

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of North Clackamas School     )  
District 1J   )  
   )  
   )

FINDINGS OF FACT,  
CONCLUSIONS, AND  
AMENDED<sup>1</sup> FINAL ORDER  
Case No. 18-054-039

**I. BACKGROUND**

On October 10, 2018 the Oregon Department of Education (Department) received a letter of complaint (Complaint) from the parent (Parent) of a student (Student) residing in the North Clackamas School District (District). The Parent requested that the Department conduct a special education investigation under Oregon Administrative Rule (OAR) 581-015-2030. The Department provided the District with a copy of the Complaint on October 10, 2018.

On October 15, 2018, the Department sent a *Request for Response* (RFR) to the District, identifying the specific allegations in the Complaint to be investigated and establishing a *Response* due date of October 30, 2018. The District completed its *Response* and the Department's Contract Investigator (Investigator) received it on October 30, 2018. The *Response* included a narrative, exhibit listing, and the following documents:

1. Amended IEP dated September 19, 2017
2. Email correspondence between District and Parent beginning October 23, 2017 through September 17, 2018
3. Prior Written Notice dated November 17, 2017
4. Summary of Meeting dated November 17, 2017
5. Daily Behavioral Tracking Sheets dated between January 4, 2018 and June 13, 2018
6. Behavioral Incident reports including Restraint Reports dated between January 5, 2018 and June 11, 2018
7. Notice of Team Meeting dated January 16, 2018
8. Prior Written Notice dated January 26, 2018
9. Handwritten Meeting Notes dated January 26, 2018
10. Notice of Team Meeting dated February 22, 2018
11. IEP Notes dated March 8, 2018
12. IEP dated March 8, 2018
13. Placement Determination dated March 8, 2018
14. Prior Written Notice dated March 8, 2018

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<sup>1</sup> On February 12, 2019, the District requested reconsideration of this final order, challenging the number of days the Department found the Student was disciplinarily removed from school during the 2017-2018 school year. The District maintained the Student was removed for 9.5 days, not 12.5 days. The Parent also sought reconsideration of this order on February 26, 2019, contending that the Student was disciplinarily removed for 10.5 days, including the Student's first day attending a CESD placement on January 3, 2018. A subsequent review on reconsideration by the Department found that the Student was disciplinarily removed for 8.5 days (November 9, 2017, November 15-17, 2017, January 23, 2018, February 27, 2018 (half-day), February 28, 2018, March 1, 2018, and May 11, 2018). The Department found that the Student participated in a new student intake on the afternoon of January 3, 2018, and this day did not count as a disciplinary removal. Because the total number of days the Student was disciplinarily removed during the 2017-2018 school year does not exceed ten, the Department will amend its "Manifestation Determination" finding. The District also requested "further clarification" regarding training in the area of determining extended school year services, arising from "nuances" referenced in the telephone conversation between the District and ODE on January 14, 2019 . . . ." As this relates to post-order communications between the District and the Department, it will not be addressed in this order. Sufficient information in the record supports the Department's final order findings regarding extended school year services.

15. Notice of Team Meeting dated April 6, 2018
16. Prior Written Notice dated April 18, 2018
17. Amended IEP dated April 18, 2018
18. Placement Determination dated March 8, 2018
19. Notice of Team Meeting dated April 23, 2018
20. Prior Written Notice dated May 2, 2018
21. IEP Meeting Minutes dated May 2, 2018
22. Notice of Team Meeting dated June 5, 2018
23. IEP Meeting Minutes dated June 12, 2018
24. Prior Written Notice dated June 12, 2018
25. Emails between District Superintendent and ODE dated September 14, 2018 through September 17, 2018
26. Inter-District emails dated from November 3, 2017 through September 5, 2018
27. PPS Grade 2 Phonics Survey – Assessor Copy (undated)

The Investigator determined that in-person interviews were necessary. On November 14, 2018, the Investigator interviewed District personnel, including a Classroom Teacher, Special Education Director, School Principal, and a District liaison/Case Manager.

