



District. [A representative] was present for the [ ] Area Education Agency. Attorney Miriam Van Heukelem appeared as counsel for the District and AEA.

K.S.'s mother R.S. and stepfather D.K.; members of K.S.'s treatment team Sharon A. Collins, M.D., Megan Foley Nicpon, Ph. D., Andrew C. Peterson, M.D., and Leslie Downs Mullen, M.S., LMFT; and [three] representatives from the [Private] School [ ] testified at hearing for the Complainant. [Ten school] district employees [ ]; and [ ], an autism consultant with the AEA, testified for the Respondent.

Each party submitted an exhibit binder. The Respondent's exhibit binder, containing pages 1 – 447, and the Complainant's exhibit binder, containing pages 1 – 214, were both admitted into the record without objection.

The parties elected to submit briefs, in lieu of closing argument, and agreed upon a post-hearing briefing schedule. Initial and reply briefs were filed by both parties and the case was submitted on November 26, 2012. Upon joint motion of the parties, the matter was continued through December 14, 2012, to allow time for preparation of this decision. On December 14<sup>th</sup>, the parties filed a joint motion to continue the matter through December 21, 2012.

### **Findings of Fact**

**Introduction:** K.S. was born on [in the spring of] 1996. K.S. resides with her mother R.S. and stepfather D.K. in [ ], within the boundaries of the [ ] Community School District and [ ] Area Education Agency. She was a student at [a District] High School during the 2010-11 and 2011-12 school years. K.S. is an extremely bright and talented young woman and has been active in extracurricular activities, including: show choir, dance, school plays, and volleyball.

K.S. is a gifted student, with a full scale IQ of 123, in the superior range (95<sup>th</sup> percentile). (Comp. p. 114) She excels in science and math and has long aspired to be a pediatrician or surgeon. (Comp. at 118; Resp. at 11) K.S. is also diagnosed with high-functioning autism, or Asperger Syndrome, which significantly affects her communication, socialization, and behavior. (Comp. at 120-121) She is also diagnosed with Obsessive Compulsive Disorder (OCD); mood disorder; adjustment disorder; and Tourette's syndrome. (Comp. at 57-58, 82, 145) As a result of these conditions, K.S. struggles with psychosocial functioning and has difficulty understanding cues, responding to situations appropriately, and connecting to others.

The school district and AEA recognize that K.S. is an eligible student under the Individuals with Disabilities Education Act (the IDEA). She has had an Individualized Education Program (IEP) and Behavior Intervention Plan (BIP) in place for several years. The District maintains an Autism Spectrum Disorder (ASD) program, in which K.S. has participated since her 6<sup>th</sup> grade year in school. The IEP adopted for her in January of 2011 calls for K.S. to receive specially designed instruction in the area of behavior and social skills through the ASD classroom and one-on-one paraprofessional support, as needed for social situations, including lunch, in classrooms, and in casual

social situations throughout the school day. (Resp. at 110-112) Despite her disability, K.S. has excelled academically and has successfully taken several advanced placement classes. In the spring of 2012, at the end of her 10<sup>th</sup> grade year, K.S. had a 4.024 grade point average. (Resp. at 1)

A series of events, beginning when K.S. was sexually assaulted in early January 2012, lead Ms. S. to a decision to remove K.S. from the [ ] High School program in the fall of 2012 and enroll her in the [Private] School. [The Private School] is a private therapeutic boarding school [ ] with a specialized program for high-functioning students with Asperger Syndrome and other learning disabilities. Ms. S. initiated this proceeding in September 2012, seeking full reimbursement of the cost of this unilateral parental private school placement. She asserts that K.S. was in a highly precarious emotional state in August of 2012 and that the school district and AEA were unable or unwilling to offer an education appropriate to meet her current needs. The school district and AEA maintain that they have and continue to offer an appropriate educational program to K.S..

Not surprisingly, the parties focus upon different events and present starkly different views of K.S.'s school experience during the spring of 2012 and the events leading to Ms. S.'s removal of K.S. from the public school. An understanding of K.S.'s disability, strengths, and vulnerabilities; as well as the nature of the program offered by the District and the context in which the unilateral placement decision was made is critical to resolution of this case.

Nature of K.S.'s disability: K.S. is, by all accounts, "twice exceptional" – being both intellectually gifted and on the autism spectrum. Autism spectrum disorders, including Asperger Syndrome, are developmental disorders that may result in severe social, communication, and/or behavioral impairments.

There is some debate in the field as to whether Asperger Syndrome is qualitatively different from high functioning autism. Megan Foley Nicpon, Ph.D., is a postdoctoral research psychologist associated with the University of Iowa, Center for Disability Research and Education, Belin-Blank Center for Gifted Education, who has focused her career on the study of "twice exceptional students" – high ability student with autism, ADHD, and other learning disabilities – for the past decades. Dr. Foley Nicpon considers high-functioning autism and Asperger Syndrome to be essentially the same thing. (Tr. at 185, Comp. at 121; see also Foley Nicpon, M., Assouline, S. G., Amend, E. R., & Schuler, P. *Gifted and talented students on the autism spectrum: Best practices for fostering talent and accommodating concerns* (2010) (published in text - *Special populations in gifted education: Understanding our most able students from diverse backgrounds*, at pp. 227 – 248 (J. A. Castellano & A. D. Frazier, Editors, Waco, TX: Prufrock Press). I do the same for purposes of this decision.

At the beginning of her 6<sup>th</sup> grade year in September of 2007, K.S. was evaluated by Foley Nicpon and others at the University of Iowa's Belin-Blank Center for Gifted Education, as a potential participant in a grant-funded research study of twice-exceptional

students. The comprehensive report of this evaluation provides insight into K.S.'s developmental history.

K.S. began having difficulties in school, personal and social life as a toddler. She was systematically removed from general education, daycare, church, music and social settings due to her inability to socially cope, empathize, or reciprocate appropriate behaviors. ...

Academically, K.S. has always done well on achievement tests and has participated in math, science, and language arts enrichment programs. In 4<sup>th</sup> and 5<sup>th</sup> grades, she was in her school's Behavior Disorders program and, as a 6<sup>th</sup> grader, she is in all general education classes and participates in a class for students with Asperger Syndrome. ...

Throughout her life, K.S. has had multiple stressors, including the death of her maternal grandmother, her parent's divorce, and removal from multiple programs. She has also reportedly struggled with issues related to being biracial. Additional concerns noted on the background information form include impulsivity; difficulty waiting her turn; interrupting; tearfulness; irritability; night terrors; separation problems; phobias/fears; obsessions/compulsions; hypochondriasis; complaints of pain; and neurological symptoms. ... She has made several suicide attempts in the past (ages 6, 7, 8, and 9), and has had headaches since age 9. ...

K.S. was evaluated by Gary Gaffney, M.D., of the UIHC Department of Child Psychiatry in July 2005. ... Dr. Gaffney diagnosed K.S. with Asperger Syndrome and he also said that OCD, obsessional subtype, and Dysthymia were being considered. ...

K.S.'s original IEP was formulated in August 2005. At that time, it was recommended that K.S. be in a "small class with intense behavioral interventions that can consistently focus on social and emotional support."

(Comp. at 112-113) Several assessments were conducted during the 2007 evaluation. K.S.'s overall cognitive ability test result from the WISC-IV was a full scale IQ of 123, in the Superior range (95<sup>th</sup> percentile) – slightly lower than prior testing in 2005. Her academic achievement, as measured by the Woodcock-Johnson Tests of Achievement, showed reading, mathematics, written language, and oral language in the Superior to Very Superior range. Developmental and behavioral assessment tools confirmed the diagnosis of Asperger Syndrome. (Comp. at 115-121)

Dr. Foley Nicpon has been affiliated with the Belin-Blank Center since completing her Ph.D in 2003. She is a widely published researcher, recognized as an expert in the field of highly functioning children on the autism spectrum. (Comp. at 109-110; Tr. at 180) Dr. Foley Nicpon's doctorate is in the area of counseling psychology and she was also providing direct clinical services from 2004 through August of 2011. She began serving

as K.S.'s therapist after the 2007 evaluation and remained her therapist until November of 2011. (Tr. at 184)

In Dr. Foley Nicpon's view, Asperger's impacts K.S.'s functioning primarily in social interactions, how she deals with change, and how she deals with stressors. She is easily manipulated or influenced by peers and often misreads or misses social cues. Dr. Foley Nicpon testified that K.S. consistently has a great deal of difficulty with change and stressors.

Q. Beyond the difficulty with social exchanges, you said she had difficulty with change . . . What did you mean by that?

A. Any minor change in her routine, or in her – anything would set her off. And what I mean by "set her off," is she may regress, she may start cutting [herself], she may make a suicidal statement, she may scream "I hate you," she thinks her life is over. I mean a little itty-bitty change would create a huge reaction.

Q. Was this manipulative on her part or real in her perspective?

A. Real. It's central to the disability. It's one of the diagnostic criteria. It appears manipulative to some people because it's so, sometimes, over the top or unexpected you think, "Wow, this cannot be how this child really feels." It really is. It's neurological. The difficulty with change is central to the diagnosis, and that for her was significant.

Q. I think the third symptom you brought up is how she reacts to stressors . . . Would you expand on that, please, now?

A. So I'm kind of back to – say a bullying incident happened at school, or a peer – I can think of one. A boy she liked, this boy didn't like her. And so if something like that happens, I'd say to a person without Asperger's syndrome, that could be very devastating. But for her it was like life was over. There was no reason to keep living. . . .

(Tr. at 188-189) Dr. Foley Nicpon indicated that K.S., like most individuals diagnosed with Asperger Syndrome, has very rigid behavior patterns and rigid – black and white – thinking patterns causing her to persevere on topics for long periods and see the world through a very inflexible lens. (Comp. at 124; Tr. at 190-92)

K.S.'s IEP includes a Functional Behavior Assessment (FBA) Summary and a Behavior Intervention Plan (BIP). The Problem Analysis section of the FBA includes the following general observations:

K.S. is currently unable to interact appropriately with adults and peers during unstructured social times without supervision of an adult within close proximity to K.S.. K.S. frequently interacts with peers in several

unsafe ways including, but not limited to: taking items from peers without asking, making negative comments/responses to peers actions, arguing with/interrupting peers and adults, hanging on peers or showing physical affection to peers or allowing peers to physically interact with her in ways not appropriate for the school environment, allowing peers to take advantage of her emotionally, financially, and physically in an effort to make and keep friends. All of the previously mentioned behaviors occur several times per day and [have] led to incidents of K.S. losing money or valuable items, being physically hurt, isolated by peers, and adult intervention to mediate issues between K.S. and peers. Negative interactions with adults and peers increase K.S.'s anxiety/depression and have a negative effect on her self-esteem.

(Resp. at 83) Dr. Foley Nicpon, Leslie Downs Mullen – K.S.'s therapist from February through August of 2012, and Sharon Collins, M.D. – K.S.'s pediatrician since birth, all agreed that this description was consistent with their impressions of K.S. (Tr. at 35-39, 187, 234-235)

Educational programming: K.S. attended [ ] Middle School and [ ] High School. The school district maintains Autism Spectrum Disorder (ASD) classrooms in each of these schools. The ASD classroom provides a setting specifically designed for “students who are on the higher...functioning end of autism spectrum disorders.” (Tr. at 722-723). Throughout middle school, K.S. participated in general education core curriculum and exploratory classes, with accommodations, and received specially designed instruction in the areas of behavior and social skills. Her academic progress was consistently well above average. (Resp. at 10-21)

K.S.'s IEP was reviewed and revised in January of 2011. This IEP was intended to cover the period from January 2011 through January 2012. (Resp. at p. 41) Following the sexual assault in January of 2012, K.S. and her family were in crisis mode. The school had difficulty scheduling an IEP review meeting. Key members of her IEP team including: K.S.'s parents, the ASD classroom teacher, and the school principal; agreed to extend the existing IEP, as an interim IEP - postponing review until the following fall.<sup>2</sup> This was done to allow K.S. “some healing time” to recover from the immediate trauma of the rape. (Tr. at 737-739)

The interim IEP includes three behavioral goals. The first goal is in the area of following directions; the second goal area deals with appropriate respectful behavioral responses to peers and adults; and the third goal relates understanding social rules and behavioral

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<sup>2</sup>The following note was added to the IEP on February 10, 2012: “Numerous attempts were made to arrange a full IEP meeting with K.S.'s parents and the majority of her IEP support team members. However, due to significant family circumstances, the parents were unable to attend an IEP meeting. The IEP meeting did occur with both parents indicating their verbal support of the team moving ahead with a meeting in order to meet the timelines set forth in the IEP.” (Resp. at 155) The Complainant explicitly waived any procedural objections to how this interim IEP was developed. (Tr. at 8, 378-379)

expectations, including: defining and recognizing bullying, demonstrating assertive behaviors to refuse bullying, and the process for reporting bullying. (Resp. at 136, 140, 146). K.S. receives specially designed instruction in social, organizational, and study skills in the ASD classroom during her daily Directed Studies class and accommodations designed to assist with homework and project completion. “Social stories, 5 Point Scales, and similar strategies are used to help K.S. understand her role in her environment and to shape socially acceptable behavior and work completion steps/organization.” (Resp. at 150-151)

K.S. is also provided with one-to-one paraprofessional support throughout the school day to assist as needed during lunch, class, and social situations during the school day. She is also allowed to return to the ASD/Asperger’s classroom as needed when she is anxious or stressed. K.S. spends the vast majority of her school day in the general education setting, with removal from general education constituting only 12% of her school day. (Resp. at 150-151). Because of K.S.’s high academic functioning, her IEP, including the goals and accommodations explained above, are focused solely on helping K.S. in these social/behavioral areas of concerns.

