

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Oregon City School District) No. 62))))	FINDINGS OF FACT, CONCLUSIONS, AND FINAL ORDER Case No. 10-054-008
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I. BACKGROUND

On April 23 2010, the Oregon Department of Education (Department) received an amended letter of complaint from the parent of a student residing in the Oregon City School District (District). The parent requested that the Department conduct a special education investigation under OAR 581-015-2030 (2010). The Department confirmed receipt of this amended complaint on April 26, 2010. The parent provided the District a copy of the complaint letter through their attorney.

Under federal law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue an order within sixty days of receipt of the complaint.² This timeline may be extended if the parent and the school district agree to the extension in order to engage in mediation or for exceptional circumstances related to the complaint³. This order is timely.

On April 30, 2010, the Department sent a *Request for Response* to the District identifying the specific allegations in the complaint to be investigated and establishing a *Response* due date of May 14, 2010. Through their attorney, the District submitted its timely *Response* to the Department and to the parent on May 12, 2010. The District's *Response* of May 12, 2010 supplemented their earlier *Response* to the original complaint and included a narrative response and a documentary file containing incident reports, witness statements, meeting notices, and student records, as well as email communications between the parties.

The Department's complaint investigator determined that phone interviews were required. On May 26, 2010 the Department's complaint investigator interviewed: 1) the Director of Special Services, 2) the Assistant Director of Special Services, 3) the Redland School Counselor, 4) the Director of Special Programs, 5) the student's classroom teacher, 6) the Redland School secretary, 7) an instructional assistant on playground duty, and 8) a Redland Key Teacher.

The investigator interviewed the parent on May 27, 2010. Pursuant to the interview with the parent, the investigator visited the Redland School on June 4, 2010 and observed the layout and spoke briefly with several members of staff regarding the complaint.

The Department's complaint investigator reviewed and considered all of these documents, interviews, and exhibits in reaching the findings of facts and conclusions of law contained in this order.

² OAR 581-015-2030(12) and 34 CFR § 300.152(a) (2009).

³ OAR 581-015-2030(12) and 34 CFR § 300.152(b).

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under 34 CFR §§ 300.151-153 and OAR 581-015-2030 (2010). 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 April 24, 2009 to the filing of this complaint on April 23, 2010.⁴

	Allegations	Conclusions
	<p>Allegations to be investigated. The written complaint alleges that the District violated the IDEA in the following ways:</p>	
1.	<p>Resolution Process Parent alleges that District violated the resolution process specified by IDEA when: The District failed to hold a resolution meeting with the parent and the relevant members of the IEP team within 15 days of receiving the parent's due process hearing request; and, By including an attorney for the school district in the resolution meeting although the parent was unaccompanied by an attorney.</p>	<p><u>Unsubstantiated.</u> The District provided five alternative meeting times for scheduling a resolution session and, after cancellation of the meeting by the parent, held the resolution session via email.</p> <p><u>Unsubstantiated.</u> The District did not include the District's attorney in the March 18, 2010 resolution meeting.</p>
2.	<p>Procedures for Complaints as Required by IDEA Regulations Parent alleges the District constructively retaliated against the parent for filing this complaint by failing to thoroughly investigate a purported assault against another child of the parent.</p>	<p><u>Unsubstantiated.</u> The District followed a standardized protocol when responding to the incident forming the basis for the retaliation allegation.</p>
	<p>Requested Corrective Action. The parents are requesting that the District provide:</p> <ol style="list-style-type: none"> 1. Copies of all email exchanges relating to the parent's child; and 2. A written apology for including an attorney in resolution session communications. 	<p><i>Corrective Action – None required.</i></p>

⁴ See OAR 581-015-2030(5) and 34 CFR § 300.153(c).

III. FINDINGS OF FACT

Background Information on Student

1. The student is a resident of the District, is 12 years old, and is eligible for special education services as a student with autism and other health impairments.
2. The student was not allowed to attend Redland Elementary School in September 2009 based on the District's concerns that the student was unable to attend that school due to the nature and extent of the student's disabilities.
3. The student is currently not receiving any educational services due to the inability of the District and parent to come to agreement regarding the conditions surrounding the provision of homebound educational services.

