student's PECS program and his inability to express "no" or "refusal" to

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

requests or demands. *See* Parent's Post-Hearing Brief at 22-24. The efforts made by the District to attempt to help Student learn to communicate through PECS have been more than *de minimus,* and Student has made more than *de minimus* progress in his communication skills. It is not insignificant that Student has attained the ability to use a 200 word vocabulary with the PECS system. *See* Findings nos. 102, 103.

I do not wish to minimize the importance of teaching Student to say "no." None of the witnesses giving credible testimony in this hearing held the view that this is not a critical communication tool for any child to have. District staff, however, worked with Student on attaining that skill, and I do not find that their lack of success renders his entire program *de minimus* and thus invalid.

> 11. "The MSBSD has failed to develop an adequate IEP with measurable goals and objectives and sufficient services to enable [Student] to meet those goals and objectives. . . . This includes an insufficient present level of performance and a statement of measurable annual goals, including academic and functional goals to meet [Student's] needs that result from his disability to enable him to be involved and make progress in the general education curriculum and to meet each of [Student's] other needs." Parent's Amended Due Process Complaint, para. 64.

As already discussed above regarding claim no. 10, I find for Parent on her claim of a FAPE violation regarding inadequate PLEPs and the lack of measurable goals in Student's IEP. The remainder of this paragraph of Parent's complaint is conclusory surplusage which need not be addressed.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

12. "The MSBSD has failed to make a good faith effort in assisting [Student] to meet his goals and objectives." Parent's Amended Due Process Complaint, para. 65.

I find that Parent failed to meet her burden of proof on this issue and therefore find for the District. Parent did not establish that the District acted in bad faith towards Student or Parent; the evidence clearly supported the view that the District did act in good faith in its efforts to attempt to meet its obligations to Student. The District's efforts simply were, in many instances, misplaced or misdirected. There was no evidence whatsoever of bad faith.

13. "The MSBSD has failed to provide [Student] supports and services that are required to assist [Student] to meet his goals under the IEP." Parent's Amended Due Process Complaint, para. 66.

With the exception of the social elements of Student's IEP, discussed above, Parent did not meet her burden of proving this allegation. The District provided a very significant level of supports and services, devoting a very large level of resources to Student's education. I find for the District on this claim.

14. "The MSBSD has failed to provide [Student] with ESY services in sufficient scope and duration, including speech therapy, to avoid regression and to maintain skills." Parent's Amended Due Process Complaint, para. 67.

I find for the District on this claim. The ESY services that are the focus of this claim were specifically requested by Parent for the summers of 2006 and 2007. *See* Findings nos. 32, 49. The services were negotiated between Parent and

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

Ms. Hope and were explicitly agreed to by Parent and the District. Parent did not meet her burden of proving that these circumstances were the result of failures by the District to offer adequate ESY services on its own.

> 15. "The MSBSD has failed to ensure that [Student] has a meaningful and reliable means of communication, through either PECS or other means, including assistive technology. Parent's Amended Due Process Complaint, para. 68.

As discussed regarding claim no. 10 above, Parent failed to meet her burden of proving that Student's progress in using PECS to communicate was *de minimus*, and therefore I find for the District on this claim as to PECS. Again, I do not find that Student's inability to say "no" or to "refuse" a request rises to the level of rendering the entire PECS communication program invalid.

However, I find for Parent as to the assistive technology element of this claim: Student's last IEP in September 2007 required that Student be provided with a voice output device called a Dynavox, but it is undisputed that, as of the filing of the amended complaint in April 2008, the Dynavox had not yet been provided to Student. *See* Finding no. 69.

> 16. "The MSBSD has failed to ensure a properly licensed special education teacher and highly qualified teacher. Parent's Amended Due Process Complaint, para. 69.

During the last three to four months of the relevant 34-month period, the District provided services to Student via a regular education teacher who was

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

supervised by a SPED teacher. Parent, however, did not meet her burden of proving that the District either violated the IDEA or failed to provide FAPE by providing SPED services to Student in this manner. Parent simply did not present a cogent, compelling argument that the delivery of services in this manner violated the law, nor did she present evidence that it in and of itself resulted in a failure to provide FAPE.

V. Remedies

The parties gave very short shrift to the subject of remedies in their presentations at hearing and their post-hearing briefs. Parent's post-hearing brief merely urged me to award (1) the remedies sought in Parent's amended complaint, without presenting any argument or rationale as to the appropriateness of those remedies, and (2) "and any others necessary to ensure [Student] receives" FAPE in the LRE, without further elaboration. The District's post-hearing brief, as one might expect, took the position that the District has fully complied with the law and therefore no remedies need be ordered. After issuing my February 2, 2009 summary decision, at my request the parties submitted supplemental briefing on the compensatory education remedy that should be awarded to Parent.