During the two years that K.S. attended [the] High School her special education teacher was [the special education teacher], who taught in [the High School]’s ASD program. In the ASD classroom, K.S. received direct instruction and support in “how to interact with her peers, how to be approachable by peers. ... She also always had the option to come back to [the ASD] room the other hours of the day to take tests in a quiet testing environment, or if she just felt emotionally like she needed a break. ...” K.S. was also presented with social stories that were developed by the AEA autism consultant and delivered by [the special education teacher]. [The special education teacher] believed these social stories were helpful tools for K.S., and noticed improvements in areas where social stories had been used. (Tr. at 724-725).

[The special education teacher] also worked with K.S. in the ASD classroom to help her understand her disability’s impact on her perceptions of social interactions – which are often at odds with the perceptions of other involved students and teachers. In one example related by [the special education teacher], K.S. came into the ASD classroom and said that [ ] – her AP biology teacher – “hate[d]” her, because she believed he gave her an “angry face.” When [the special education teacher] checked with [the teacher] later, “he didn’t recall giving her any kind of face.” By discussing and working through this interaction in the ASD classroom, K.S. was able to overcome this negative perception so that she could continue attending and enjoying [the] AP Biology class. (Tr. at 725-727).

Finally, K.S. worked on developing healthy relationships with peers. She was allowed to bring friends into the ASD classroom to have lunch. [The special education teacher] believed that K.S. was able to generalize those friendships into a larger, less structured environment and maintained these friendships during her sophomore year. Unfortunately, after the assault in January of 2012, K.S.’s attendance became more sporadic and her lunches with friends became less frequent. (Tr. at 756-757)

2010-2011 / Freshman Year of High School : K.S. had some significant difficulties when she transitioned into [the] High School in the fall of 2010. [ ], the AEA autism consultant, was frequently in communication with Ms. S. and [the special education teacher]. [The AEA consultant] helped [the special education teacher] to develop and implement strategies like a five-point scale, social stories, and social behavior maps to work on K.S.'s social and behavioral needs. [She] also provided support for K.S. in "helping her to keep her dream [of wanting to be a pediatrician] alive," by helping her to avoid internalizing negative comments and understanding that other pediatricians experience similar difficulties as K.S. – like taking antidepressant medication. (Tr. at 350-353)

During her freshman school year K.S.'s graded courses included language arts 9, advanced geometry, show choir, vocal ensemble and chorus, biology, advanced placement geography, directed studies, and Japanese 1. [The] High School uses a standard 4.0 grading scale, with the exception that students earn grades on a 5.0 scale in advanced placement (AP) courses. K.S. finished her freshman year at [the High School] with an overall grade point average of 4.095. (Resp. at 1)

At the request of Ms. S., [the special education teacher] prepared a three page report for K.S.'s therapy team in Iowa City in May 2011, reviewing the challenges K.S. faced and the progress she made during her freshman year. (Resp. at 87-89; Tr. 728-729). [The special education teacher] reported that K.S. had made a significant amount of progress in use of positive body language and facial expression, had an increased tolerance of her peers on the Autism Spectrum, and an increased "overall ability to keep herself safe physically" from inappropriate sexual interactions. (Resp. at 87). [The special education teacher] noted that:

Although K.S.'s responses to others when she is stressed or angry continue to be verbally abusive/disrespectful, the frequency of this type of reaction has decreased and it is no longer a blanket indiscriminant response, but rather a response she consistently has to particular peers or adults that she dislikes. . . .

K.S. appears to have developed some healthy female friendships at [the High School]. By staff observation, she does not appear to be interacting in person with any peers who are considered to be unsafe or manipulative.

(Resp. at 88).

[The special education teacher] also reported the following areas of concern:

There has been an increase in K.S.'s feeling that others "don't like her," are picking on her, or are purposely trying to hurt her – including peers and teachers/staff. K.S. has always expressed these concerns, but in the past, it has been after her social obstacles have caused a tense social situation in a class. Lately, K.S. has been expressing these feelings about peers and teachers in classrooms where by teacher report and by associate



observation, there are simply not any issues beyond typical teenager interactions and typical teacher responses.

K.S. has had an increase in her exaggerating of how others are treating her including teachers, peers, and her parents. K.S. tends to bring up incidents where a peer, teacher, or a parent has “mistreated” her when she is already in a stressful state and is not getting the response she wants from the person she is expressing frustration to. She has brought up several [incidents] which were later confirmed to be minor, but K.S.’s description of the situation alludes to abuse. These statements are across all settings (telling school personnel about parental “mistreatment”, telling parents about school and peer “mistreatment”, and peers about parental “mistreatment”). K.S. realizes after the fact that her statements were overly dramatic and exaggerated, but appears unable at this time to control this in the height of stress.

. . . K.S. continues to cause physical harm to herself by not allowing injuries to heal (ex. poking at her floor burn on her leg or tearing scabs off), or by causing small injuries to herself by poking with sharp objects. At school we have not seen any cutting or similar purposeful behavior. Mostly what has been observed is repeated picking at/pushing on existing injuries. She will then comment on how much the injury hurts.

(Resp. at 88–89). [The special education teacher] concluded the report by stating:

Overall, K.S. has grown tremendously this past school year. She appears to have matured, she is making progress toward managing her social and emotional responses outside of the ASD classroom in the hallway and in her general education classes, and her overall demeanor has changed from cold and unapproachable to friendly and comfortable with most adults and peers throughout the school day.

(Resp. at 89).

2011-2012 / Sophomore Year of High School: The record contains little information about the first half of K.S.’s sophomore year. By [the special education teacher]’s report, some of the difficulties that K.S. experienced had improved significantly throughout the course of her freshman year. Apparently this progress continued through the fall of 2011. K.S.’s grade point average for the first trimester of her sophomore year was 4.309. (Resp. at 1)

[R.M.] is a certified teaching associate and program paraprofessional in the ASD classroom. She has received training in working with students on the autism spectrum. [R.M.] served as K.S.’s one-on-one paraprofessional during the 2011-2012 school year. [The associate] accompanied K.S. throughout the day – in the hallways, at lunch, and in every class; except Japanese and AP Biology, which K.S. was able to attend on her own. K.S. was very independent and required minimal paraprofessional support in class. A

couple of times a month K.S. would signal [the teaching associate] that she needed to step out of the room because she was feeling uncomfortable. (Tr. at 405 -406)

Through the fall, [the special education teacher] provided training to K.S.'s volleyball, show choir, and dance teams, to inform the activity sponsors, adult volunteers, and student participants about autism in general, and about K.S. specifically. [The special education teacher] explained K.S.'s strengths and the positive things that she could contribute to the extra-curricular activities, as well as some of the obstacles that K.S. faced and how they could handle those obstacles. [The special education teacher] received positive feedback, both from Ms. S. and some of the participants, about the value of these trainings. (Tr. at 732-733)

The first half of 2012 was very traumatic for K.S. and her family. At the end of December 2011, the family went on a 10-day cruise to the Bahamas. K.S.'s mother and D.K. were married on the ship on Christmas Day. On January 3<sup>rd</sup>, the last day of the cruise, K.S. was raped by two brothers, who lured her into a room on the ship after an organized teen event ended earlier than scheduled. The brothers – one an adult and one a juvenile – were identified, prosecuted, and ultimately convicted for the rape. (Tr. pp. 135-138)

K.S. was frequently absent from school during the months following the rape. She struggled with anxiety and focus. K.S. was deposed multiple times in conjunction with prosecution of the rapists. On at least one occasion she had to travel to Florida for proceedings and had a “melt down” during the airport security pat down. Additional stress was placed on the family when K.S.'s older sister was hospitalized for nearly the entire month of March with a life-threatening condition. K.S. also experienced several incidents – discussed in more detail below – that she and her family perceived as bullying. These events presented huge challenges for K.S..

Immediately after the rape, Ms. S. consulted with K.S.'s medical team for advice about how to assist K.S. in responding to and overcoming this event. Dr. Sharon Collins, K.S.'s pediatrician since birth, worked with the University of Iowa Hospitals to devise a course of prophylactic medication. K.S.'s psychiatrists recommended getting her back to something routine as quickly as possible and suggested asking K.S. what she wanted to do. Her first request was to get back into show choir and the family returned to Iowa as quickly as possible. K.S. returned to classes and participation in show choir in less than a week. (Tr. p. 138-139)

Prior to K.S.'s return to school, Ms. S. called [the special education teacher], told her about the assault, and asked her to be the “point person” for developing a plan so that [the special education teacher] could “be available to K.S. if she ha[d] some kind of emotional issue in school.” Because of the pending criminal charges related to the assault, Ms. S. did not want [the special education teacher] to give K.S.'s teachers specific information about what happened. Initially, only [the special education teacher], [the High School Principal], and possibly [the head vocal Director and JV show

choir director], were told that the incident involved a sexual assault.<sup>3</sup> (Tr. at 326-327, 734)

[The special education teacher] talked to each of K.S.'s general education teachers individually and told them that K.S. was "involved in the incident . . . and she may have some emotional issues." (Tr. at 734-735) The teachers were given [the special education teacher]'s cell phone number and instructed to call her if they ever had any doubt of whether K.S. was okay. [The special education teacher] reported that she only received one call, from [ ] – K.S.'s Japanese teacher, who was worried that she had not been marked absent but had not arrived in class. (Tr. at 735)

As noted above, a revision of K.S.'s IEP that was due in January was postponed. [The special education teacher] talked to Ms. S. and K.S.'s father about the situation and they both agreed to extension of the pre-existing IEP, with the expectation that a full review would be done at the beginning of the following school year. (Tr. at 738-739) In the interim, the specially designed instruction and support services detailed in her prior IEP remained in place. Several additional accommodations were also implemented in January to support K.S. and ease return to school. (Tr. at 734-736) K.S. was taking new medications and was very tired. (Tr. 417, 736) One of the accommodations was an agreement to allow K.S. to stay in the ASD classroom or return to the ASD classroom if she was feeling overwhelmed or tired. (Tr. at 327, 417, 736) Her assignments were reduced for some classes and she was allowed to make up missed assignments and exams that she missed due to absence. (Tr. at 431, 445-446, 736) The aim after K.S. returned in January was to allow her to work at her own pace and keep her comfortable. (Tr. at 417, 735-736)

[The special education teacher] was in frequent contact with K.S.'s mother during this time period and was often copied on progress reports that Ms. S. e-mailed to K.S.'s treatment team. (Tr. at 740-41) Ms. S. told her that the treatment team recommended that K.S. "stay in her routine as much as possible." (Tr. at 736)

K.S.'s attendance was sporadic in January and February, and improved somewhat in March, April, and May. (Resp. at 5–9) [The special education teacher] tried to address the attendance issue. K.S.'s therapist, Leslie Downs Mullen, recalled speaking to [the special education teacher] at least once in February, about K.S.'s school attendance and participation. (Tr. at 236) [The special education teacher] counseled K.S. about the importance of attendance and offered to come and get her at home if that would help, but Ms. S. told [the special education teacher] that she preferred to deal with it herself. (Tr. at 740)

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<sup>3</sup> Ms. S. testified that [the head vocal director and JV show choir director] were among those who were told that K.S. had been sexually assaulted. (Tr. at 326-327) [The head vocal Director] recalled that [the special education teacher] met with him and [the JV Director] and said that something had happened to K.S. that could impact her severely. She gave them her cell phone number and asked them to be on the lookout and supportive. (Tr. at 607-608)

Several witnesses described K.S. as more withdrawn in early 2012. There were many days when K.S. wanted to stay in the ASD classroom, but [the special education teacher] could not recall any incidents during this time where K.S. was so upset in class that she had a meltdown or needed to leave. (Tr. at 417-418, 734-735) Despite the trauma she experienced, K.S. was able to meet two of her three IEP goals, although the IEP Monitoring Logs note that “frequent absences, medical issues possibly skewing data[;] will discuss options with IEP team at next IEP meeting in September.” (Resp. at 208–14)

Throughout her sophomore year, K.S.’s courses included: language arts 10, Advanced 2nd Year Algebra, show choir and chorus, AP Biology, AP World History, directed studies, and Japanese 2. Despite her disability and the trauma of the rape, K.S. was able to maintain high grades. Although K.S.’s second and third trimester grades were slightly lower than first trimester, her second and third trimester grades were also lower than her first trimester grades during her freshman year. K.S. finished the year with a cumulative grade point average of 4.024 and a class ranking of 40<sup>th</sup> out of 385. (Resp. at 1)

K.S. also took the AP Biology exam in early May of 2012. This exam is nationally normed, and students are graded in comparison to approximately 170,000 other students who take the same exam. K.S., as a sophomore, scored a “4” – the equivalent of earning a B or B+ in a college biology course – putting her in the top third of all test takers and making her eligible to receive college credit for the course. (Tr. at 444-445)

Perceived bullying and harassment: In addition to the stressors in her personal life, there were several incidents at the school in which that K.S. and her mother believed K.S. was the victim of bullying or harassment. After returning home from a show choir event on January 7, 2012 – just days after she was raped, K.S. got in the family car and started curling up and displaying regressive baby-like behavior, as she had immediately after the rape. She reportedly told Ms. S. that while backstage after a performance “Student 1,” a boy in the show choir, held a knife to her throat and said “I’m going to cut you, bitch.” (Tr. at 141) Ms. S. got out of the car, saw Student 1, and asked him to join her as she approached [JV vocal Director] – one of the directors – and explained K.S.’s allegation. Student 1 said that he found a small pocket knife in one of the drama rooms. [The Director] admonished him for handling the knife. The student denied that he approached K.S. with the knife. (Tr. at 143-144)

During show choir class on February 13<sup>th</sup>, part of the opening song was in Portuguese – the language spoken by one of the rapists. K.S. was in the front row of the choir and was not smiling. She got upset when [the JV Director] told her that he would move her out of the front row if she did not smile. Ms. S. recalls [the special education teacher] reporting that K.S. was devastated and would not leave the stage. [The JV Director] called Ms. S. that day and explained that he did not realized why K.S. was upset during the song. (Tr. at 147-149) Ms. S. understood that K.S. would be kept in the front row. K.S. was not placed in the front row during show choir practice later that day. Ms. S. observed [the JV Director] standing near a chart board with Parent 1 – one of the show choir parent chaperones, referred to throughout hearing testimony as “show choir