The Parent submitted the following documents to the Investigator in advance of an interview:

1. Behavioral and Discipline Incident reports dated between January 5, 2018 and July 11, 2018
2. Amended IEP dated March 15, 2017
3. IEP dated October 17, 2016
4. Notice of Team Meeting dated October 1, 2016
5. Prior Written Notice dated October 17, 2016
6. Special Education Determination Placement dated October 10, 2016
7. Emails between Parent and District dated March 17, 2017 through December 15, 2017
8. Behavioral Data for school year 2016-2017 from MESD
9. IEP team meeting Minutes dated March 8, 2018
10. Goal summary sheet for school year 2017-2018
11. Behavioral Incident report chart for school year 2017-2018 from CESD
12. Emails between Parent and CESD dated between January 3, 2018 and July 17, 2018
13. Notice of team meeting dated June 5, 2018
14. Prior Written Notice dated June 12, 2018
15. IEP team meeting minutes dated June 12, 2018
16. School work the Student completed in school years 2015-2016, 2016-2017, and 2017-2018.

The Investigator interviewed the Parent via telephone on November 19, 2018. Thereafter, the Parent provided additional documentation, including:

1. IEP Goal tracking for school year 2018-2019
2. Behavioral Data for school year 2018-2019
3. FBA and BSP dated May 17, 2018
4. Family feedback form dated November 17, 2018 (after complaint was filed)

The Investigator reviewed and considered the previously-described documents, interviews, and exhibits in reaching the findings of facts and conclusions of law contained in this order.

Under federal and state law, the Department must investigate written complaints that allege Individuals with Disabilities Education Act (IDEA) violations that occurred within one year prior to the Department's receipt of the complaint. The Department must issue a final order within sixty days of receiving the complaint. The District and the Parent can agree to extend the timeline to

participate in mediation. The timeline may also be extended for exceptional circumstances.<sup>2</sup> To best align with a parallel investigation underway at the same time as this complaint investigation, the issuance date of this Order was extended by one week.

## II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this Complaint.<sup>3</sup> The Parent's allegations and the Department's conclusions are set out in the chart below. These conclusions are based on the Findings of Fact in Section III and the Discussion in Section IV. This Complaint covers the one-year period from October 11, 2017 through October 10, 2018.

	<b>Allegations</b>	<b>Conclusions</b>
<b>1.</b>	<p><b>IEP Implementation</b></p> <p>The Parent alleges that the District violated the IDEA because it did not provide the Student a 1:1 aide and transportation in accordance with the Student's IEP.</p> <p>(34 CFR §§ 300.323, 300.324, 300.320; OAR 581-015-2220, 581-015-2205).</p>	<p><b>Substantiated</b></p> <p><b>a. 1:1 Aide</b> The District failed to implement the Student's IEP between January 4, 2018 and January 26, 2018 when it removed the supplementary aid/service of a 1:1 aide without first convening an IEP Team Meeting to make such a determination. The Department substantiates this allegation and orders corrective action.</p> <p><b>b. Transportation</b> The Student's IEP includes transportation as a daily related service with a "Start Date" of March 15, 2017 and an "End Date" of March 14, 2018. On November 13, 2017, the District did not provide the Student with home-school transportation. The Department substantiates this allegation for this single day and orders corrective action.</p>
<b>2.</b>	<p><b>Least Restrictive Environment</b></p> <p>The Parent alleges that the District violated the IDEA because it failed to place the Student in a self-contained classroom within the District but rather placed the Student in a more restrictive out-of-district placement.</p> <p>(34 CFR § 300.114 OAR 581-015-2240, OAR 581-015-2250)</p>	<p><b>Not Substantiated</b></p> <p>The Student demonstrated significant behaviors that were tracked and consistently reviewed by the District. The District considered less restrictive placement options. The Student's behaviors required a more therapeutic and restrictive educational placement. The Department does not substantiate this allegation.</p>

<sup>2</sup> OAR 581-015-2030(12).

<sup>3</sup> 34 CFR §§ 300.151-153; OAR 581-015-2030.