Chronology of Events

4. The student was to be transitioned into Redland School in September 2009, but the parent discovered through the enrollment paperwork of her other child that the student would not be allowed to attend Redland School.
5. In September of 2009, upon further investigation, the parent discovered that the basis for this denial was the District's belief, absent a physician's release, that the child was unable to attend school due to the nature and extent of the student's disabilities. The denial was due in part to the parent previously revoking consent for special education rendering the prior placement obsolete. The District claimed to have requested updated medical information in order to review the student's current medical and safety needs in September 2009.
6. In early October 2009, the District acknowledged receipt of updated medical information and indicated a willingness to consider homebound instruction given the nature of the student's disabilities.
7. On March 9, 2010, after many months of back and forth dialogue, the District and the parent were unable to agree on the conditions (mutual videotaping and/or sound recording) surrounding homebound instruction and the parent filed a due process hearing request.
8. On March 10, 2010, the District's attorney sent the parent an email communication listing five time slots for a resolution session, all which fell within the 15 day period identified in OAR 581-015-2355. The District offered to hold the meeting on March 12th at 1 p.m.; March 17th at 11:30 a.m. or 3:00 p.m.; or March 18th at 11:30 a.m. or 3:00 p.m.).
9. On March 12, 2010 the parent agreed to meet on March 18th at 3:00 p.m. The District's Spring Break holiday was the following week, March 22-26, 2010.
10. On March 15, 2010, the March 18th meeting was confirmed by the Assistant Director of Special Services via email communication to the parent.
11. On March 18, 2010, at approximately 10:00 a.m., the parent cancelled the meeting via email to the Director and Assistant Director of Special Services. The parent offered to reschedule the meeting or attempt to resolve the issues through email and restated the reason for the due process hearing request and her position on the conditions surrounding homebound special education services.

12. On March 18, 2010 at approximately 3:45 p.m., 45 minutes after the scheduled start of the meeting, the Director of Special Services responded to the parent via email restating the District's position on homebound services and the due process hearing request. The Director of Special Services copied the District's attorney on this reply.
13. On March 19, 2010, the parent sent the Director of Special Services an email inquiry asking if the meeting would be rescheduled the following week or if the resolution session was over. Later that day, the District's attorney replied to the parent indicating that the meeting was scheduled within the appropriate timeline and that they had agreed to conduct the resolution session via email 'per her request.'
14. On March 24, 2010, the parent filed a complaint alleging violations of the IDEA related to the resolution session timeline and the presence of an attorney for the District at the session while the parent was unrepresented.
15. On April 15, 2010, another child of the parent (not the child who was the subject of the initial complaint) was assaulted by another student while at lunch recess at a District elementary school.
16. On April 17, 2010, the parent notified the Oregon Department of Education that she intended to withdraw the complaint originally filed on March 24, 2010 because she was fearful for her child's safety.
17. On April 26, 2010, the parent rescinded her withdrawal and amended the initial complaint against the District to allege that the District retaliated against the parent for filing the initial complaint by failing to thoroughly investigate the purported assault of her child.

IV. DISCUSSION

1. Resolution Process

Under Oregon law, school districts must convene a resolution meeting within 15 days of receiving a parent's due process hearing request. The meeting must include the parents and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the complaint.⁵

District participants must include a representative of the school district who has decision-making authority on behalf of the school district and may not include an attorney for the school district unless the parent is accompanied by an attorney. The purpose of the meeting is for the parent of the child to discuss the hearing request and the facts that form the basis of that request so that the school district has the opportunity to resolve the dispute.⁶

The parent contends that the resolution meeting held by the District failed to comply with these requirements in two ways: 1) the District failed to hold the resolution session within the required 15 day time period; and 2) the District included an attorney in the resolution discussion by virtue of copying their attorney on their email response.

With respect to holding the resolution session within 15 days, the District contends that the parent was provided five alternative meeting times for scheduling a resolution meeting, and,

⁵ OAR 581-015-2355(1)

⁶ *Id.*

after cancellation of the meeting by the parent, the District held the resolution session via email per the parent's request.

On March 18, 2010 at approximately 10:00 a.m., the parent emailed the District notifying them of her inability to keep the 3:00 p.m. appointment. In that email, the parent offered the District the option of rescheduling the meeting or holding the resolution session via email. The parent's email also stated the facts underlying the parent's due process hearing request and her position with respect to the issues raised in the hearing request. In that email, the parent states:

'You are already aware that my reason for filing the due process hearing request is that OCSD continues it's (sic) refusal to provide services to my child...It appears that your only reason for refusal to provide services is that I won't allow you to videotape my [child]...Now that I've briefly explained my reason for filing this DPH (the failure to provide services), you have an opportunity to resolve this matter by email if you choose to resolve it.'

At approximately 3:45 p.m. on March 18, the Director of Special Services replied to the parent restating the District's position that videotaping of any homebound instruction was a necessary condition to the provision of educational services in the student's home.

Although the District failed to respond to the parent's cancellation notice prior to the start of the afternoon meeting, the District's eventual response did inform the parent of their ongoing position. This was after the parent had, in the earlier cancellation email, restated her reason for requesting the resolution session and her position concerning the District's desire to videotape her child. The Department concludes that this exchange satisfies the requirement that the resolution meeting allow the parent an opportunity to "discuss the hearing request, and the facts that form the basis of that request."⁷

The Director of Special Services copied the District's attorney on the response email, but this was not done with the purpose or opportunity of obtaining legal guidance in formulating the District's response to the parent's email or her position on the provision of homebound educational services. The email was copied to the attorney to keep the attorney apprised of the day's developments. The response of the District remained unchanged from their position in the March 10, 2010 email from the District's attorney to the parent attempting to schedule the resolution session. Therefore, the Department finds that the resolution meeting, conducted via email exchange between the parent and District staff, did not include an attorney for the school district.