Moms.” Ms. S. believes that Parent 1 was responsible for K.S. being moved out of the front row. (Tr. at 149-151)

Over the many years that K.S. has participated in show choir, she and Ms. S. have had several negative interactions with Parent 1 and Parent 2. They are both show choir moms and they have repeatedly raised the issue of K.S. and other dark-skinned show choir participants straightening their hair. At one point in 2009, K.S. was given “Performance Instructions” for show choir that included reference to students “with darker skin tones.” Ms. S. wrote a long e-mail to the show choir director expressing her disappointment and belief and offense at the suggestion that students of color would be held to a different standard than the white students. (Comp. at 162-163, Tr. at 153-154)

Comments about hair straightening were a perennial issue that K.S. and her mother both perceived as bullying. (Tr. at 154-155) In February of 2011, Ms. S. again e-mailed show choir directors to express concern about race discrimination issues with show choir parents from [ ] Middle School and ongoing threats from them to remove K.S. from the front row during performances if she did not straighten her hair. (Comp. at 168-170)

Before the end of that week, [ ], the Director of Choral Activities at [the High School], sent a responsive e-mail to Ms. S. – with copies to [K.S.]’s show choir director – [ ]. [The head vocal Director] reminded Ms. S. that K.S. is always free to come to one of the directors for assistance and support and suggested that [the Middle School show choir Director] meet with parent volunteers and make it clear to them they were not to discipline or make value judgments about the students. [The head vocal Director] directed [the Middle School Director] to inform the parents and group members that there were to be “NO FURTHER comments about anybody’s hair!!” He also instructed [the Middle School Director] to “make it clear that students commenting on anyone’s hair would be jeopardizing future participation in our show choir program” and reminded him that “[p]arents MAY NOT make demands of what students will or won’t do with their hair.” (Comp. at 171-172) [The head vocal Director] also met with the show choir students and sent a letter to the director and the parents involved telling them that they were not to address K.S.’s hair. [He] testified that Ms. S. later expressed appreciation for the way he handled this situation. He did not recall her ever approaching him again on this subject. (Tr. at 605-606)

In February of 2012, the [Junior Varsity] show choir students played “the face game,” which bothered K.S. a great deal. Ms. S. testified that [the JV Director] developed this game to teach students to keep their face in character on stage.<sup>4</sup> She understood that [the JV Director] would direct the students to perform a part and would pick out the girl who had the best performance face. Then that girl would pick a boy; the boy would select another girl; and so on. Ms. S. observed the game on February 21<sup>st</sup>. In her view,

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<sup>4</sup> [The High School Principal] talked to [the JV vocal Director] during her investigation into a bullying complaint filed by Ms. S. in the summer of 2012. [The JV Director] said that the game was initiated by the students, not him, and that when he saw how it was played he did not think it was appropriate. (Tr. at 644-645)

the game was essentially a popularity contest in which students would pick their friends. K.S. was the last student selected and was very upset by the experience. An aide who was there to assist K.S. said that she told [the JV Director] the game was bad for K.S. the first time it was used with the choir. Ms. S. immediately went into a room with [the JV Director] and explained this game was brutal on K.S., due to her autism. She recalls that [the JV Director] replied, "It's not that big of a deal." (Tr. at 156-159) There is no evidence that the "face game" was repeated after Ms. S. spoke with [the JV Director] on February 21<sup>st</sup>.

K.S. auditioned and was selected for a role in the [High School] drama department's 2012 spring musical. On April 19<sup>th</sup> – opening night of the musical, Ms. S. and her husband were in the audience watching the show. K.S. was doing fine and she did not have an aide supervising her back stage. When the performance was over, [the High School Principal] approached Ms. S. and Mr. K. and told them that there had been a little incident that they needed to talk about tomorrow. K.S. was clearly upset when her parents saw her. K.S. told them that while Ms. S. was at the Mayo Clinic with her older sister another student in show choir – Student 2 – hit her in the hallway. K.S. explained that Student 2 had poked her again backstage that evening at least 50 times. Finally, K.S. took her hand to tell Student 2 not to touch her. K.S. thought that she may have swiped Student 2's face, or something. (Tr. at 164-166)

[The High School Principal] was present backstage at opening night of the musical performance. Midway through the show the drama director asked her to assist with a situation involving K.S. and another student that K.S. had issues with during rehearsal. Students who witnessed the incident told [the Principal] that after K.S. came off the stage, she laid down in a pathway that other performers were using. A couple of students asked her to move and Student 2 kind of tapped her on the shoulder and said, "K.S., you need to move. You're in the way." K.S. responded by slapping the student hard with her hand, leaving a mark. A short time later, after she moved, K.S. yelled at the student using foul language. The Principal was told that during rehearsal, K.S. was talking to other students while the director was talking and Student 2 shushed the crowd. K.S. got angry and pushed the other student. The director felt that disciplinary action needed to be taken against K.S. The Principal testified that she called Ms. S. the next morning and asked her to come to her office to talk about the situation. Her intent was to suspend K.S. from the performance that night, but to allow her to complete the run of the play the following day. (Tr. at 653-657).

The day after opening night, K.S. was still upset and did not want to go to school. Ms. S. finally convinced her to go to school so she would not miss the play that night. Midmorning, before they left home, [the Principal] called and told Ms. S. that she was suspending K.S. from the play because she had assaulted Student 2. Ms. S. told the Principal that K.S. would not be suspended and that they were coming to meet with the Principal right now, so that K.S. could tell her side of what happened. (Tr. at 166-167) During the meeting that followed, which [teaching associate R.M.] also attended, K.S. explained that Student 2 hit her the week before. K.S. said that she reported the incident to [the associate], who was present when it happened, but [the associate] did

not do anything.<sup>5</sup> Ms. S. said [the associate] said she did not see exactly what happened and that's why she let it go. K.S. then observed, "They never do anything. It's okay to hit K.S." K.S. then proceeded to explain and demonstrate her side of what happened with Student 2 the evening before. Ms. S. recalls that the Principal discounted K.S.'s explanation, saying K.S. slapped the other student leaving a mark and would be suspended. Ms. S. objected to this punishment and [the Principal] ultimately decided not to suspend K.S. from the play that night, if there was an aide available to supervise her. (Tr. at 168-169, 657-660).

Two noteworthy things happened on Friday, May 18, 2012. The first involved a language arts classroom assignment involving *To Kill a Mockingbird*. A unit of study in the spring of 2012 focused on this novel, which has a story line centering on a rape allegation and trial. Before starting the unit, the language arts teacher talked to [the special education teacher] with concern about how to handle this unit with K.S.. [The special education teacher] consulted with Ms. S. and they decided to have K.S. participate, with awareness that she might have difficulty with parts of the process. There were chapters that were hard for her and the teacher excused her from some activities. (Tr. at 770-771) Ms. S. believes that they asked to have K.S. excused from the unit and the teacher refused. (Tr. at 258)

Ms. S. testified that on May 18<sup>th</sup> the teacher was insisting that K.S. complete an assignment in which she was to interview the alleged rapist in the novel and K.S. refused and simply "shut down" because she could not go through with it, so [the special education teacher] called her and asked her to contact K.S.'s medical team and get them to contact the school so that K.S. could be excused from the assignment. Ms. S. left a mandatory work-related training in [ ] and went to the [hospital] and filled out a release so that one of K.S.'s psychiatrists could contact [the special education teacher] about how to help the teachers know how to deal with K.S.'s behavior. (Tr. at 258-259; Comp. at 71-72) [The special education teacher] remembers calling Ms. S. on May 18<sup>th</sup> because K.S. was unable to complete an assigned task. She also recalls that by the time she got off the phone and returned to the classroom, K.S. was engaged and actually doing the assignment. (Tr. at 770-771)

Ms. S. believed that K.S. was in crisis. After leaving the hospital she started to drive directly to the school in [ ]. Before she arrived at the school, Ms. S. received a telephone call from [the head vocal Director and the JV director]. They were contacting her to tell her that K.S. had not been selected for either of the show choirs for the 2012-2013 school year.

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<sup>5</sup> [Teaching associate R.M.] testified that, although she accompanied K.S. in the hallways, to lunch, and in most of her classes, she did not witness K.S. being bullied by other students, nor did K.S. report that she had been bullied. (Tr. at 409, lines 7-17).

**Show Choir participation:** K.S. participated in show choirs throughout her junior high and high school years. She took pride in her singing and dancing ability and show choir has been important to her self-esteem and social interaction. Ms. S. and K.S.'s therapists and doctors believe that show choir was a therapeutic experience that provided K.S. the opportunity to do something at which she excels.

The show choir program at [the High School] is highly competitive. The varsity show choir, [recently] won [a major] choir competition [ ] and [received national publicity], which generated significant student interest in the program. (Tr. at 593) [ ] is the head vocal music director at [the] High School. He has served as the director at [the High School] for eight years, and served as the assistant director for the eight previous years. As head vocal music director, [ ] is in charge of a program that includes eleven separate choir groups, is the director of the varsity show choir, and teaches AP music theory. (Tr. at 586-587; Resp. at 365)

Selection for the junior varsity (JV) and varsity show choir programs is based on a competitive audition process. Participation in show choir one year does not guarantee participation in any subsequent school year – every student is required to audition every year, even if that student had been in the show choir the year before. Nearly every year, a few students who participated in show choir the previous year fail to earn a spot for the following year. [The head vocal Director] testified that “[i]t is common for students who are in [the JV choir] to not be cast in [the varsity show choir]. It’s less common for students in [the JV choir] not to be cast in [the JV choir] again, but it does happen.” (Tr. at 591-592)

Auditions for the 2012-2013 the varsity and JV show choirs took place in April and May of 2012. The auditions are a two-stage process. The first audition is a “blind” vocal audition, which was held on April 11, 2012. A panel of three judges, consisting of the junior varsity and varsity show choir directors and the accompanist, listened to each student sing for approximately 30–60 seconds each. The judges cannot see the student who is auditioning, and students are identified by a number, not a name. Between each of the approximately 180 vocal auditions, the judges each enter separate scores for the previous student, and then the next student begins his or her audition immediately thereafter. (Tr. at 587; Resp. at 366)

The second part of the audition process consists of a dance audition, which was held on May 9 and 10, 2012. Students are broken into audition groups, taught a dance routine, and then required to perform the dance in their audition group before a panel of four judges, consisting of the freshman, junior varsity, and varsity show choir directors and the choreographer. Judges individually score each student’s dance performance. At the conclusion of the auditions, the scores that each student receives from each judge are compiled, and a weighted vocal score and a weighted dance score are calculated for each student. The vocal audition is worth 60% of the student’s total audition score, and the dance audition is worth 40% of the student’s total audition score. (Tr. at 587-588; Resp. at 366-367)



Casting for the varsity and JV show choirs is based entirely on the audition scores, and not on previous experience, behavior, grades, or any other factors. The only exception would occur when there are several students with identical or nearly-identical scores who are in contention for the last remaining spots, known as being “on the bubble.” In this case, the show choir director may consider factors like grades, participation, behavior, or other relevant factors in determining which student or students would be cast for the last remaining spot(s) in the JV show choir. (Tr. at 590; Resp. at 367–68)

[The head vocal Director] testified that the strength of the audition pool “changes every year with the kids that come into the school.... [T]his year’s sophomore class, last year’s freshman class, was a very strong class of singers that entered the program and impacted the audition.” (Tr. at 592-593) [The Director] further stated that “one of the most frustrating aspects of this job is that we have many talented kids that we just don’t have room on the stage for.” (Tr. at 593). [He] characterized the posting of the audition results as “one of the most highly anticipated events of the year. We used to post [the results] outside of...our classroom door...and there was all sorts of angst and emotion involved right there at the list.... [W]e decided several years ago...to post it online so kids could find out in an environment that was comfortable to them.” (Tr. at 599)

The directors start in January preparing students for the competitive audition process. [The head vocal Director] stated that:

[B]ecause we know...the numbers of kids we have audition, we know there will be large numbers of disappointed kids. We start in January preparing kids for the likelihood that they won’t make a group, and we try to help them think about...what is an appropriate response to finding out that you didn’t make the group, what are some things that you can do.

Part of that...after we’ve the weekend to sort of react and calm down, you’re not in the heat of the moment, come in, ask us “Was there something I can improve on? Was there something I did that may have resulted in the audition result?” We also meet with parents because the parents have questions, too.

...[F]or a week or two after the auditions are posted, we’re having meetings with parents who [ask], “What can we do for our child to help and improve the next time? Is this really the activity for them? Should we be steering them toward something else?”