3.	<p><b>Extended School Year (ESY)</b></p> <p>The Parent alleges the District violated the IDEA because it failed to provide ESY services to the Student when data existed that evidenced the Student's regression.</p> <p>(34 CFR § 300.106, OAR 581-015-2065).</p>	<p><b>Substantiated</b></p> <p>The District found the Student did not qualify for ESY despite the existence of documented evidence indicating the Student had failed to recoup skills. The District acknowledged the benefit of the Student participating in ESY to build relationships but did not offer the Student a complete ESY program. The Department substantiates this allegation and orders corrective action.</p>
4.	<p><b>Manifestation Determination</b></p> <p>The Parent alleges that the District violated the IDEA because it engaged in systematic removal of the Student for disciplinary reasons without holding a manifestation determination review. The Parent alleges the removals were based on behaviors that were/are a manifestation of the Student's disability.</p> <p>(34 CFR §§ 300.530, 300.536; OARs 581-015-2415 and OAR 581-15-2420).</p>	<p><b>Not Substantiated</b></p> <p>During the 2017-2018 school year, the Student was disciplinarily removed from school for 8.5 days. The District was not required to conduct a manifestation determination review because the Student was not removed for disciplinary reasons for more than ten school days. The Department does not substantiate this allegation against the District.</p>
5.	<p><b>Parent Participation/Pre-Determination</b></p> <p>The Parent alleges that the District violated the IDEA because it predetermined the placement of the Student prior to the IEP/Placement Meeting and without considering the input of the Parent.</p> <p>(34 CFR §§ 300.324, 300.327, 300.501; OARs 581-015-2190, 581-015-2205, and 581-015-2210).</p>	<p><b>Not Substantiated</b></p> <p>After the Multnomah Education Service District (MESD) provided the Parent with a Prior Written Notice (PWN) stating the Student would be placed elsewhere, District staff and the Parent exchanged emails regarding potential placements. The Parent inquired about the programming at each facility and the District responded. The District explored different potential placements for the Student and the Parent was provided with options. There is no indication that the District unilaterally made such a decision. The Department does not substantiate this allegation</p>
6.	<p><b>FAPE</b></p> <p>The Parent alleges that the District violated the IDEA because it:</p> <p>(1) Failed to place the Student in the least restrictive environment;</p>	<p><b>Substantiated, in Part</b></p> <p>(1) Not substantiated, See Discussion - Part B;</p>

	<p>(2) Failed to provide the Student with an educational program that was based upon the Student's IQ, skill level, age, and grade level;</p> <p>(3) Failed to provide the Student with Extended School Year Services; and</p> <p>(4) Failed to hold a manifestation determination meeting in light of a history of disciplinary removals from school.</p> <p>(34 CFR § 300.103, OAR 581-015-2040).</p>	<p>(2) Not substantiated. The District provided the Student with an academically and socially appropriate educational setting, given the Student's specific needs;</p> <p>(3) Substantiated, See Discussion - Part C;</p> <p>(4) Not Substantiated, See Discussion - Part D</p>
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<p><b>REQUESTED CORRECTIVE ACTION</b></p>
<p>The Student should have the opportunity immediately to return to a self-contained classroom for behavior in the NCSD and should complete any remaining education in a [District] classroom. Due to the incredible disregard for parent input into the placement decision and the incredible amount of harm caused to the Student by being forced to be in an inappropriate, violent placement for 2+ years, the parent should have a 50% of the decision power in regards to placement for the Student. Should the district and myself not agree on placement, then a mediator should be brought in by ODE at the cost of the district to help determine the best placement for the Student. The Student should be offered summer school for 6-8 weeks for at least 4 days a week for 3 hours a day (not ESY) for the next 3 years to make up for the lack of appropriate education the Student has received for the last 2+ years.</p>

### III. FINDINGS OF FACT

1. The Student is eleven years old and in the fifth grade. The Student resides within the District and attends a Clackamas Education Service District (CESD) therapeutic placement.
2. The Student is skilled at making crafts and is entrepreneurial, developing businesses such as selling "pom poms" made out of yarn. The Student also has an active interest in recycling, so much so that a school the Student attended adopted a recycling program of its own. The Student is also physically active and enjoys playing sports such as soccer and basketball.
3. The Student receives special education services under the eligibility of Other Health Impairment (OHI). In the school environment, the Student exhibits behaviors such as walking out of assigned areas, hitting, pushing, throwing items, grabbing, kicking, and slapping. The Student's behaviors have resulted in many incident reports and the deployment of physical restraint by school staff.
4. During the 2016-2017 school year, the Student was removed from a general education classroom school and placed on home-bound instruction. Thereafter, the Student was placed in a Multnomah Education Service District (MESD) therapeutic placement.