The following orders were contained in my summary decision, and they remain in effect (with some minor changes), requiring that the District:

A. Contract with Dr. Carol Quirk, the inclusion expert who has already

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

observed Student and staff at school, to perform the necessary systematic analysis and planning in conjunction with the IEP team and any behavioral consultants that may already be involved in Student's program, to ensure that Student is educated in the LRE, while protecting staff and other students from any potential harm associated with Student's aggressive or inappropriate behaviors; Ms. Hope should supervise this process, including the team's implementation of Dr. Quirk's plan; the team should provide regular reports to Ms. Hope regarding their implementation of Dr. Quirk's plan, and Ms. Hope should communicate with Dr. Quirk to ensure implementation is in line with Dr. Quirk's intentions.

B. Rewrite Student's IEP to provide adequate baseline data and PLEPs, and to allow for objective measurement of Student's progress on his goals and objectives.

C. Provide the Dynavox required by Student's last IEP and the training for staff and instruction for Student necessary to implement that element of the IEP, while ensuring that it is done in a manner that does not cause regression in Student's ability to use PECS.

D. Provide compensatory education in the form of Student's current daily instruction in an amount equivalent to the approximately 13 days that Student was excluded from school due to the suspensions and re-entry plan in January 2008.[13]

E. Compensatory education is also appropriate for the District's failure to

[13] 2.5 hours should be deducted from this award for the time Student could have attended school on January 29, the date of the parties' last mediation.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

meet its LRE obligations to Student over the period covered by this hearing, and to a lesser extent for the District's failure to provide the Dynavox in a timely fashion. Having received the parties' supplemental briefing, I will address additional compensatory education remedies below.

In its supplemental brief, the District correctly notes that in my summary decision, I sought additional guidance from the parties regarding compensatory ed remedies for the District's violations regarding LRE placement of Student and failure to timely provide the Dynavox. The District, however, mischaracterizes my ruling on the LRE violation as "isolated to a concern regarding socialization opportunities in the regular education classroom." District's Feb. 26, 2009 Reply re Comp Ed, p. 2. The District argues that an "award of compensatory education in this matter is specifically limited to the social elements of [Student's] education." *Id.* at p. 3. The District also argues that I should take into account "the limited scope of the District's violations." *Id.* at p. 4.

The District's argument misses the mark concerning the LRE violations discussed in this decision. Although the LRE requirements of the IDEA and state law do relate to socialization of disabled children, their scope is not as limited as the District suggests. In addition to social skills, education in the LRE can provide academic benefits as well, especially for a child such as Student whose primary, severe deficits are in the areas of socialization and communication. For example, a child can "learn how to learn" by observing his regular ed peers engaged in the

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

learning process.

The District's narrow, limited view of its LRE violations leads it to suggest a comp ed award of 88.8 hours of services[14] targeted at socialization and/or inclusion opportunities. *Id.* at p. 5. I find that the LRE violations were much more fundamental and much broader in scope than the view espoused by the District, with greater impact on Student's progress both socially and academically. Therefore the remedy proposed by the District is inadequate.

Parent, on the other hand, proposes essentially an "hour for hour" comp ed remedy, based on the number of days and hours of instruction during the timeframe when the violations occurred. Parent acknowledges that the comp ed award must be "individually tailored . . . to meet a student's prospective needs," rather than being a "rote" award equal to each hour allegedly lost. Parent's February 14, 2009 Response re Comp Ed, at p. 2. Parent then asserts that in order to meet Student's unique needs, the award should be for 180 days of instruction for each year covered by the hearing, at 6.5 hours per day (the District has a 6.5 hour school day), less the 13 days already awarded for the January 2008 suspensions. *Id.* at p. 3. This totals 3217.50 hours of services, which Parent argues she should awarded in the form of a comp ed services fund which she may access for "any reasonable educational services" for Student. *Id.* at p. 4.

[14] The District did not set forth a proposed cost of these services; using the range of cost of services proposed by Parent, $60 to $125 per hour, the District's proposal would be valued at between approximately $5,280 and $11,000.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

There is no doubt that Student's needs are very significant, as argued by Parent in her supplemental brief, and that the comp ed award should take this into account. Parent's proposed award in her supplemental brief seems to assume, however, that Student's educational services during the 34 months at issue have been essentially useless. My rulings above, however, make clear that Student has received some educational benefit from his program. Parent's supplemental brief also goes beyond the mandate of my summary decision, by bringing into consideration the District's failures to write measurable goals in Student's IEPs. Parent's comp ed proposal, therefore, is excessive.[15]

Compensatory education is an equitable remedy designed to compensate a student for services not received when the student is denied FAPE. An award of compensatory education is within my authority as an independent hearing officer. Cocores v. Portsmouth New Hampshire Sch. Dist., 779 F.Supp. 203 (D.N.H. 1991). The remedy is designed to "place disabled children in the same position they would have occupied but for the school district's violations of the IDEA." Mary McLeod Bethune Day Academy Public Charter School v. Bland, 555 F. Supp.2d 130, 50 IDELR 134 (D. D.C. 2008); Reid v. D.C., 401 F.3d 516 (D.C. Cir. 2005).