(Tr. at 600)

During her freshman year, 2010-2011, K.S. was in the ninth grade show choir. In the spring of 2011, K.S. participated in the competitive auditions for a spot in the 2011-2012 JV and varsity show choirs. Although her audition score did not automatically qualify her for a spot in either choir, [ ], who was director of the JV choir at that time, acted within his discretion to select K.S. for one of the last remaining JV choir spots, in part to

avoid conflict with Ms. S., like the conflict that arose when K.S. was not cast in May 2012. (Tr. at 595-597; Resp. at 368–69)

In April and May of 2012, K.S. again participated in show choir auditions. 104 young women who would be in grades 10 through 12 the following year auditioned for 52 openings – 27 spots for female students in the varsity show choir and 25 spots for female students in the JV show choir. K.S. placed 62<sup>nd</sup> out of the 104 female students who auditioned for the show choirs. She did not qualify for one of the 52 total spots available. (Tr. at 597-598; Resp. at 367-368).<sup>6</sup>

Students and their parents are usually not informed about the results of show choir auditions before the results are posted. However, it is routine practice in the relatively rare instance where a student is in the JV or varsity show choir one year but fails to qualify the next year for the director(s) to call the student's parents to inform them of the decision. The parents can then be prepared for the student's reaction and provide needed support. (Tr. at 593-594; Resp. at 264)

[The head vocal Director and the JV Director] knew that K.S. was on the autism spectrum and understood that her mother has been a fierce advocate for her. When the results of the spring 2012 auditions were tallied and they determined K.S. would not be recast, the directors wanted guidance about how best to break the news to K.S. and her mother. On May 16, 2012, [the head vocal Director and JV Director] met with [the special education teacher,] the AEA autism consultant, and [the High School Principal] to discuss how to best notify K.S. and Ms. S.<sup>7</sup> (Tr. at 611, 765)

During the May 16<sup>th</sup> meeting, [the special education teacher] and [the AEA autism consultant] asked about the selection process and criteria, to ensure that the decision was not related to K.S.'s disability. [The special education teacher] and [the AEA consultant] were prepared to offer strategies to allow K.S. to participate if the decision was related to K.S.'s disability. (Tr. at 360-362, 747-748) After ascertaining that the casting decision was based solely on the audition results, and not K.S.'s disability, [the AEA consultant] inquired whether K.S. would still have the opportunity to sing or perform. She was assured that she would still be able to participate in the High School choir. (Tr. at 361-362) The meeting participants ultimately agreed that the directors would call Ms. S. to tell her the outcome before the results were posted. (Tr. at 362, 611-612)

Reaction to the casting decision: Hours before the result of the tryouts were posted on May 18<sup>th</sup>, the choir directors called Ms. S. and told her that K.S. had not been chosen for

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<sup>6</sup> Although she did not qualify for show choir, K.S. could still participate in the [High School] choir, an open group that holds at least four vocal music performances throughout the school year. If attending [the High School], she could also audition for the show choir programs again in the spring of 2013, for the 2013–2014 school year. (Tr. at 601-602, 614; Resp. at 370)

<sup>7</sup> [The head vocal Director] testified that the meeting with [the High School Principal] was held on May 11<sup>th</sup>. (Tr. at 611) From clarification offered during [the special education teacher]'s testimony, it appears that this meeting was actually held on May 16<sup>th</sup>. (Tr. at 765)

either the varsity or JV show choir for the following year. Ms. S. was shocked and did not accept this news well. She believed that the show choir decision was made in retaliation for her recent request for paraprofessional support during show choir and other extracurricular activities and that the decision was based, not on the tryouts or her daughter's ability, but on discrimination against K.S. due to her disability and the fact that she is bi-racial. (Tr. at 260-265; Resp. at 234-240, 248)

Ms. S. called her husband and [the special education teacher] and proceeded to the school to address the situation. Mr. K. met Ms. S. at the school, where she spoke separately [to the head vocal Director] and [the special education teacher]. She told each of them that K.S. was not going to be able to handle being completely excluded from show choir on top of everything else. Ms. S. maintains that her conduct was not inappropriate. [The head vocal Director] and [the special education teacher] both remember her as being very emotional, saying she did not believe the decision was fair, and asserting that this was "KKK show choir." (Tr. at 263- 265, 612-13, 750-52) [ ], K.S.'s biology teacher, has a room near [the special education teacher]'s ASD classroom. He heard yelling late on the afternoon of May 18<sup>th</sup> and overheard Ms. S. saying "they are racist." (Tr. at 449-451)

K.S. was devastated that evening when Ms. S. told her that she had not been cast for either show choir. Ms. S. reports that she "lost it," ripped off her show choir necklace, and began spiraling out of control crying and hitting herself. K.S. blamed herself – because of her skin color and hair and began pulling out her hair. She said she wanted to die. She started gouging at her skin – as she had after the rape, but in more visible areas such as her face. (Tr. at 267-272)

Undeniably, and understandably, the casting decision was a huge disappointment for K.S.. Her behavior regressed and Ms. S. sought advice and support from members of K.S.'s treatment team. Ms. S. also began advocating for the school to put K.S. back into the show choir. On May 22, 2012, four days after the show choir casting decision was announced, attorney Curt Sytsma filed a request for mediation and "stay put," under the IDEA. The express purpose of this filing was to "insure K.S.'s ability to participate and advance in the Show Choir Program . . ." (Resp. at 215-217)

On July 3, 2012, before a mediation session was held, Mary Richard, a second attorney retained by Ms. S., wrote a letter to the Superintendent of the school district, alleging: "ongoing acts of harassment, bullying, disability and race discrimination and retaliation perpetrated against K.S." by the school district. The letter stated that unless the matter was resolved immediately, damages would likely exceed remedies available through the pending IDEA action and evidence was being developed prefatory to the filing of a complaint against individual District employees with the Iowa Board of Educational Examiners, and/or the Iowa Civil Rights Commission and/or the filing of an action for damages under state and federal law unless the matter was satisfactorily resolved by July 12<sup>th</sup>. The first item listed in the relief demanded in this letter was "[r]einstatement of K.S. in the [High School] show choir program with instatement in the [Varsity] Show Choir." Other requested relief included enforcement of school policy and implementation of measures to prevent further harassment by students and/or parents,

mandatory training regarding K.S.'s Asperger Syndrome for all show choir personnel, Asperger awareness training for all show choir students and parents, reimbursement of expenses and monetary damages. (Resp. at 218-220)

Two days later, on July 5, 2012, Ms. S. filed a complaint under the District's internal complaint policy, alleging that the show choir casting decision was discriminatory.<sup>8</sup> (Resp. at 231–240) She cited alleged acts of bullying, going back to 2008, and asserted that “K.S. was the only current qualified student excluded by [the High School] staff from both the [JV and varsity show choir] programs.” Again, the primary demand to resolve this complaint was for the school district to immediately install K.S. into the varsity show choir. (Resp. at 240).

A mediation session held on July 9, 2012, did not resolve the Complainant's concerns. On July 18, 2012, she filed an application for injunctive relief with the United States District Court [ ], seeking an emergency injunction against the District “to restrain [the District] from denying K.S.'s participation...in the [Varsity] show choir.” In the federal action, Complainant alleged violations of the IDEA, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. (Resp. at 287-326) Hearing on the request for temporary restraining order and preliminary injunction was held on July 25<sup>th</sup>.

On July 23, 2012, in an attempt to meet Ms. S.'s concerns, the District made an unconditional offer to immediately place K.S. in the junior varsity show choir. (Resp. at 241–42). This offer was not accepted. It is clear from Ms. S.'s testimony during the July 25<sup>th</sup> hearing, that to her and K.S., the offer of the JV choir was simply unacceptable, because “K.S. is qualified to be in the [Varsity] Show Choir where she is supposed to be, and her Autism is the only reason why [she was excluded].” (Resp. at 254).<sup>9</sup>

Judge [ ] conducted the injunction hearing and issued a ruling from the bench. The judge recognized that the show choir program at [the] high school is prestigious and requires students to compete for a spot in the show choir every year. (Resp. at 267). She found that, although K.S. did not qualify for either the varsity or JV show choir for the 2012–2013 school year, “this decision was not based on her behavior or disability.” (Resp. at 268). Judge [ ] found that there was “simply no evidence that the decision regarding [K.S.]’s participation in the show choir was based on anything other than the

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<sup>8</sup> An earlier version of this Complaint, signed by Ms. S. on May 21, 2012, was filed by the school district as Exhibit 15 to the district's resistance to a subsequent federal court action. (Resp. at 392-399). This copy contains a fax header dated June 29, 2012. The Complaint that was filed on July 5<sup>th</sup> includes the allegations from the May 21<sup>st</sup> version, as well as additional allegations related to subsequent events.

<sup>9</sup> Ms. S. further explained: “[I]nclusion into the program just randomly is simply not—is only to satisfy the school, is not for the purposes of benefitting K.S... [P]utting K.S. back in [the JV choir] would make as much sense as me simply going down the street and putting her in a...dance program down the street.” (Resp. at 254). However, Complainant later admitted that when completing her audition application for the 2012–2013 school year K.S. herself indicated that she would be willing to participate in the JV show choir. (Resp. at 255, 380).

audition scores,” and that K.S. “is eligible to audition for [Varsity or JV show choir] for the next school year [and] is currently eligible to participate in other choir programs.” (Resp. at 268). The Judge also found “no evidence in this record that [K.S.] was denied anything because of her disability.... [H]er disability played no role in whether or not she was selected for the two show choirs....” (Resp. at 269).

Following the injunction hearing, the District, despite prevailing on the merits of all of Complainant’s claims, issued yet another offer to place K.S. in the JV show choir. (Resp. at 412–13). Even though K.S. would be placed above nine other students who scored higher than K.S. on their auditions but still failed to earn a spot in [the JV choir], the District was willing to offer this compromise one more time. This offer was conditioned on a dismissal of the federal lawsuit and a release of Complainant’s threatened legal actions against the District and its employees, but expressly allowed Complainant to continue to pursue her internal District complaint. (Resp. at 412). Yet again, the District’s offer was rejected. (Compl. at 210. *See also* Compl. at 211–12).

Events in August, 2012: In early August [the special education teacher], K.S.’s special education teacher for the prior two years, took a leave of absence and the District assigned [a replacement special education teacher] to the ASD program to fill the open position. [The replacement teacher] had the appropriate certification for the ASD program and received autism training from the AEA. [ ], the AEA’s autism consultant who has provided consultative support for the ASD program at [the High School], was very impressed with her attitude and understanding of students on the autism spectrum. (Tr. at 365-366) A letter was sent home to parents to notify them of this change. (Resp. at 415).

After receiving notice of the change in teacher, Ms. S. contacted an Associate Superintendent for the District about the change and was told that [the special education teacher] would not be returning to [the High School] in the fall. On August 2, 2012, Ms. S. contacted the District to request an IEP meeting in light of the transition of teachers. She also made it clear that she perceived the assignment of the new teacher, who had a background working with student with behavior disorders, to K.S.’s classroom “as further retaliation against K.S..” (Tr. at 281; Resp. at 414-415)

[ ], the District’s Executive Director of Special Services, responded to Ms. S.’s request and directed District staff to set up an IEP meeting. (Resp. at 414) Notice of the meeting, to be held on August 16, 2012, was sent to Ms. S. on August 9<sup>th</sup>. (Resp. at 416) On the day before the scheduled IEP meeting, [an Associate Director of Special Services] from the District and [a representative] from the AEA called Ms. S. to talk about the agenda for the meeting. Ms. S. told them “that the IEP team needed to decide if K.S.’s needs would be met by being in show choir, which she believed they would be.” (Tr. at 509-510)

Ms. S. attended the meeting accompanied by more than 10 witnesses that she felt could address K.S.’s special needs – including show choir participation – and help the team make decisions about her academic, therapeutic, or social needs. (Tr. at 281, 510; Resp. at 419) After learning that Ms. S. planned to further explore the option of the team

placing K.S. in show choir, the school district asked head vocal director [ ] to attend, so that he could explain the show choir audition and selection process, as well as other opportunities available for K.S. to perform. (Tr. at 511, 624-625) When Ms. S. and her husband entered the room, as everyone was gathering for the IEP meeting, she saw [the head Director] and immediately became upset and angry. [The head vocal Director] had not attended prior IEP meetings for K.S. and they demanded to know why he was invited to this meeting. [The vocal Director] was allowed to leave so that the meeting could proceed. (Tr. at 512-513, 625-626; Resp. at 420)

The school district representatives planned to review K.S.'s current level of need and identify necessary additional supports for the coming school year. (Resp. p. 418) Ms. S. was hopeful that meeting would get K.S. back into show choir and resolve the bullying and harassment that she perceived K.S. had been experiencing. She and her witnesses advocated for placing K.S. in the varsity show choir, which they characterized as a therapeutic need for K.S. (Tr. at 282-283, 514)

[The Japanese language teacher], attended the meeting as a general education teacher for the District. He has taught Japanese language classes at [the High School] for eight years and had worked with K.S. for two years. [The Japanese language teacher] did not witness bullying in his class and K.S. never told him that she felt bullied. (Tr. at 432) [The Japanese teacher] testified that he was surprised by the tenor of the IEP meeting. He felt "that the school was being portrayed in a way that does not reflect the institution that I work in." (Tr. at 433) He heard the information presented by Ms. S. and her witnesses understood that in their view, participation in show choir was "an absolute prerequisite" for K.S. to attend school and do any work. He found this puzzling, as much of the information was inconsistent with what he had observed of K.S. in his class. (Tr. at 434-435)

[The District Associate for Special Services], who was facilitating the meeting, tried to keep the team's focus on K.S.'s disability-related needs and how they could be met. The team identified the following needs for K.S.: social skills, physical activities that reinforce skills, consistent routines and regular schedule, and challenging academic courses. (Tr. at 515, Resp. at 420-22). Ultimately, although Ms. S. disagreed, the school district and AEA representatives found that K.S.'s needs could be met through means other than show choir participation.

The team also considered whether K.S. could take some college courses, to supplement her coursework at [the High School]. [C.K.], friend of the family, shared that it would be beneficial for K.S. to take advanced classes, including college courses. Ms. S. stated that she wanted K.S. to take some classes in the college environment with paraprofessional support. [The High School] guidance counselor [ ] provided some options regarding post-secondary enrollment options ("PSEO"), but he could not provide all requested detail. (Resp. at 421-422) [The guidance counselor] scheduled a meeting with Ms. S. to discuss PSEO options further, which was held the following day. (Tr. at 669; Resp. at 422, 428-29.

Two “Prior Written Notices” (PWN) were issued after the August 16<sup>th</sup> meeting. The IEP team suspended its discussion of PSEO until Complainant had the opportunity to meet with [the guidance counselor] and gather more information. The first notice addressed this issue, stating:

Because this request is being researched and not finalized, no options have been finalized (either accepted or rejected). This PWN is being issued for purposes of information only, and will not lead to any immediate changes to K.S.’s IEP until Ms. S. and the IEP team are able to get more information about the PSEO options and the possible benefits and drawbacks of these options. The team will reconvene if necessary, to discuss the possible options, including PSEO or full days at [the High School], and will amend K.S.’s IEP based on the decisions made during the later meeting.

(Resp. 424)

The second PWN addresses Ms. S.’s request for K.S. to be placed in varsity show choir. The notice states that K.S.’s IEP goals relate to following directions, respecting the perspectives of others, and appropriate social interactions. The District and AEA found that K.S. is receiving appropriate instruction and authentic opportunities to practice these skills in the classroom setting and other school settings. (Resp. at 426).