5. On November 13, 2017, the Student did not receive home-school transportation service.
6. During the 2017-2018 school year, at the MESD placement, the Student's conduct at school generated multiple Behavior Incident Reports. The reports cite behaviors such as yelling, leaving assigned areas, use of profanity, punching, pushing, and kicking staff, and destruction of property.
7. On November 9, 2017, the Student was disciplinarily removed for one day for aggressive behaviors, including punching and kicking at staff while using threatening language.
8. On November 14, 2017, the Student was involved in an incident involving numerous violent acts against staff. The District employed physical restraints in response to the Student's conduct. The Student was suspended for November 15-17, 2017.
9. On November 17, 2017, MESD provided the Parent with a Prior Written Notice (PWN) stating that the Student would undergo a change in placement. The PWN indicated the Student would be placed at an interim placement through MESD between November 27, 2017 and December 15, 2017. MESD noted that after December 15, 2017, the District would place the Student somewhere else. The PWN disclosed that the Student "needs a higher level of support than the MESD is able to provide."
10. The decision to issue the PWN indicating an intent to change the Student's placement was based upon the accumulation of Behavior Incident Reports, Behavior Observation Tracking System (BOTS) data, and teacher/administrator observation.
11. On November 20, 2017, MESD contacted the Parent and relayed information regarding an interim placement through MESD.
12. During December 2017, the Parent contacted the District with questions about potential placements for the Student. The District's Special Education Program Coordinator responded, supporting the Student attending the interim placement through MESD, but also noted the Parent was free to explore other potential placements.
13. On December 5, 2017, the District Special Education Program Coordinator emailed the Parent stating that no permanent placement decision had been made regarding the Student. The District Special Education Program Coordinator stated that two programs were being considered for the Student's placement. The Student was ultimately placed at a CESD therapeutic placement.
14. Beginning December 1, 2017, the Student began receiving educational services at the interim MESD placement. The Student received educational services through MESD until January 4, 2018, when the Student began at a CESD therapeutic program.
15. At the time the Student began attending the CESD therapeutic program, MESD had not yet transferred the Student's complete educational record. CESD had in its possession the Student's IEP, Functional Behavioral Assessment (FBA), and Behavior Intervention Plan (BIP).
16. Upon entering the CESD therapeutic program in January 2018, CESD staff assessed the Student using the "Let's Go Learn" curriculum to determine the Student's present educational levels.
17. After participating in the Let's Go Learn testing, a variety of subtest results were generated in

the areas of reading and mathematics and the instruction the Student received was informed by this testing.

18. The Student entered the CESD therapeutic program with an IEP that included a full day of 1:1 adult assistance as a school wide supplementary aid or service. MESD staff that had worked with the Student during the 2017-2018 school year noted that the 1:1 aide was beneficial to the Student, even as the Student continued to struggle with behaviors and attention to academics.
19. Beginning January 4, 2018, the CESD therapeutic program did not provide the Student with a 1:1 aide. On January 16, 2018, CESD sent a notice to the Parent regarding a meeting to remove the Student's 1:1 aide as a supplementary aid or service on the Student's IEP. The meeting was held on January 26, 2018 without the Parent in attendance. The Parent did not attend because she believed it was fruitless to participate because CESD had already decided to remove the Student's 1:1 aide.
20. On January 26, 2018, the District removed 1:1 full day adult assistance from the Student's IEP. CESD sent the Parent a PWN noting that CESD wanted to see "the student succeed without 1:1 support" and also noted that CESD's small staff to student ratio was the main factor relevant to the decision. CESD's therapeutic program classes contained five staff for a class size of five to nine students.
21. The District agreed with CESD's position that the Student's 1:1 aide be removed. The January 26, 2018 PWN notes that the District will "review daily tracking data at the annual IEP Meeting and adjust if necessary."
22. At the Student's March 8, 2018 IEP Team Meeting, CESD and the District agreed to temporarily assign the Student a 1:1 aide between March 12, 2018 and April 18, 2018 and collect data to determine if a 1:1 aide was necessary. The IEP noted that the IEP Team would meet on April 18, 2018 to review data and evaluate the appropriateness of a 1:1 aide.
23. During April 2018, the Student's classroom behavioral data sheets do not contain data for the following dates: April 11, 17, 20, 23, 26 and 27. The Student's behavioral data sheets contain only partial tracking information for April 9, 10, 12, 13, 23, and 24. There is handwritten notation in absence of data stating, "unable to track."
24. On April 18, 2018, the Student's 1:1 aide "trial period" ended and CESD removed the Student's assigned 1:1 aide.
25. On May 2, 2018, CESD sent the Parent a PWN stating that the data taken between March 12, 2018 and April 18, 2018 after providing the Student a 1:1 aide on a trial basis did not support providing the Student with a 1:1 aide.
26. At the Student's May 2, 2018 IEP Team Meeting, the Parent suggested a goal for the Student regarding ignoring negative comments from others. The IEP Team added this goal to the Student's IEP.
27. At the Student's May 2, 2018 IEP, the IEP Team reviewed data and discussed whether the Student qualified for Extended School Year Services (ESY). The Student had qualified for ESY every year since second grade. The District representative noted the Student had qualified the previous year. The IEP Team noted that it would "look at ESY by May 15th."
28. On June 5, 2018, CESD issued a Notice of Team Meeting for June 12, 2018, noting that on

June 1, 2018, IEP Team members confirmed attendance, but on May 25, 2018, the Parent declined to attend an IEP Team Meeting to discuss ESY.