The comp ed remedy is equitable in nature. Parents of Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994). Because of the

[15] I note that based on Parent's proposed range of cost of services, $60 to $125 per hour, her proposed award would be valued at between approximately $193,000 and $402,000.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

equitable nature of the remedy, to determine the amount of comp ed that is appropriate to award in this matter, I must weigh the evidence presented by both sides and weigh the actions of both the District and Parent with regard to Student's education. Id.; W.G. v. Board of Trustees of Target Range Sch. Dist., 960 F.2d 1479, 1486 (9th Cir. 1992) (conduct of both parties must be reviewed in fashioning equitable relief); Parents of Student W, 31 F.3d at 1497 (parents' behavior is also relevant).

When fashioning an equitable comp ed remedy, the question of the amount of the award is a fact-specific inquiry; the award of compensatory education is not a simple entitlement to an equal amount of educational services, because the remedy is equitable rather than contractual in nature. Id. The award "must be reasonably calculated to provide the *educational benefits* that likely would have accrued from special education services the school district should have supplied in the first place." Mary McLeod, 50 IDELR 134 at 3 (*quoting* Reid).

As discussed above, I have found that the District acted in good faith in providing services to Student under his IEP and in attempting to implement behavior plans to remedy Student's behavioral difficulties. The District's LRE violations, however, were quite significant, and should not be minimized.

Parent's behavior throughout the period covered by the hearing cannot be faulted. She has been an active advocate on behalf of Student, and her actions give every appearance of trying to work with the IEP team and District staff in a

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

cooperative and collaborative fashion. I do not consider her apparent misunderstanding of the nature of Student's placement to be a factor to be held against her in examining the parties' conduct herein.

Having considered all of the evidence, as well as the parties' supplemental filings regarding these comp ed issues, I find that a comp ed award of $50,000 in services is appropriate to put Student in the place he would have been in absent the District's LRE and Dynavox violations. This award is equivalent to approximately 300 hours of speech therapist services plus roughly 208 hours of aide services, at the $125 and $60 per hour rates cited by Parent, or 2.7 hours of speech services and 1.9 hours of aide services per week for 3 school years. I find that this level of services is reasonably calculated to assist Student in remedying the deficits caused by the District's LRE violations and the violation concerning provision of the Dynavox.

The comp ed award shall be in the form of a comp ed "bank" or "fund," in essence an account on which Parent and the IEP team can draw to procure services. Parent shall not have unfettered access to the fund. Parent's argument that the District should not be allowed to control the remedy (*see* Parent's February 14, 2009 Response re Comp Ed, at p. 4) is misplaced. Student's IEP team will continue to be the entity that controls his educational program, so these comp ed services must be provided in conjunction with the team. Parent should work with the IEP team to determine appropriate services to fund from the bank.

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

The team must and will act in good faith in working with Parent in making that determination. The numbered list of possible services set forth in Parent's February 14 Response, p. 4, presents good examples of the types of services Student may need, but the list is by no means exhaustive. The general rule of thumb for the team's reference is that the comp ed bank should be used for direct services to Student, evaluations, assessments, training, and assistive technology.

Ms. Hope shall be the final decision-maker regarding usage of the comp ed bank. Parent and Student will be allowed to access the bank until he ages out of the system at age 21 or graduates from high school, whichever occurs first. The parties may seek relief for any dispute that may arise regarding usage of the comp ed bank via their remedies under 4 AAC 52.550(a) or in court as permitted by the IDEA.

In accordance with AS 14.30.193(f) and 20 U.S.C. 1415(i)(1)(A), this decision is a final administrative order. The parties are reminded that either party may appeal this decision within 30 days of the date of issuance of this decision with the Alaska Superior Court, pursuant to AS 14.30.193(f) and AS 44.62.560. An appeal may also be taken pursuant to 20 U.S.C. 1415(i)(2)(A) and 34 CFR 300.516, and applicable federal rules.

DATED at Anchorage, Alaska, this 13th day of March, 2009.

s/Andrew M. Lebo
Andrew M. Lebo, Alaska Bar #9011106
Due Process Hearing Officer

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848

Certificate of Service

The undersigned certifies that on the 13th day of March, 2009, a true and correct copy of the foregoing Order was served by US mail and email on Teri Hennemann and Sonja Kerr, and by email on Parent.

s/A.Lebo
Andrew M. Lebo

LAW OFFICES OF
ANDREW M. LEBO
425 G Street, Suite 920
ANCHORAGE, AK 99501
(907) 276-8275
FACSIMILE
(907) 278-4848