Although K.S. may gain additional benefits in following directions and positive social interactions through participation in a variety of extra-curricular activities, these benefits would be above and beyond the programming offered to K.S....which is specially designed to meet K.S.’s unique disability-related needs. Therefore [the District and AEA] do not believe that placement in the [ ] Varsity Show Choir is necessary in order to meet K.S.’s disability-related educational needs.

Although the IEP team has not determined that participation in any extra-curricular activity is necessary to provide K.S. with an appropriate IEP, the IEP team did explain that K.S. was already entitled to participate in [the High School choir], which means she has the opportunity to continue participating in vocal music performance at [the High School].

(Resp. at 426). At no time during the August 16, 2012, IEP meeting did Ms. S. inform the IEP team that K.S. would not return to [the High School] in the fall. Ms. S. met with [the guidance counselor] on Friday August 17<sup>th</sup> to discuss PSEO options. She explained to him that she was considering several options for K.S.’s education at that point. If K.S. was reinstated into show choir, she would take three courses at [the High School] in the morning and take the rest of her courses off-campus through PSEO. If K.S. was not reinstated into show choir, then K.S. would attend school in a private setting; take all of her coursework through PSEO; or, if it was possible for K.S. to be convinced to return to [the High School] they could try three courses at [the High School] and PSEO – as they were planning if she was back in show choir. (Resp. at 428-429)

Before the follow-up IEP meeting was scheduled, Ms. S. notified the school district that K.S. would not be returning to [the High School].

Conclusion of Bullying-Complaint investigation : On August 18, 2012, [ ], a Deputy Superintendent with the [ ] School District, issued a formal written response to the complaint alleging repeated harassment and bullying that Ms. S. filed with the District on July 5, 2012. (Resp. at 435-442) In the course of investigating the complaint, [the Deputy Superintendent] interviewed [the High School Principal], [the head vocal Director, the JV vocal Director], R.S., [S.K.] (an AEA parent advocate who was assisting Ms. S.), and K.S.'s therapist, Leslie Downs Mullen. He reviewed written responses from [the Principal], [ ] (the District's Executive Director of Special Services), and [the special education teacher]. [The Deputy Superintendent] also offered to meet with K.S., but Ms. S. "believed that would not be helpful to her daughter." (Resp. at 436)

The report on the bullying complaint includes the following summary of Ms. S.'s position:

R.S. does not believe that [the High School] school officials are acting in her daughter's best interest.

R.S. believes that K.S. has been subject to bullying and harassment since her middle school years. R.S. believes that show choir parents have singled out her daughter for abuse and mistreatment and influenced the selection of show choir members.

R.S. believes her daughter when her daughter tells her of show choir parents threatening her, swearing at her, and making racial comments to her. She believes her daughter when her daughter tells her of abuse from peers. For example, a description of [Student 1] holding a knife to her daughter's throat is plausible to a mother who believes her daughter has been a victim in numerous scenarios.

R.S. believes that her daughter is one of the top performers in show choir, and she has concluded that K.S. could only have been excluded for reasons other than her singing/dancing ability. R.S. stated that the selection process was subjective and unfair. Example: "They knew voices. They said thank you to students by name."

R.S. believes that denying her daughter admission into both [JV] and [varsity show choirs] is an egregious error causing her daughter irreparable harm. R.S. fears for her daughter's safety and well-being; she believes her daughter will not return to school and face the disappointment of not being selected for show choir. R.S. stated that show choir is "water to her daughter" and is a necessary part of the therapeutic support for her daughter, given her daughter's disability. R.S. stated that



she feels a tremendous responsibility to advocate for her daughter, stating “I need to get this for her.”

(Resp. at 436-437) The report then provides a summary of the information gathered by [the High School Principal] and other school officials in their investigations of specific alleged incidents of bullying and harassment. These incidents and many of the specific findings were discussed previously in this decision.

After considering all of the information presented to him, [the Deputy Superintendent] found:

There is evidence that several altercations took place between K.S. and other students and that several altercations took place between [R.S.] and other parents. There is evidence that these situations were promptly investigated and resolved appropriately by District personnel who had knowledge of these incidents. There is insufficient evidence to support a finding that K.S. has been the subject of bullying and harassment, as defined by [school district policy].<sup>10</sup> Although it is difficult to resolve an investigation into incidents that involve different, and often conflicting, accounts between the students involved, I find evidence that school officials responded reasonably under the circumstances. Further, I believe that school officials have acted in good faith to deal effectively with the challenges of providing appropriate social, emotional, and behavioral support for K.S. and her family. . . .

There is no evidence that K.S. was denied admission to show choir because of her disability or race. Casting decisions were based on an audition process involving a dance audition and blind voice audition. All students who want to compete for a spot on show choir must complete the audition process. Students are scored and ranked based on their scores. Casting decisions are made based on student performance in the audition process.

There is no evidence that the selection for show choir was influenced by students or parents. There is also no evidence that there were promises made at any special education meeting by any person with the authority to make selection decisions for show choir.

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<sup>10</sup> The District policy defines harassment and bullying to be “any electronic, written, verbal, or physical act or conduct toward a student which creates an objectively hostile school environment that meets one or more of the following conditions: Places the student in reasonable fear of harm to his/her person or property; Has a substantial detrimental effect on the student’s physical or mental health; Has the effect of substantially interfering with the student’s academic performance; or Has the effect of substantially interfering with the student’s ability to participate in or benefit from the services, activities, or privileges provided by the school.” (Resp. at 443 – emphasis added) *See also* Iowa Code § 280.28(2)(b) (2011).

R.S. has lost confidence that school officials at [the] High School are acting in the best interest of her daughter. School officials believe that they have acted reasonably and have not discriminated against K.S.. Although R.S. was clearly disappointed by K.S. not being cast for show choir, school officials believe that they have a fair audition process and that this process should be respected. K.S. still has the opportunity to participate in other vocal music programs at [the High School], and can audition for show choir again next year.

(Resp. at 441-442).

Withdrawal of K.S. from the public school: Upon receiving and reviewing the complaint investigation report, Ms. S. immediately telephoned members of K.S.'s mental health treatment team and shared statements from the report with them, including statements about "kids not wanting to be around K.S., and conclusions that she wasn't being bullied and harassed."<sup>11</sup> In Ms. S.'s view K.S. was extremely fragile and wanted to kill herself. Despite the fact that she and many of the witnesses that she took to the IEP meeting on August 16<sup>th</sup> were convinced that K.S. was not safe at the school, the school's position was that K.S. was not bullied and was perfectly safe at the school. Ms. S. felt the school district was totally disregarding prior acts of student-violence against K.S. as well as K.S.'s emotional well-being. Ms. S. was concerned that "knowing all those things were just going to spiral K.S. into suicidal risk and self-mutilation." She concluded that removal of K.S. from the school was necessary to protect her daughter's life. (Tr. at 284-285)

On Monday August 20, 2012, the day before school started at [the High School], Ms. S. sent the following e-mail to the District Superintendent, [ ], and [the High School Principal]:

This letter is to advise you that K.S. will not be attending school tomorrow. Her treating therapists have advised me that it would be highly detrimental to her emotional, physical, and academic well-being if I were to force her to attend. Regardless of whether you believe that her perceptions of the school are accurate, her perceptions are an integral part of her disability, and we cannot ignore them.

She is in a fragile emotional state, and I am looking for an alternate placement that can provide an appropriate education. If I find such a placement, it is my intention to seek reimbursement from the school district and the AEA for the costs of that placement.

(Resp. at 446)

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<sup>11</sup> The report notes that through the course of her investigation, [the High School Principal] "determined that members of the musical cast are afraid of K.S. and avoid any confrontation of interaction with her for fear of her response." (Resp. at 437)

[T]he District's Executive Director of Special Services, sent Ms. S. the following response on August 24<sup>th</sup>.

...I am confident that the [ ] Community Schools has provided and can continue to provide an appropriate education to meet K.S.'s needs.

K.S.'s IEP already provides for support of her social/emotional needs, and we can certainly ensure that methods like social stories that have been successful with K.S. in the past are used to help her continue to benefit from her educational experience at [the High School] and prepare for post-secondary education. You have indicated that K.S. is experiencing increased emotional distress. I am aware that K.S. has private counseling or therapy sessions, but I'd like to offer additional counseling services through the school, if you are interested. ... [W]e can add this to the IEP as an amendment. In addition, we are very interested in continuing to work with you on a schedule for K.S. at [the High School] that could include some Post-Secondary Enrollment Options that were discussed with you.

(Resp. at 447). Ms. S. did not respond. The present due process complaint was filed on August 31, 2012.

Parental placement at the [Out-of-state Private] School: As soon as R.S. decided to withdraw K.S. from the [school district], she went to work to find an appropriate private school placement for her daughter. She contacted autism support organizations for advice and suggestions; she contacted a college that had offered K.S. a scholarship and asked about their experience with graduates from various college-prep schools. In the end Ms. S. narrowed the choice to four schools and scheduled a trip to visit two: [the Private] School and [another out-of-state School]. Ms. S. and K.S. visited both of these schools and K.S. went through admission interviews. After interviewing at [the Private School], K.S. decided that she wanted to go there. [The Private School] met all of Ms. S.'s criteria. It had advanced placement classes, a rigorous academic environment, and was designed as a therapeutic boarding school specifically designed to serve students with emotional and learning disabilities. (Tr. at 289-296)

The [Private School] serves students of average to above average intelligence with social and emotional problems, such as depression, anxiety, mood disorders, and social skills disorders such as Asperger Syndrome. They do not accept students with a history of violence, behavior disorders, or chronic substance abuse issues. They limit admission of students with autism spectrum disorders to those who are high functioning. (Tr. at 60-61) The school's intent is to create a therapeutic milieu – in which every interaction is a therapeutic action that students can learn something from. K.S. has an assigned team made up of her therapist, her psychiatrist, her advisor, her academic case manager, group therapy leaders, and two special education teachers. (Tr. at 70) K.S.'s teachers are appropriately licensed, as required in the state [where the school is located]. (Tr. at 93-94)

K.S. enrolled at [the Private School] on September 11, 2012. She has made a good transition to the school, although not without difficulty with some of her ridged thinking, learning new rules, and being able to adapt to them. Despite these challenges, at the time of hearing in mid-October, K.S. was performing in her classes, forming relationships with adults and peers, and becoming involved in activities. (Tr. at 71-72; Comp. at 153-155)

Observations of K.S. by doctors and therapists (May-August, 2012): K.S. was seen by her long-time pediatrician, Dr. Sharon Collins, for a “well-child exam” on Wednesday, May 23, 2012 – five days after the show choir casting decision was announced. Chart notes from that visit list the “chief complaint[s]” as: “needs physical form completed, abdominal, menstrual, and school issues, migraines, depression, and aspergers issues.” (Comp. at 56) The “social history” section, which records information provided to Dr. Collins by Ms. S. (Tr. at 44-45), notes:

*Persons in Home*: Mother is very upset emotionally. Sobbing because of all the stress she is under.

*School*: Is in the 9<sup>th</sup> grade. Attends [the] High School. She had been doing very well in school and show choir and seemed to be enjoying herself, although she was still dealing with the trauma of the recent rape. Last Friday the show choir director called mother saying that “news was not good for K.S..” She then went on to say that K.S. was not going to do show choir next year because she did not “cut the mustard.” K.S. was devastated. Mother contacted several people from the school district and finally filed a lawsuit against the school. It is illegal to pull her out of show choir. She has an IEP. On Monday, they called asking for a resolution. K.S. is so traumatized by the entire thing that she has begun scratching and producing sores on her body. She then picks at the sores until they bleed. If they heal, she picks at them again until they open back up and bleed. At the end of the situation, her skin is significantly scarred. Everyone who works with K.S. at her school is “beyond pissed.”

(Comp. at 55-56) The doctor observed that K.S. displayed a blunt/flat affect and was depressed, absent from school, fidgety, unable to sit still, and having trouble sleeping. With regard to the self-injurious behavior, K.S. had “several gauged out sores on her extremities, trunk, and over her breasts. There are some that she has picked until they bleed. There are many hyperpigmented, macular healed scars all over her body.” Dr. Collins was concerned about possible secondary bacterial infection of the wounds and planned to take a culture for testing. (Comp. at 56-58) This is the only visit with Dr. Collins documented in the record.

On August 29, 2012, Dr. Collins wrote a letter supporting K.S.’s enrollment in a school specializing in student’s with Asperger Syndrome. She observed:

K.S. has been through several things that would cause normal individuals to crash emotionally. She was raped at the end of 2011. She was

recovering from this personal assault when things in her otherwise “stable” world began to collapse. There were several situations that transpired in her school environment (bullying, rejection, harsh accusations, and disapproval) which threw her into an unsettling emotional tailspin. This was manifested in many ways, but very concerning was compulsive, self-destructive behaviors. One such behavior was her constantly picking at her skin. This left several open sores on her body, which then became secondarily infected and required antibiotic treatment and intensive topical therapy to deal with the scars that resulted from that.

K.S. has been so traumatized by these situations that I do not believe it is advisable to thrust her back into this school environment. I believe it would be harmful to her emotionally. I also do not believe that K.S. would cope very well if she were made to go into a learning situation where she would have no opportunity to build any real type of trusting relationships with others over a prolonged period of time.

(Comp. at 53). At hearing, Dr. Collins affirmed her opinion that K.S. had been traumatized by events at [the] High School. (Tr. at 31-32) When asked, Dr. Collins did not recall having any communication directly with the school staff about K.S.’s needs. (Tr. at 43). Rather, her knowledge of events at the school came from reports given to her by K.S. and Ms. S. Dr. Collins believes that all children with Asperger’s who do not function very well, like K.S., would benefit from special placement. (Tr. at 48-49)

Oyindamola Amao, M.D., is in her child psychiatric residency at the University of Iowa Hospital and Clinics. (Comp. at 37-39) She is under the supervision of Dr. Gary Gaffney, who is a Fellow in Child Psychiatry at the University of Iowa Hospitals and Clinics. (Comp. at 85-101) K.S. was seen by Dr. Amao on June 6, 2012, soon after the show choir casting decision was announced. Chart notes from that visit reference the sexual assault and that K.S. “was recently asked to leave” the choir.