29. The June 12, 2018 IEP Team Meeting went forward without the Parent. The IEP Team members who were present reviewed data to determine whether ESY services were appropriate for the Student. The IEP Team decided that the data did not indicate that the Student needed ESY in the areas of behavior or academics.
30. The IEP Team further noted that the Student's anticipated fifth grade teacher for the 2018-2019 school year would be present for the ESY program. The IEP Team decided that "relationship building and development is very important for [the Student]." As such, the District and CESD agreed to offer one day per week of ESY to assist the Student in building a relationship with the Student's fifth grade teacher and other potential staff to help promote greater success for the beginning of the 2018-2019 school year.
31. On June 12, 2018, the District sent the Parent a PWN noting that the Student did not qualify for ESY services based on the data reviewed by the IEP Team, but that the Student would be welcome to attend ESY one day per week to help support the Student with relationship building in advance of the 2018-2019 school year. The PWN noted that the Parent could select which day of the week (Tuesday, Wednesday, or Thursday) the Student would attend ESY, and that a decision needed to be communicated to the District by June 18, 2018 so that transportation could be arranged.
32. The Student attended one day of ESY due to a miscommunication between the District and the Parent regarding the weeks ESY was offered. The Student's intended fifth grade teacher was not ultimately present for ESY, but the District nevertheless kept the Student's ESY spot open so the Student could attend for the purpose of building relationships with other CESD staff.
33. According to incident reports generated during the second term of the 2017-2018 school year, the Student continued to be physically aggressive with staff and peers, damaged property.
34. While attending the CESD therapeutic school, the Student was disciplinarily removed from the CESD program for 4.5 days. The Student's disciplinary removals were due to either physical aggression against staff, physical aggression against peers, or property damage.
35. Between January 4, 2018 and July 11, 2018, the Parent received 106 written behavioral incident reports from CESD. The reports include incidents of the Student's failure to follow directions, expression of aggression toward and injury to peers and staff, and incidents of property damage that occurred both inside and out of the classroom. The Student had 94 incidents of "danger to others," 70 incidents of violent acts, and 91 reported incidents of classroom disruption.
36. The District did not convene a manifestation determination review to address the Student's disciplinary removals.

## **IV. DISCUSSION**

### **A. IEP Implementation**

The Parent alleges that the District violated the IDEA because it did not provide the Student a 1:1 aide and transportation in accordance with the Student's IEP.



## **1. 1:1 Aide**

At the beginning of each school year, a school district must have in effect an IEP for each child with a disability within the school district's jurisdiction. A school district must provide special education and related services in accordance with the student's IEP.<sup>4</sup> A material failure to implement an IEP constitutes a violation of the IDEA. "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."<sup>5</sup>

The Student's March 15, 2017 IEP contained a provision describing the supplementary aid/service of "1:1 adult assistance full day." During the time the Student attended Multnomah Education Service District (MESD) programs, the Student was provided with a 1:1 aide. MESD staff noted that the 1:1 aide was beneficial to the Student, even as the Student continued to struggle with behaviors and attention to academics. In January 2018—when the Student began attending the CESD therapeutic program—the Student did not receive 1:1 aide services. Between January 4, 2018 and January 26, 2018, the Student did not receive full-day 1:1 adult assistance. On January 26, 2018, the District removed the 1:1 aide supplementary aid/service from the Student's IEP and sent the Parent a Prior Written Notice (PWN) noting that CESD wanted to see "the student succeed without 1:1 support" and also that CESD's small staff to student ratio was the main factor relevant to the decision. Indeed, while CESD's staff to student ratio was small, the Student did not receive the equivalent of full-day 1:1 adult assistance.

The District failed to implement the Student's IEP between January 4, 2018 and January 26, 2018 when it removed the supplementary aid/service of a 1:1 aide without first convening an IEP Team Meeting to make such a determination. The Department substantiates this allegation and orders corrective action.