In conclusion, the Department does not find that the District failed to hold a resolution discussion within the 15 day time period or that the District included an attorney in the resolution meeting. While it is true that the parent was not explicitly told by the District that they would attempt to conduct the resolution discussion via email, the parent, in her cancellation email, restated the purpose of her request for these discussions and her position on the District's desire to videotape her child thereby presenting the parent with the opportunity to discuss the hearing request. The District, in their response, simply restated their position and copied their attorney on that response neither changing their position nor creating the opportunity to obtain legal counsel during the email exchange. The Department does not substantiate the allegations that the district violated the IDEA by failing to hold a timely resolution meeting or by including an attorney for the District in the meeting.

⁷ *Id.*

2. Procedures for Complaints as Required by IDEA Regulations

Oregon law permits an organization or individual to file with the State Superintendent of Public Instruction a written, signed complaint that an Oregon school district is violating or has violated the Individuals with Disabilities Education Act or regulations under that Act.⁸ Oregon law also states that no person may be subject to retaliation or discrimination for having filed or participated in this complaint procedure. Any person who believes that she or he has been subject to retaliation or discrimination may file a complaint with the State Superintendent of Public Instruction.⁹

The parent alleges that the District constructively retaliated against her by failing to thoroughly investigate a purported assault of her child in retaliation for filing a special education complaint. In making this claim the parent points to the requirements of the child's Safety Protocol Health Care Plan and Seizure Disorder Health Care Plan and the process utilized during the District's investigation of the incident. In support of her contention that a serious assault occurred, the parent provided a doctors memorandum and a receipt of a police report.

The District acknowledges that on April 15, 2010 another child of the parent (not the child that was the subject of the initial complaint) was struck in the face by another student with a casted hand during the lunch time recess. The child suffered bruises and scratches as a result of the incident. According to the incident report prepared by the school and the subsequent report on the incident prepared by the Director of Special Programs, the child did not report the incident to anyone on recess duty and went directly to the school office. At the office, the student was given ice for the affected cheek and instructed to return to the classroom. Upon returning to the classroom, the student notified the teacher of the incident and the teacher contacted the school counselor. The counselor then began to coordinate an investigation into the incident.

The nature and extent of the child's injury or injuries are without dispute the most important and legitimate concern surrounding such an incident, especially from the perspective of a parent. However, the child's injuries are not determinative as to whether the District retaliated against the parent for filing a complaint.

In order to make a finding of retaliation, the Department applies a four-part test. Complainants alleging retaliation must demonstrate that:

- a. They engaged in a protected activity;
- b. District personnel were aware of the complainants' protected activity;
- c. Following the complainants' protected activity, the District took adverse action against them; and,
- d. There was a causal connection between the protected activity and the adverse action.

It is true that the parent engaged in a protected activity by filing the initial special education complaint and that the District was aware that the parent filed a complaint; however, the parent's claim of retaliation fails the third element of the test – that the District took adverse action against the parent.

In response to this incident, the District proceeded consistent with the procedures listed in the Positive Behavioral Interventions and Supports Handbook (Referral Process) and both the Oregon City School District Suspension Policy (Code JGD) and the Oregon City School District Suspension Procedures (Code JGD-AR). Consistent with these procedures the offending student's parents were notified of the incident and the student was given in-school suspension.

⁸ OAR 581-015-2030(1)

⁹ OAR 581-015-2030(19)

The manner in which this incident was handled appears to be consistent the District's handling of similar incidents.

It should be noted that in the process of this investigation the investigator noticed various elements and inconsistencies within the District's documentation of the incident. Two such examples are inconsistencies regarding the time at which the incident happened and the time at which the parent was notified. Upon further questioning and evaluation of the materials the investigator concluded that these were due primarily to poor procedure implementation and insufficient training of District staff.

With respect to the parent's assertion that Health and Safety Protocols were not followed, it is clear from reading these protocols that they reasonably would not apply to this incident. The student's health and safety protocols are specifically related to seizures and outline the process to be followed in the event the student falls as the result of a seizure. According to the reports filed contemporaneous with and in response to this incident, it appears the student was not manifesting any of the symptoms that would activate the safety protocols. Despite assertions of concussion-like symptoms, the physician's report makes no mention of the student having sustained a concussion.

V. CORRECTIVE ACTION¹⁰

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Based on the findings that the District followed established procedures in response to the assault and that the child's Health and Safety Protocols were inapplicable under the circumstances, the Department concludes that the District took no adverse action against the parent. Therefore, the Department does not find that the District retaliated against the parent for filing a complaint with the Oregon Department of Education.

Dated: June 23, 2010

Nancy J. Latini, Ph.D.
Assistant Superintendent
Office of Student Learning & Partnerships

Mailing Date: June 23, 2010

APPEAL RIGHTS: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this Order with the Marion County Circuit Court or with the Circuit Court for the County in which you reside. Judicial review is pursuant to the provisions of ORS 183.484.

¹⁰ The Department's order shall include any necessary corrective action as well as documentation to ensure that the corrective action has been completed. OAR 581-015-2030(13). The Department expects and requires the timely completion of corrective action and will verify that the corrective action has been completed as specified in any final order. 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).