On June 6<sup>th</sup>, K.S. told Dr. Amao that there had been “some stressors lately related to being out of the show choir. She is hoping that her mother can get her back in.” K.S. was also hoping to visit her father in Portland and that her mother would enroll her in a contemporary dance class. Ms. S. was observed as being very upset about the show choir decision and believing that the school was failing to accommodate K.S.’s disability. K.S. was observed to be calm and cooperative. She was also “[s]ensative to her mother’s sadness and worries and [told] her mother ‘stop’ when her mother started crying.” (Comp. at 76)

The doctor noted that K.S.’s “anxiety has increased significantly since being asked to leave the choir as evident by her avoidance of the school building, increased skin picking and insomnia.” She had a lot of sores on her arms and legs. A suicide risk screening was done with no positive results. There was “no concern of lethality towards self or others.” The doctor increased K.S.’s sertraline (Zoloft), targeting anxiety symptoms, and recommended an increase in the frequency of therapy, to assist K.S. in “developing

better coping strategies.” With regard to school, the doctor “strongly advise[d] that K.S. be allowed to participate in a healthy pro-social outlet, ideally in the choir, with accommodations as required by ADA.” (Comp. 76-77)

K.S.’s next psychiatric appointment was on July 23, 2012, two days before the federal court hearing. The notes from this visit include the following:

K.S. did not respond to a lot of the questions asked of her as usual. When asked how her mood was, she said she is unable to tell. She is also not certain if the higher dose of sertraline was helpful and tells me today that her mother will be able to tell better. She notes that she has been sleeping a lot during the day, but less at night. When asked about suicidal ideation, she reports that it has not changed from previous. She denies any thoughts of harming others. Denies any psychotic symptoms. She does note that she has not been doing a lot lately and stays at home for the most part. She also goes for volleyball once in a while. She is hoping to get back into the show choir when school starts. Mother reports that K.S. seemed to do much better on the higher dose of sertraline. She was less anxious and the picking behaviors decreased significantly. However, things got really stressful when she went to her father’s place. She returned back to her mom extremely anxious, but they also ran out of sertraline about a week ago and it appears that her picking behaviors have increased since then. In terms of the show choir, it is uncertain what is going to happen at this time. Mother worries that K.S. may decompensate if she is not taken back and mother worries about what to do at that time. Otherwise, things are fairly stable for now and mother has no other concerns today.

(Comp. at 81) No subsequent psychiatric visits are documented in the record.

The record includes a letter from Dr. Amao, dated August 29, 2012, after K.S. had been withdrawn from [the] High School. The doctor notes K.S.’s Asperger’s diagnosis and observes:

K.S. is a very bright young lady who has faced quite a few difficult challenges this past year. . . . I have seen her go on a downward spiral, unfortunately. K.S. is in need of a very supportive and loving environment, and a place where she can show case her numerous talents. She was in the show choir in her former school and loved it very much. It was one of the things she often looked forward to. Since taken [out] of the choir, she has experienced intense dysphoria, severe anxiety and self-injurious behaviors. I believe K.S. will benefit from a program that takes into consideration this child’s needs and does everything in their power to encourage this lovely young lady to believe in herself and make the best use of her potential. A school which specialized in dealing with children with Asperger’s might be the best for her at this time.

(Comp. at 47)

Andrew Peterson, M.D., is a neurologist whose practice focuses, among other things, on sleep disorders. (Tr. 212-213; Comp. 126-130) Dr. Peterson has been treating K.S. for migraine headaches and other issues for several years. He recalled that the last time that he saw K.S. in his office – which he thought was about the time he wrote the letter found in the record – “she was a wreck,” laying on the exam table and crying, distraught. (Tr. at 215) It was his opinion then that Ms. S. should take K.S. out of [the High School] because “there was so much water under the bridge, things had happened, and she was in a very, I thought, fragile emotional state.” The doctor was concerned about K.S. being suicidal, given the observed self-injury. “She was not perceiving support at the school. If anything, going to school made her worse because of things that had happened, and I thought she needed a different learning situation.” (Tr. at 216)

The record contains Dr. Peterson’s chart notes for K.S. from two office visits – the first on April 24, 2012 and the second on August 3, 2012. During the April 24<sup>th</sup> encounter, K.S. was upset about the school principal’s recent threat to suspend her from the spring musical performance. She told the doctor that she made the school play and “they got upset and she does the weird autistic stuff.” K.S. also told Dr. Peterson that her principal “says the kids are scared of her.” The doctor’s notes mention that K.S. “[h]ad to do depositions for the rape trial in the middle of the play.” She “gouged a spot in her face, has been pinching and gouging flesh out of own buttocks. Cut self once. . . . OCD stuff still going on, not clear if the mutilation is part of that or not. Still very depressed and suicidal.” (Comp. at 133)

On May 24, 2012, Dr. Peterson wrote the letter referred to in his testimony, advocating K.S.’s reinstatement in show choir. He stated:

After speaking with K.S.’s mom this morning, I found out that she was booted from show choir apparently because of behavioral issues or other students being uncomfortable. I am really unclear of the circumstances surrounding it. Certainly her performance issues have been fine, and her academic achievements have been fine, again, per K.S.’s mom. This has caused a marked regression in her level of function and behavior, with increased self-mutilation. . . .

... To be discriminated against to the extent that she was removed from show choir for little apparent reason is profoundly unfair and devastating to her overall health, well-being, and level of function. I had actually suggested to K.S.’s mother that she consider pulling her out of [the High School] High School all together because of the perceived deterioration in the level of support in her environment, and the consequent decline in K.S.’s function. . . .

(Comp. at 145-146) Dr. Peterson testified that he learned K.S. was “booted” from show choir from talking to her parents. The doctor knew show choir participation was subject to competitive auditions, but he did not know when show choir audition results were

posted or that K.S.'s discharge from the show choir was the result of recent auditions. (Tr. at 217-218)

The chart notes from K.S.'s August 3, 2012 visit with Dr. Peterson state: "Still negotiating with the school about stuff . . . some depression: sleepy all day but not sleeping at night. Lots of rumination about the show choir, regressive behavior. . . . Lot of healing of the skin stuff and less of the picking. Went to camp just to get away. She is staying in bed a lot hard to get her out of the house. Taking a college class and doing well (Chem Class). Did horseback riding/biking camp thing." (Comp. at 135)

Leslie Downs Mullen, MS, is a licensed marriage and family therapist, who currently works primarily with adolescents. Mullen began treating K.S. in February of 2012, after the rape. She has written several letters that are included in the record. In a letter on May 30, 2012, addressing the trauma of the rape and the show choir decision, Mullen stated:

The recent removal from the show-choir program at K.S.'s school has had a damaging effect on K.S.. Since finding out about being excluded from the show choir, K.S.'s self-harm has re-surfaced. She has begun making odd vocalizations and resorting to earlier developmental coping strategies, all signs of enormous amounts of stress and anxiety. K.S. does not understand why she is not allowed to participate in an activity that she loves, that she is talented in, and which obviously helps her both socially and academically. K.S.'s mother has been working with counselors and doctors involved in her care to stabilize K.S., but she continues to struggle. In my observation, K.S.'s response to her removal from show-choir appears to have been more traumatic to her than the abuse she suffered in December [sic] of last year.

(Comp. at 105)

Mullen prepared a follow-up letter on July 11, 2012, again commenting on the potential ramifications if K.S. was not allowed to participate fully in show choir. She stated:

If K.S. is excluded from the varsity show choir program, it will no doubt devastate her emotionally. For K.S., emotional pain is frequently displayed by physical self-harm and a regression in coping. A previous report from a psychologist who worked with K.S. indicates that K.S.'s strengths need to be cultivated in order for her to develop a healthy perception of self, and for her to recognize that, while she has to work harder than other children without Asperger's Syndrome, it is worth the process so that she can reach her full potential. As talented as she is, and as hard as she has worked for show choir, to not allow her to participate in the varsity show choir will demonstrate to K.S. that she is "not good enough," a belief and a struggle she has fought her whole life. In order to cope with that belief, K.S. acts out in extremely self-damaging ways.



I hope that for the stability of K.S.'s mental health, as well as the continued development of her perception of self and the world, she is allowed to participate in the varsity show choir.

(Comp. at 106) Mullen was questioned about her knowledge of the [ ] High School show choir program during the federal court proceeding and at the hearing for this case. Each time she acknowledged that she was wholly unfamiliar with the show choir selection process. (Tr. at 239-241; Resp. at 258) During her testimony at the federal court hearing on July 25<sup>th</sup>, Mullen said that K.S.'s behavior had "settled down some" in the two months since the show choir casting decision was announced; that K.S. seemed to expect the show choir thing to be "worked out;" and that placement in either the varsity show choir or the junior varsity show choir would fill K.S.'s need for a social outlet. (Resp. at 257)

On August 21, 2012, Mullen wrote two letters supporting Ms. S.'s decision to withdraw K.S. from [the] High School. In the first, she stated: "I have witnessed the rapid decline in [K.S.'s] functioning since being removed from the show choir program; that coupled with the change in the lead teacher of her Asperger's Classroom and her beliefs and perceptions of being bullied, create [an] environment in which K.S. has verbalized she does not feel safe." (Comp. at 107) In the second letter, Mullen expressed her agreement with the view of Dr. Foley Nicpon, "that K.S. would benefit from a school setting that specifically can meet her high academic needs while also providing a safe environment that not only understands her Asperger's diagnosis, but one in which K.S. feels safe, respected, and encouraged to reach her goals." (Comp. at 108)

Mullen attended the August 16, 2012 IEP meeting by telephone. She testified at hearing in this case that she was highly concerned about K.S.'s emotional state and was concerned about how they would get her to go to school at [the High School] without show choir. (Tr. at 231-233) K.S.'s perception was that she "was bullied; she really wanted friends, didn't know how to make them. The more she tried, the more they would move away; [she] sometimes felt taken advantage of, but didn't have a lot of insight into that." (Tr. at 235-236) Toward the end of Mullen's work with K.S. in August of 2012, K.S. was telling her that she would rather be dead than walk into [the High School]. Mullen was convinced that K.S. truly felt that way. (Tr. at 236-237)

As noted above, Dr. Foley Nicpon has a great deal of experience in the field working with twice-exceptional children and she served as K.S.'s therapist from 2007 through November of 2011. Due to changes in her work commitments, Dr. Foley Nicpon discontinued her therapeutic relationship with K.S. in November of 2011 – before K.S. was raped. She had no recent contact with K.S. or the school, other than participating in a portion of the August 2012 IEP meeting by telephone. (Tr. at 194, 200)

Dr. Foley Nicpon wrote a letter on August 21, 2012, supporting Ms. S.'s decision to withdraw K.S. from [the] High School. She stated:

Throughout our interactions, it was clear that K.S.'s rigid thinking and behavioral patterns were consistently unbreakable. For example, once she

had a bad experience with someone at school, it was difficult to utilize cognitive behavioral or interpersonal strategies to help her cope and move forward. She responded extremely negatively to incidents of bullying, or if her academic experience did not go as she expected. I remember two specific school situations involving bullying and harassment that set her back therapeutically by several months. She engaged in self-harm and made suicidal statements and required more intense intervention.

Based on my history with K.S., I believe an educational setting specific for students with Asperger Syndrome would be ideal. She would strongly benefit from an environment that would understand and accommodate her AS symptoms, help her excel in her talent domains, and guide her in future planning.

(Comp. at 124)

Dr. Nicpon testified that, "sometimes I felt like progress was made, and then something would happen that would set this poor kid back tremendously." (Tr. at 208) Based on her expertise and her years as K.S.'s therapist, Dr. Nicpon testified K.S. would benefit from a more intensive therapeutic environment:

Q. Are you familiar with any educational approach, not [the Private School] in particular, but one that is a therapeutic environment full-time, that would increase your likelihood of being able to achieve those goals?

A. Yeah. Anything when there's increased services and intervention is more helpful. I mean, it's like an inpatient program for substance abuse versus outpatient. Typically inpatient programs have better success rates. . . . So, yes, if you can have more intervention, I think it improves your likelihood of a more positive outcome.

(Tr. at 209)

Observations of K.S. by school personnel (May-August, 2012): K.S. did not return to school during the eight days of class that remained after the May 18<sup>th</sup> announcement of show choir casting for the following year. Her absences were logged into school attendance records simply as unspecified "Family Personal" leave. (Resp. at 9) Ms. S. was in contact with [the special education teacher] in late May and told her that K.S. was traumatized and did not feel safe in the building after being told that she did not make show choir. [The special education teacher] had no contact with any of K.S.'s therapists after May 18<sup>th</sup>. (Tr. at 700-702, 750, 752, 767)

Arrangements were made for K.S. to take her final exams at the District central office building with [the special education teacher], rather than at the [High School] building. [The special education teacher] noted that K.S. complained a lot about being very tired and sleepy and cold, but other than that, she seemed to be in good spirits. "She was able to get all of her tests done really without much struggle with the frequent breaks." K.S.

and [the special education teacher] did not directly discuss the show choir and K.S. did not tell [the special education teacher] that she did not want to return to [the High School]. (Tr. at 753)

Through June, July, and August 2012, K.S. participated in the [High School] volleyball program as a member of the junior varsity team, attending at least 13 optional training sessions in June, July, and early August. The mandatory season began on August 6, 2012, and K.S. attended all but one mandatory practice during the two weeks before she was withdrawn from school. The practices, with the exception of Thursday evening sand volleyball, were held in the gymnasiums at [the] High School. (Tr. at 409-410, 466; Resp. at 430-32)

During K.S.'s participation in volleyball during the summer of 2012, K.S.'s coaches and paraprofessionals did not observe a student who was on a downward spiral. [Teaching associate R.M.], K.S.'s paraprofessional throughout the 2011-2012 school year, served as one of K.S.'s paraprofessionals during summer volleyball. She testified that K.S. seemed to be enjoying herself during volleyball. [The teaching associate] kept a calendar of practices and occasionally noted that K.S. was having an "excellent day" or an "awesome day," where she was smiling, having a good time, and interacting with the girls. (Tr. at 413) [The teaching associate] said there were "a lot" of practices where no one was smiling because the coach worked them hard. (Tr. at 423) [She] noticed no significant change in how K.S. was feeling or behaving over the summer. (Tr. at 412-414)

Volleyball coach [ ] testified about K.S.'s volleyball participation during the summer of 2012. [The Coach] was impressed by K.S.'s attitude and how well she performed throughout the summer practice season. (Tr. at 464-465, 471-475) K.S. had a one-on-one paraprofessional attending practices with her throughout the summer, but [the Coach] could not remember a single time that K.S. needed support from the aide. (Tr. at 472) [The Coach] drafted a very positive report for K.S.'s IEP team meeting on August 16, 2012. (Resp. at 434).