## **2. Transportation**

The Parent alleges that on October 3, 2017<sup>6</sup> and November 13, 2017, the District failed to provide transportation to the Student. A school district must take steps to provide nonacademic services in a manner to afford children with disabilities an equal opportunity for participation. Transportation is noted as one of the non-exclusive nonacademic services, as well as a related service.<sup>7</sup>

The Student received home-school transportation to and from the Student's MESD placement. The Student's operative IEP notes transportation as a daily related service with a "Start Date" of March 15, 2017 and an "End Date" of March 14, 2018. On November 13, 2017, the District did not provide the Student with home-school transportation. The Department substantiates this allegation and orders corrective action.

### **B. Least Restrictive Environment**

The Parent alleges that the District violated the IDEA because instead of placing the Student in a self-contained classroom within the District, the Student was placed in a more restrictive out-of-district placement. When determining the appropriate placement for a student with a disability, the following four factors are considered: (1) the educational benefits of placement full-time in a general education environment; (2) the non-academic benefits of placement in the general

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<sup>4</sup> 34 CFR § 300.323; OAR 581-015-2220.

<sup>5</sup> Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 822 (9th Cir. 2007).

<sup>6</sup> The alleged failure to provide the Student with home-school transportation on October 3, 2017 falls outside the one-year investigation period associated with this complaint, and as such will not be evaluated here.

<sup>7</sup> OAR 581-015-2070; OAR 581-015-2000(29).

education environment; (3) the effect of the student's presence in the general education environment on the teacher and other students; and (4) the cost of placing the student in a general education environment.<sup>8</sup>

The Student participated in the general education environment during second grade and a portion of third grade. However, the Student was not receiving educational benefit in a general education environment because the Student frequently demonstrated unsafe behavior and would leave assigned areas without permission. The Student's behavior significantly affected the teacher and other students in the classroom, as expressed in hitting, pushing, throwing items, grabbing, kicking, and slapping. The Student required a highly structured and supportive program with a high staff-to-student ratio. Placement in a general education classroom, even with supplementary aids, services, and accommodations were not enough to allow the Student to make educational progress appropriate in light of the Student's circumstances.<sup>9</sup> Notwithstanding the Student's behavioral history, the District considered less restrictive placement alternatives for the Student.

Based upon the collection of behavior data, accumulation of behavior incident reports, and teacher/administrator observation, the District's offer of placement in a special education therapeutic school (first through MESD, then CESD) was appropriate in light of the Student's circumstances. The Department does not substantiate this allegation.

### **C. Extended School Year (ESY)**

The Parent alleges the District violated the IDEA because it failed to provide ESY services to the Student when data existed that evidenced the Student's regression. School districts must "ensure that extended school year services are available as necessary to provide a free appropriate public education to a child with a disability." Additionally, "extended school year services must be provided only if the child's IEP team determines, on an individual basis, that the services are necessary for the provision of free appropriate public education to the child."<sup>10</sup>

School districts must develop criteria for determining the need for ESY services. Criteria must include regression and recoupment time based on documented evidence or, if no documented evidence, on predictions according to the professional judgment of the team. "Regression" means significant loss of skills or behaviors in any area specified on the IEP as a result of an interruption in education services. "Recoupment" means the recovery of skills or behaviors specified on the IEP to a level demonstrated before the interruption of education services.<sup>11</sup>

The Student had qualified for ESY every previous year since second grade. At the time ESY for 2018 was considered, the Student's operative IEP contained goals centered on three different behaviors: responsibility, respect, and safety. Each of those behaviors had subsets of more precise behaviors and expectations for the Student. During the 2017-2018 school year, the Student's regression and recoupment was measured based upon the Student's return from spring break.<sup>12</sup> The Student failed to recoup skills to the level shown prior to spring break in two areas: responsibility (stay in seat/raise hand) and respect (identifying feelings and expressing them appropriately). Specifically, the Student's behavioral data averages fell substantially during the weeks of April 2, 2018 and April 9, 2018, the two weeks following CESD's spring break between

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<sup>8</sup> *Sacramento City School Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994)

<sup>9</sup> Positive peer modeling is an example of the non-academic benefits of placing the Student in a less restrictive environment. However, the demonstrated need for keeping the Student, other students, and school staff safe weighed heavily in the District's determination to place the Student in the MESD, then CESD program. With respect to cost, the out-of-district placement is a more costly, but appropriate selection of placement for the Student, who requires a highly structured and small school environment at the present time.

<sup>10</sup> 34 CFR § 300.106; OAR 581-015-2065.

<sup>11</sup> OAR 581-015-2065.

<sup>12</sup> In Spring 2018, the Student had not attended a CESD program through either a summer or winter break.

March 26, 2018 and March 30, 2018.

The District found the Student did not qualify for ESY, despite the existence of documented evidence indicating the Student had failed to recoup skills over the spring break period to a level demonstrated before the interruption. The District acknowledged the benefit of the Student participating in ESY to build relationships with staff and the Student's projected fifth grade teacher, but did not offer the Student a complete ESY program. The Department substantiates this allegation and orders corrective action.

#### **D. Manifestation Determination**

The Parent alleges that the District violated the IDEA because it engaged in systematic removal of the Student for disciplinary reasons without holding a manifestation determination review. The Parent alleges the removals were based on behaviors that were/are a manifestation of the Student's disability. A disciplinary removal is considered a change in educational placement and requires the convening of a manifestation determination review if a child is removed for more than ten cumulative school days and those removals constitute a pattern.<sup>13</sup>

During the 2017-2018 school year, the Student was disciplinarily removed for 8.5 days. On November 9, 2017, the Student was disciplinarily removed for one day for aggressive behaviors, including punching and kicking at staff while using threatening language. The Student was suspended November 15-17, 2017 for engaging in numerous violent acts against staff. The Student's placement changed to a CESD therapeutic program, where the Student was disciplinarily removed for 4.5 days before the end of the school year. In each instance, the Student was disciplinarily removed for exhibiting aggressive behaviors such as hitting, kicking, or otherwise placing peers and school staff at risk of physical harm.

While it may have been prudent to convene a manifestation determination review to evaluate the connection between the Student's disability and the Student's violation of each respective school's code of conduct, one was not required. The District did not remove the Student from school for disciplinary reasons for more than ten consecutive or cumulative days that constitute a pattern. The Department does not substantiate this allegation.

#### **E. Parent Participation/Pre-Determined Placement**

The Parent alleges that the District violated the IDEA because it predetermined the placement of the Student prior to the IEP/Placement meeting and without considering the input of the Parent. School districts must provide one or both parents with an opportunity to participate in meetings with respect to the identification, evaluation, IEP and educational placement of the child, and the provision of a free appropriate public education to the child.<sup>14</sup> Predetermination occurs when school district staff unilaterally decide a student's placement prior to an IEP team meeting.<sup>15</sup>

After MESD provided the Parent with a PWN stating the Student would be placed elsewhere, District staff and the Parent exchanged emails regarding potential placements. The Parent asked questions about the potential placements, to which the District responded. District staff recommended one placement over another, but noted the Parent was free to visit placements and explore other potential placements. The District explored different potential placements for the Student and the Parent was provided with options with regard to the decision-making leading up to the Student's placement at the CESD therapeutic program. There is no indication that the

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<sup>13</sup> 34 CFR § 300.536; OAR 581-015-2415.

<sup>14</sup> 34 CFR § 300.501; OAR 581-015-2190.

<sup>15</sup> See *J.G. v. Hawaii*, 2018 U.S. Dist. LEXIS 132945.

District unilaterally made such a decision. The Department does not substantiate this allegation.

**F. FAPE – Failure to Provide An Educational Program Based on Student IQ, Skill Level, Age, and Grade Level**

The Parent alleges that the District violated the IDEA because it: (1) Failed to place the Student in the least restrictive environment; (2) Failed to provide the Student with an educational program that was based upon the Student’s IQ, skill level, age, and grade level; (3) Failed to provide the Student with ESY; and (4) Failed to hold a manifestation determination meeting in light of the Student’s disciplinary removals from school. Allegations 1, 3, and 4 are analyzed in the sections above.

School districts must provide a free appropriate public education to all school-age children with disabilities for whom the district is responsible.<sup>16</sup> The Student entered the CESD therapeutic program with the most recent IEP, Functional Behavioral Assessment and Behavior Intervention Plan. Upon entering the CESD therapeutic program, school staff tested the Student to determine an appropriate instructional level. CESD utilized the “Let’s Go Learn” curriculum to develop an appropriate educational program for the Student. The instruction the Student received was based on this testing. The District, through CESD, delivered to the Student an appropriate educational program for the Student to make progress in light of the Student’s circumstances.

Additionally, the District, through CESD, placed the Student in a classroom environment with a high staff-to-student ratio. CESD’s classes contained five staff for a classroom containing five to nine students. This setting allowed for CESD staff to provide necessary interventions to build the Student’s self-regulations skills and develop positive peer relationships.