During summer volleyball at [the High School], K.S. also worked with the junior varsity coach, [ ]. [The JV Coach] also thought that K.S. did very well. She got along with her teammates "for the most part," and when she did have problems with a teammate, it consisted of "[a]rguments about the score, or something like that, during practice. Nothing out of the ordinary." Like [the Coach, the JV Coach] was aware that K.S. had a paraprofessional who attended volleyball with her, but never observed K.S. requiring paraprofessional support during practice. [The JV Coach] testified that the only time K.S. seemed upset to her was on August 17<sup>th</sup>, the day after the August IEP. [The JV Coach] was working with K.S. in the weight room that day and K.S. said "she didn't want school to start because her mom didn't want her to go to [the High School] anymore." (Tr. at 483-485)

### **Conclusions of Law**

**The IDEA:** The overriding purpose of the Individuals with Disabilities Education Act (IDEA) is to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A); *see Bd. of Education of Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (examining history and purpose of the Education for All Handicapped Children Act, the first comprehensive federal statute addressing special education from which the IDEA has evolved). In exchange for accepting federal money to assist in educating children with disabilities, state and local education agencies must agree to make a free appropriate public education (FAPE) available to all qualifying children in their jurisdiction. 20 U.S.C. § 1412(a)(1).

Participating schools must evaluate and identify eligible students, develop an individualized educational program (IEP) for each qualifying child, comply with the Act’s procedural safeguards, and provide services to each child in the least restrictive environment (LRE) appropriate for the child. 20 U.S.C. § 1412(a)(3)-(6). A parent or guardian who believes that a school district has failed to comply with the IDEA may seek relief by filing a complaint initiating due process proceedings with respect to “any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” 20 U.S.C. § 1415(b)(6).

**Burden of persuasion:** “[T]he burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district.” *School Bd. of Ind. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1010 at fn. 3 (8<sup>th</sup> Cir. 2006), citing *Schaffer ex rel. Schaffer v. Weast*, 546 U.S., at 62. Here, this burden rests with the Complainant.

**Unilateral parental placement / reimbursement:** Although the provisions of the IDEA, as originally enacted, were silent as to reimbursement of costs related to private education, the Act authorized a reviewing court to “grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii). Through decisions issued in 1985 and 1993, the United States Supreme Court held that the scope of relief available to courts and hearing officers under the IDEA included the power to order school authorities to reimburse parents for the cost of privately educating a child with disabilities upon finding that the public schools failed to develop an adequate IEP and provide a FAPE. *School Comm. of Burlington v. Department of Ed. of Massachusetts*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993). Under these cases, parents could recover reimbursement for the cost of private education only upon findings “both that the public placement violated the IDEA and the private school placement was proper under the IDEA.” *Florence v. Carter*, 510 U.S. at 15.

In 1997, Congress directly incorporated this remedy into the IDEA.

**Reimbursement for private school placement.** If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii). This provision did not alter the meaning of section 1415(i)(2)(C)(iii), as interpreted in *Burlington* and *Carter*. The twin requirements must still be met. A Court and or hearing officer may order a school district to reimburse parents the costs of a unilateral private-placement only if (1) the public agency has not made a free appropriate public education available in a timely manner and (2) the private-school placement is appropriate under the Act. See *C.B. v. Special School Dist. No. 1, Minneapolis*, 636 F.3d 981, 988 (8<sup>th</sup> Cir. 2011), citing, *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 246, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009).

When both of the prerequisite factors are established, the IDEA still allows reduction of the amount of expense reimbursement in some circumstances.

**Limitation on reimbursement.** The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

20 U.S.C. § 1412(a)(10)(C)(iii).

Thus, even when parents establish both of the prerequisite criteria for reimbursement of expenses related to unilateral private placement, courts and hearing officers “retain discretion to reduce the amount of a reimbursement award if the equities so warrant – for instance, if the parents failed to give the school district adequate notice of their intent to enroll the child in private school. In considering the equities, courts should generally presume that public-school officials are properly performing their obligations under IDEA.” *Forest Grove School Dist. v. T.A.*, 557 U.S. at 247; 129 S.Ct. at 2496, citing *Schaffer v. Weast*, 546 U.S. 49, 62-63, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) (STEVENS, J., concurring). “As a result of these criteria and the fact that parents who ‘unilaterally change their child’s placement during the pendency of review proceedings, without the consent of state or local school officials do so at their own risk,’ the incidence of private-school placement at public expense is quite small . . .” *Id.*, quoting *Carter*, 510 U.S., at 15, 114 S.Ct. 361 (quoting *Burlington*, 471 U.S., at 373-374, 105 S.Ct. 1996).

*Free Appropriate Public Education - FAPE*: The first of the two prerequisites for a parent to obtain reimbursement of expenditures related to a private placement is a showing that the public school district failed to make a free appropriate public education available in a timely manner. The term free appropriate public education – or FAPE – means special education and related services provided without charge at public expense, which: meet the standards of the State educational agency; include an appropriate school education; and are provided in conformity with an individualized educational program. 20 U.S.C. §§ 1401(9); 1414(d). In many cases, a mere offer of specialized instruction is not sufficient to constitute a FAPE. FAPE is defined to include both instruction specially designed to meet the needs of the child and “related services,” including: “such developmental, corrective, and other supportive services . . . as may be necessary to assist a child with a disability to benefit from special education.” 20 U.S.C. § 1401(26).

The substantive requirement to offer a free appropriate public education is generally satisfied when “a school district provide[s] individualized education and services sufficient to provide disabled children with some educational benefit.” *Fort Osage R-1 Sch. Dist. v. Sims*, 641 F.3d 268, 1003 (8<sup>th</sup> Cir. 2011), quoting *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8<sup>th</sup> Cir. 1999). The individualized education program – or IEP – is a “comprehensive statement of the educational needs of [the] handicapped child and the specially designed instruction and related services to be employed to meet those needs.” *C.B. v. Special School Dist. No. 1*, 636 F.3d 981, 989 (8<sup>th</sup> Cir. 2011), quoting *Burlington*, 471 U.S. at 368, 105 S.Ct. 1996.

In our circuit, “[t]he standard to judge whether an IEP is appropriate under IDEA is whether it offers instruction and supportive services reasonably calculated to provide some educational benefit to the student for whom it is designed.” *Park Hill School Dist.*

*v. Dass*, 655 F.3d 762, 765-66 (8<sup>th</sup> Cir. 2011). “IDEA does not require that a school either maximize a student’s potential or provide the best possible education at public expense. The statute only requires that a public school provide sufficient specialized services so that the student benefits from his education.” *Fort Zumwalt School Dist. v. Clynes*, 119 F.3d 607, 612 (8<sup>th</sup> Cir. 1997), citing *Rowley*, 458 U.S. at 185 & 203, 102 S.Ct. at 3045 & 3049. “IDEA’s goal is ‘more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.’” *Id.*, quoting *Rowley*, 458 U.S. at 192, 102 S.Ct. at 3048-49.

Specific results are not required, but a student’s academic progress can be an “important factor” in determining whether an IEP complies with the IDEA and academic progress can tip the determination in either direction. The fact that a student is falling behind or failing to make academic progress is an indicator that current programming is not sufficient to meet the student’s needs. See *C.B. v. Special School Dist. No. 1*, 636 F.3d at 989-990 (holding that public school failed to provide a FAPE, where despite student’s average intellectual ability, positive attitude, and willingness to work, the educational program offered by the school did not assist him in making progress in reading during the fourth and fifth grade); and *Independent School Dist. No. 284, Wayzata Area Schools v. A.C.*, 258 F.3d 769,776-778 (8<sup>th</sup> Cir. 2001) (residential placement found necessary for FAPE, where – despite the absence of a learning disability – student’s emotional and behavioral problems led to truancy and disruptiveness caused her to fall behind).

On the other hand, a showing that a student is progressing academically at an average rate, despite psychiatric illness and behavior problems is an indicator that current programming is reasonably calculated to provide educational benefit. *CJN v. Minneapolis Pub. Schools*, 323 F.3d 630, 642 (8<sup>th</sup> Cir. 2003), see also *School Bd. of Independent School Dist. No. 11 v. Renolett*, 440 F.3d 1007,1012 (8<sup>th</sup> Cir. 2006) (holding that where student made academic progress despite cognitive and behavioral disorder, he was provided with meaningful educational benefit and the substantive requirements of the IDEA were satisfied). FAPE is provided and the IDEA’s requirements are satisfied “when a school district provides individualized education and services sufficient to provide disabled children with ‘some educational benefit.’” *Blackman ex rel. Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648, 658 (8<sup>th</sup> Cir. 1999) (quoting *Rowley*, 458 U.S. at 200, 102 S.Ct. 3034); see also *Clark*, 315 F.3d at 1027.

**Propriety of private placement:** The second prerequisite is to an order for reimbursement of expenses related to a private placement is a finding that the private placement is “proper under the Act and the award furthers the purposes of the Act.” *C.B. v. Special School Dist. No. 1*, 636 F.3d at 991, citing, *Burlington*, 471 U.S. at 369, 105 S.Ct. at 2002, and *Forest Grove*, 557 U.S. at 242, 129 S.Ct. at 2493 (n. 9). This is not to say that the alternative placement chosen by the parent must meet the standards applicable to the public school.

Reimbursement is not barred simply because the private chosen school does not meet state standards, is not on a state-approved list, or has faculty members who are not certified teachers. See *Carter*, 510 U.S. at 14-15, 114 S.Ct. at 365-366. Nor must an

alternative placement satisfy the least restrictive environment requirement. While the IDEA expresses a clear preference for children with disabilities to be educated in the least restrictive environment and requires the public school to educate children with disabilities with children who are not disabled “[t]o the maximum extent appropriate,” 20 U.S.C. § 1412(a)(5)(A), this preference for mainstreaming is not intended to limit parental discretion. The Eighth Circuit court has clearly held that “a private placement need not satisfy a least-restrictive-environment requirement to be ‘proper’ under the Act.” *C.B. v. Special School Dist. No. 1*, 636 F.3d at 991.

In fact, to be ‘proper’ under the IDEA, the placement need only be reasonably calculated to enable the child to receive educational benefits. . . Accordingly, to qualify for reimbursement under the IDEA, parents need only demonstrate the alternative placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

*T.B. v. St. Joseph School Dist.*, 677 F.3d 844, 847-848 (8<sup>th</sup> Cir. 2012) (internal quotations and citations omitted.)

Analysis: K.S. is an extraordinary young woman with many talents and skills. Despite suffering from Asperger Syndrome and OCD and despite experiencing the trauma of being sexually assaulted in January of 2012, she completed her sophomore year of high school in May of 2012 with a cumulative grade point average above 4.0 and a ranking in the top 11% of her class. The Complainant does not seriously challenge the appropriateness of her daughter’s prior educational placement or programming.

Rather, the Complainant contends that, as the result of her disabilities and a number of extraordinary emotional setbacks during the 2012, K.S. was in a highly precarious emotional state in August of 2012. The Complainant focuses upon K.S.’s emotional and behavioral needs. In essence, she contends that the events of 2012, as filtered through the lens of K.S.’s disability, led K.S. to a state of emotional crisis so severe that she was unwilling to return to [the] High School and was in need of an intense therapeutic environment to avoid “a downward spiral” of behavior. The Complaint alleges that because of K.S.’s fragile emotional state, K.S.’s “team of treating physicians and therapists are unanimous in the belief that any attempt to force K.S. to return to the educational program currently offered by the [ ] Community School District could result in an emotional melt-down, serious regression in social skills, and/or suicide.” (Due Process Complaint at ¶ 3)

After carefully reviewing all of the testimony and evidence presented at hearing, I find that the record as a whole simply does not support the central premise of Complainant’s argument. While K.S. certainly experienced extreme trauma and unexpected disappointment during the first five months of 2012, the preponderance of evidence does not support a finding that K.S. was in an extraordinarily precarious emotional state and unwilling to return to [the] High School in middle of August of 2012, when her parents decided to withdraw her from the public school.



The physicians and therapists who saw K.S. in the weeks immediately after the May 18<sup>th</sup> show choir casting decision: her long-time pediatrician Dr. Sharon Collins; her psychiatrist Dr. Oyindamola Amao; and her therapist Leslie Downs Mullen all describe her as depressed and exhibiting an escalation of anxiety and self-injury. On May 23<sup>rd</sup>, Dr. Collins observed several gouged out sores from skin and scab picking. In a letter written on May 30<sup>th</sup>, Ms. Mullen noted that K.S.'s self-harm has resurfaced and her behavior had regressed since she learned of the show choir decision.<sup>12</sup> On June 6<sup>th</sup>, Dr. Amao noted increased anxiety, skin picking, and insomnia – for which she recommended increased medication and therapy. But even then, Dr. Amao did not believe that K.S. was suicidal.

It appears that K.S.'s emotional state improved through the summer. Dr. Amao and Dr. Andrew Peterson, K.S.'s neurologist, both treated K.S. later in the summer of 2012. Dr. Amao's chart note from a July 23<sup>rd</sup> encounter states that K.S.'s mother reported that K.S. was doing much better with the medication adjustment: she was less anxious and the picking behavior had decreased significantly. The doctor noted: "things are fairly stable for now." Dr. Peterson saw K.S. on August 3<sup>rd</sup>. He noted some depression and regressive behavior, but less of the picking. He also noted that K.S. had gone to camp and was attending a college course. The [High School] volleyball coaches and [teaching associate R.M.] all testified that K.S. did well during the volleyball practices she attended in June, July, and August. None of these witnesses observed behavior of concern.

There is also little evidence to support the assertion that K.S. would have to be forced to return to [the] High School. K.S. did not return for the last eight days of school in May of 2012, after the show choir decision was announced. Ms. S. told K.S.'s teacher at the time that K.S. was traumatized and did not feel safe in the building after being told she did not make show choir. Although this may well have been true at that time, other than the Complainant, only one witness – therapist Leslie Downs Mullen – testified that K.S. remained unwilling to attend [the] High School in the fall.

Ms. Mullen is a mental health professional and I give her opinion serious consideration. Mullen testified that K.S. told her in August and over the summer that "she would rather be dead than walk into [the High School]." The therapist was convinced that these were K.S.'s real feelings. However, Mullen worked with K.S. for only six months, beginning in February of 2012. She had little contact with representatives of the school and spoke with no one from the school after May 18<sup>th</sup>. Because of this, her view of the show choir casting decision and other events at the school was based exclusively upon information given to her by K.S. and her mother. Mullen wrote letters supporting Ms. S.'s attempts

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<sup>12</sup> It is difficult to discern the degree of impact specific events had upon K.S.'s behavior. During correspondence and proceedings through the summer of 2012, Ms. S. attributed a significant increase in K.S.'s anxiety and self-injury to being cut from show choir. But this behavior has clearly been an ongoing issue, noted by school personnel and K.S.'s therapists for years. An increase in K.S.'s self-injury happened in January, immediately after the rape. In addition, when K.S. was seen by Dr. Peterson on April 24, 2012, he noted that she was distraught and crying and the doctor observed self-injury.

to get K.S. back into the show choir, even though she was not familiar with the selection process for this group, and she appears to have accepted the Complainant's view that K.S. was unfairly excluded.

K.S. certainly might have been apprehensive about returning to classes at [the High School] and facing peers. She also may well have told her mother and therapist that she would rather be dead than return to the school. But assuming this statement was a true representation of K.S.'s feelings when she made the statement, I am not convinced that the statement was literally true. As detailed in the findings of fact, K.S. is also prone to making dramatic and exaggerated statements about how she was treated and how she felt. K.S.'s Asperger's impacts her social interaction and how she deals with stress and change. Dr. Foley Nicpon testified that "any minor change to her routine . . . would set her off . . . she may regress, she may start cutting [herself], she may make a suicidal statement." (Tr. at 188)

By August of 2012, other witnesses – both members of K.S.'s treatment team and representatives of the school – observed that K.S. was less anxious and more communicative. K.S. walked into the [High School] building approximately eight times in June, six times in July, and 10 times in August for volleyball practice. She did not appear to the coaches or her paraeducator to be traumatized by being there.

Ms. S. testified that her concern for K.S.'s safety and K.S.'s level of discomfort with the school increased dramatically on August 28<sup>th</sup>, when they received [the Deputy Superintendent]'s report regarding the bullying investigation. The report did not accept K.S.'s version of January 2012 incident involving the knife or K.S.'s view of the incident during the spring musical. The report noted that some members of the choir did not want to be around K.S. because they were scared of her unpredictable behavior. The report rejected the request for K.S. to be reinstated in show choir. Ms. S. did not believe that the school could keep K.S. safe from future bullying, when the school did not even agree that she had been a victim of bullying in the past.

Ms. S. spoke with K.S.'s doctors and therapist and they agreed that K.S. would be at risk if forced to return to a school environment where she would not be protected and feel safe. These opinions are also entitled to careful consideration. I am, however, greatly concerned about the methodology underlying these opinions.

After studying the testimony, letters, and treatment notes of members of K.S.'s treatment team it appears that no one on the treatment team reviewed K.S.'s IEP or had direct contact with anyone on the school staff after May 18<sup>th</sup>. With the exception of Dr. Peterson, the members of K.S.'s treatment team were not familiar with the show choir selection process. No one on the treatment team was involved in or fully aware of the extent of the school's investigations into K.S.'s complaints of bullying. Their views of the school's conduct were based exclusively upon information relayed to them by Ms. S. and K.S..

Although each of K.S.'s doctors and therapists is a highly credentialed professional, even a professional's opinion can be no more valid than the information upon which the

opinion is based. And it is clear to me from review of the treatment notes and hearing testimony that K.S.'s mother did not portray the school's actions fairly or accurately. Ms. S. believes that K.S. was repeatedly harassed and bullied. I am convinced that, although K.S. frequently perceived that she was the victim of bullying, K.S.'s perceptions and the events she described were often much different from what other witnesses observed. Each alleged incident of bullying that was reported to the school was promptly investigated and resolved. The school district also fully investigated the bullying complaint that Ms. S. filed in July of 2012 and found virtually no evidence to support the allegations in the complaint. After examining the evidence of the alleged bullying incidents presented at hearing in this case, I agree with the conclusions of [the Deputy Superintendent]'s investigative report.

Ms. S. also believes that K.S. was unfairly kicked or booted out of the show choir. Despite repeated explanation of the show choir selection process, the findings of the federal court, and the conclusions of the bullying investigation, Ms. S. seems certain that K.S.'s voice was recognized and that she was intentionally targeted for removal from the show choir. Again, there is no objective evidence to support this belief.

The Complainant argues that even though the events underlying the bullying complaint are subject to dispute, K.S.'s perception of the events is her reality. Ms. S. argues that because K.S. perceived that she had been bullied and she feared returning to the school, the school district did not – indeed could not – provide her with a FAPE. It seems that in the Complainant's view the validity of K.S.'s perception of the events cannot be questioned or rejected unless the very essence of K.S.'s disability is discounted or ignored. While I understand that the Complainant believes the [ ] School District failed to accommodate K.S.'s disability when responding to her bullying complaints, I disagree.

It is possible to validate and respond to a student's feelings without accepting the student's perception as truth. In my view, a school cannot be expected to clamp down on non-existent bullying; but a school can be expected to react promptly to verifiable misconduct – as [the head vocal Director] did in response to comments about K.S.'s hair; a school can be expected to attempt to sensitize students and staff to a student's disability – as [the special education teacher] did in providing training to K.S.'s volleyball, show choir, and dance teams; and a school can be expected to mitigate consequences when a student's inappropriate action is largely attributable to their disability – as [the High School Principal] did when she decided not to suspend K.S. from the spring musical performance. Simply put, the school district has presented substantial evidence refuting the claim that K.S. was subjected to ongoing bullying or harassment.

What remains are subjective perceptions and beliefs of K.S. and her mother. The IDEA does not require a public school to base educational programming exclusively upon the subjective perceptions of the student or the student's parent. *See Waco Indep. Sch. Dist.*, 130-SE-0112, 59 IDELR 57 (Tex. Educ. Agency, April 13, 2012) (denying reimbursement following a parental private school placement, even though the

Petitioner was convinced that the student would not be safe at school, where the student had suffered no physical harm while attending school) .

The IDEA does recognize that a student's social and emotional problems may directly impact the student's ability to benefit from education. Indeed, K.S. is eligible for services under the IDEA because she is a student with a serious emotional disability. There are also rare circumstances where the social, emotional, and behavioral manifestations of a student's disability are so extreme that a therapeutic residential placement is necessary in order for the student to get an education. In *Independent School Dist. No. 284, Wayzata Area Schools v. A.C.*, 258 F.3d 769, 776-777 (8<sup>th</sup> Cir. 2001), the court found that a that student whose truancy and classroom disruption prevented her from attending school, or succeeding academically when at school, required a residential placement to enable her to receive educational benefit. Unlike *Wayzata*, however, the Complainant in this case has not proven that K.S.'s absenteeism or emotional disturbance has had an objectively significant effect on her ability to benefit from the educational program offered by the public school.

Students with Asperger Syndrome present a clear challenge to educators, in part because the disability alters their perception of events and the actions of others. The challenge to educators is even greater when dealing with a twice-exceptional, gifted or high functioning student with Asperger's who, like K.S., often have an extreme reaction to a minor event or change in routine. They also tend to have very rigid thinking, to see the world in terms of black and white rules, and to perseverate on perceived violations of these rules.

The functional behavioral assessment (FBA) included in K.S.'s IEP presents an accurate picture of many of K.S.'s behavioral difficulties. While it is possible that the FBA could be improved with review and revision to address behaviors, such as absenteeism, that have increased within the past year. It is also possible that further review and assessment will result in a finding that much of the absenteeism resulted from the rape, a specific traumatic event, rather than from K.S.'s disability. The Complainant's suggest that the school district and AEA should have requested further assessment and evaluation to resolve this question. I agree that further functional and educational assessment might have benefited all parties in identifying and addressing K.S.'s current needs. I do not, however, believe that the Respondent's failure to pursue an evaluation constituted a denial of FAPE.

The bulk of K.S.'s current IEP was developed in January of 2011. After K.S. was raped in January of 2012, annual review of the IEP was delayed – upon agreement of all parties, until September 2012. An IEP meeting was held in May, at the request of Ms. S., for the sole purpose of addressing the need for paraeducator support during extracurricular activities. Another IEP meeting was held in August, at the request of Ms. S., after she learned that K.S. would have a new special education teacher in the ASD classroom in the fall.

The purpose of the August 16<sup>th</sup> IEP team meeting was to review K.S.'s current level of need and identify supports necessary for the start of the school year. A substantial

portion of the meeting was devoted to further discussion of the show choir decision and the question of whether K.S. had a therapeutic need to participate in this activity. The remainder of the meeting focused on programming options for the fall of 2012. Post-secondary enrollment was on the table as an option and the team could not finalize the IEP without additional information. The team planned to reconvene soon, but five days later Ms. S. withdrew K.S. from the school and gave notice that she was seeking a private placement.

The legal question is whether the school district made a free appropriate public education available to K.S. in a timely manner. The IEP that was in place throughout the 2011-2012 school year was still effective in the fall of 2012. The services and supports provided pursuant to this IEP were sufficient for K.S. to have significant academic success during her sophomore year, despite the multiple traumas she experienced and despite frequent absenteeism. The Complainant has failed to prove circumstances rendering the existing IEP inappropriate to provide FAPE.

It is certainly possible to dissect the IEP and find fault. But it is also possible to view the IEP as including many strategies that are viewed as best practices for dealing with twice-exceptional students with Asperger's.

The following are some examples of accommodations in various areas of functioning that could benefit a gifted and talented student with ASD.

... Some examples of academic recommendations are subject or whole-grade acceleration, enrichment, attending special programs for gifted students, cluster grouping, extracurricular activities, mentorships, or independent research activities. Furthermore, in cases where the twice-exceptional student processes information slower than his or her talented peers, speed of completing projects should be de-emphasized and tests should be given untimed. Once students reach adolescence, their intellectual and academic abilities and talents may have new outlets in high school extracurricular activities, community activities, or national competitions. A larger variety of challenging courses from which to choose may help in meeting their intellectual and academic needs.

... Setting and enforcing a time or page limit helps to decrease perseveration and frustration. Written and oral checklists for tasks or assignments are helpful, as are frequent feedback and redirection. ...

... Gifted and talented students with ASD also may have trouble adjusting to changes in daily routine, therefore alerting them to differences is essential so they know what to expect and how to cope with change. ...

... Gifted and talented students with ASD need opportunities for social interaction so that they can establish positive interpersonal relationships and improve their social skills. Understanding the perspective and

feelings of others is a necessary component of any social skills program for twice-exceptional students. ...

... A behavioral treatment plan is often advantageous in helping gifted and talented students with ASD (autism spectrum disorder) learn emotional self-control. Skills such as identifying emotions of self and others, reacting to those emotions, perspective taking, emotional reciprocity, and sensitivity to criticism may have to be taught through direct instruction. In addition, providing a safe place to go where there is an understanding adult is a vital accommodation for a twice-exceptional child who is experiencing intense frustration, anger, or rage.

Foley Nicpon, M., Assouline, S. G., Amend, E. R., & Schuler, P. *Gifted and talented students on the autism spectrum: Best practices for fostering talent and accommodating concerns; supra*, at pp. 240-242.

I do not question the opinions of the members of K.S.'s treatment team who believe K.S. will benefit from a therapeutic boarding school environment, like the [Private] School. Given the nature of Asperger Syndrome and the functional limitations inherent in this disorder, I agree with the view of Dr. Collins and Dr. Foley Nicpon that most children with significant Asperger's symptoms would benefit from immersion in a residential program that combines high quality academic challenges with 24-hour a day therapeutic environment.

I believe that Ms. S. has chosen the educational placement that she and K.S.'s treatment team believe will best serve K.S. Although I share the Respondents' concern that the [Private] School offers limited opportunity for K.S. to interact with nondisabled peers, I also share the Complainant's view that the [Private] School therapeutic milieu may significantly benefit K.S. This is not the same as saying that a therapeutic boarding school environment is necessary in order for K.S. to attend class and obtain some benefit from her education.

For the reasons discussed herein, I conclude that Complainant has failed to meet the burden of proving that the [ ] Community School District and [ ] AEA failed to offer a free appropriate public education to K.S. in a timely manner. Therefore, she is not entitled to receive reimbursement of the cost of the private placement.

### **Decision**

The Respondents have prevailed on all issues raised in this proceeding. The public school is ready and willing to provide K.S. with a free appropriate public education that will provide her with educational benefits in the least restrictive appropriate environment.

Issued on December 27<sup>th</sup>, 2012.



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