The District provided the Student with an academically and socially appropriate educational setting, given the Student’s specific needs. The Department does not substantiate this allegation.

**V. CORRECTIVE ACTION<sup>17</sup>**

*In the Matter of North Clackamas School District  
Case No. 18-054-039*

Based on the facts provided, the following corrective action is ordered.

	<b>Action Required</b>	<b>Submissions<sup>18</sup></b>	<b>Due Date</b>
<b>1.</b>	The Student Services Director (or designee) and other Special Education administrators (selected by the District) will participate in a conference call with ODE staff to discuss the	E-mail verification of call completion, including listing of call participants.	<b>Not later than January 7, 2019</b>

<sup>16</sup> 34 CFR § 300.101; OAR 581-015-2040.

<sup>17</sup> The Department’s order includes corrective action. The order includes documentation to be supplied to ensure the corrective action has occurred. (OAR 581-015-2030(13).) The Department requires timely completion. (OAR 581-015-2030(15).) The Department may initiate remedies against a party who refuses to voluntarily comply with a plan of correction. (OAR 581-015-2030(17)-(18).)

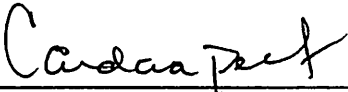
<sup>18</sup> Corrective action submissions and related documentation as well as any questions about this corrective action should be directed to Rae Ann Ray, Oregon Department of Education, 255 Capitol St. NE, Salem, Oregon 97310-0203; telephone – (503) 947-5722; e-mail: [raeannray@state.or.us](mailto:raeannray@state.or.us); fax number (503) 378-5156.

	<p>implementation of the Corrective Action and any associated questions.</p> <p>Review, and revise as needed, existing District policies, implementing procedures, and any communication protocols, flowcharts, or similar workflow tracking used to ensure provision of special education services and supports for students placed by District in out-of-district programs, services, or schools.</p> <p>Following ODE review and discussion with District, provide documents and training regarding any policy and procedures changes to: a) District staff and administrators who may be involved in out-of-district placement decisions and services; b) representatives of external partners with whom the District places students.</p>	<p>Submit draft, with edits showing, for ODE review and approval.</p> <p>Submit dated agenda, identifying presenter, copy of presentation, and attendee sign-in sheet including organization (District/external) and position.</p>	<p><b>February 1, 2019</b></p> <p><b>March 15, 2019</b></p>
<p><b>2.</b></p>	<p>Prior to the next IEP Team Meeting, provide IEP Team, and other staff members as determined by District, training on ESY requirements including multiple methods of determining regression and recoupment.</p>	<p>Submit dated agenda, identifying presenter, copy of presentation, and attendee sign-in sheet including position.</p>	<p><b>January 21, 2019</b></p>
<p><b>3.</b></p>	<p>Convene an IEP Team Meeting to review and revise, as needed, the Student's IEP, with special attention to the Student's need for evidence-based behavioral supports in any of the following areas:</p> <ol style="list-style-type: none"> <li>1) special education and related services,</li> <li>2) supplementary aids and services, and</li> <li>3) program modifications or supports for school personnel.<sup>19</sup></li> </ol>	<p>Submit to Parent, ODE, and Student's external school administrator, a copy of the revised IEP and attachments (such as the FBA and BIP) and any associated notices (such as IEP Team Meeting Notice, Prior Written Notice, etc.)</p>	<p><b>January 22, 2019</b></p>

<sup>19</sup> Based on Office of Special Education and Rehabilitative Services (OSERS); Office of Special Education Programs (OSEP) Dear Colleague Letter, August, 2016

	<p>Include a representative of the external placement in the meeting. Specifically address the issues identified in this Complaint, by including the following in the IEP:</p> <ol style="list-style-type: none"> <li>1) 1:1 assistant at least equal to the number of days missed; specific areas for 1:1 service to be determined by team;</li> <li>2) Date upon which ESY services will be determined;</li> <li>3) transportation as a related service.</li> </ol>		
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Dated this 9th Day of April 2019




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Candace Pelt, Ed.D.  
Assistant Superintendent  
Office of Student Services

Mailing Date: April 9, 2019

Appeal Rights: Parties may seek judicial review of this Order. Judicial review may be obtained by filing a petition for review within sixty days from the service of this Order with the Marion County Circuit Court or with the Circuit Court for the County in which the party seeking judicial review resides. Judicial review is pursuant to the provisions of ORS § 183.484. (OAR 581-015-2030 (14).)