

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of Salem-Keizer School )  
District )  
)  
)

FINDINGS OF FACT,  
CONCLUSIONS,  
AND FINAL ORDER  
Case No. 10-054-029

**I. BACKGROUND**

On October 4, 2010, the Oregon Department of Education (Department) received a letter of complaint from the parent of a student attending school and residing in the Salem-Keizer 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 complaint on October 4, 2010 and provided the District a copy of the complaint letter.

On October 12, 2010, the Department sent a *Request for Response* (RFR) to the District identifying the specific allegations in the complaint to be investigated with a Response due date of October 26, 2010. The District submitted its timely *Response* to the Department and to the parent, denying the allegations in the parent’s complaint.

The Department’s complaint investigator determined that on-site interviews were not necessary to resolve the issues in this complaint.<sup>1</sup> The Department’s complaint investigator reviewed and considered all of the documents and exhibits submitted by the District in this matter, together with the written information and interviews provided by the parent and student.

Under federal and state law, the Department must investigate written complaints that allege IDEA violations that took place within the twelve months prior to the Department’s receipt of the complaint; the Department must issue a final order within 60 days of receipt of the complaint. The timeline may be extended if the District and the parent agree to extend the timeline to participate in mediation or if exceptional circumstances related to the complaint require an extension.<sup>2</sup> This order is timely.

**II. ALLEGATIONS AND CONCLUSIONS<sup>3</sup>**

The Department has jurisdiction to resolve this complaint under 34 CFR §§ 300.151-153 (2010) and OAR 581-015-2030. 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 (Section III) and the Discussion (Section IV). This complaint covers the

<sup>1</sup> The Department’s complaint investigator contacted the parent and discussed arranging in-person interviews in addition to conducting the telephone interview with the parent and student. The parent and complaint investigator were satisfied that the telephone interview was satisfactory for discussing the issues in this complaint.

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

<sup>3</sup> The parent also wrote to the Department asserting that certain disciplinary action and changes in procedure by District staff were in retaliation for the parent’s prior state complaint. The parent later requested that the Department not investigate the retaliation issue, informing the Department that the Office for Civil Rights had agreed to investigate this part of his complaint.

approximately one year period from October 5, 2009 to the filing of this complaint on October 4 2010.<sup>4</sup>

	<b>Allegations</b>	<b>Conclusions</b>
1.	<p><u>Implementation of IEP:</u></p> <p>The parent alleges that the District has failed to appropriately implement the student’s IEP. Specifically, the parent alleges that the District:</p> <ul style="list-style-type: none"> <li>a. Did not follow the Behavior Support Plan (BSP) in the student’s IEP;</li> <li>b. Did not provide the student with an updated visual reminder about school rules;</li> <li>c. Did not provide needed modifications and support for the student’s placement; and</li> <li>d. Did not contact the parent concerning an October 1, 2010 problem behavior.</li> </ul>	<p>Not substantiated.</p> <p>The Department concludes that The District implemented the student’s IEP consistent with the requirements of the IDEA. The Department does not substantiate this allegation.</p>
2.	<p><u>IEP Team Considerations and Special Factors:</u></p> <p>The parent alleges that the student’s teacher withheld information from participants at a September 23, 2010 IEP meeting needed by the team to determine appropriate services for the student.</p>	<p>Not substantiated.</p> <p>The District did not violate the IDEA by failing to discuss the student’s interactions with a particular peer at the September 2010 IEP Team meeting. The Department does not substantiate this allegation.</p>

### III. FINDINGS OF FACT

#### **Background**

1. At all times relevant to the investigation in this case, the student resided within the District and was enrolled in the eleventh grade in a District high school. The student is eligible to receive special education and related services as a child with ‘Other Health Impairment’ related to several diagnosed medical conditions.

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<sup>4</sup> See 34 CFR § 300.153(c); OAR 581-015-2030(5).

2. The parent home-schooled the student at various times during the student's academic career, including from the beginning of the 2010-11 school year to September 27, 2010. The parent then enrolled the student in the District. The student had previously attended school in the District for part of the 2009-10 school year, and the District had developed an IEP for the student during the spring semester of that year, on April 8, 2010.
3. In anticipation of the student's enrollment, the District held a meeting on September 23, 2010 to plan for the student's return and to review the student's April 8, 2010 IEP and placement determination. The purpose of the meeting was to review up-to-date information about the student, plan for the student's transition needs, and revise the current or develop a new IEP for the student.
4. The team considered parent information, the student's present levels of academic achievement and functional performance, measurable annual goals, and appropriate services. The IEP Team also discussed the student's functional behavior assessment, behavior support plan, and safety plan. The team revised the student's April 8, 2010 IEP, including the statements of present levels of academic achievement and functional performance, goals, and accommodations. The parent participated in this meeting, along with several District staff members including the student's special education teacher, the student's case manager, a regular education teacher, a District representative, a school psychologist, and other District staff.<sup>5</sup>
5. The student's revised September 23, 2010 IEP provided for substantially the same services as the student's April 8, 2010 IEP. The student's updated BSP included several sections describing the support plan, as follows:

Setting Events: *What are ways to change the context to make the problem behavior unnecessary?*

- Clarify rules and expected behavior throughout the school day (visual reminders)
- Individualized teaching times built into schedule to remind student of school rules and consequences of inappropriate behavior.
- Positive reinforcement throughout the school day.

Predictors: *What are ways to prevent the problem behavior?*

- Increase the amount of structure provided.
- Modify assignments to match student skills.
- Provide visual reminders about school rules.
- Ability to take a walk or visit assistant principals (sic) office.
- Staff with him at all times (If he shows up to class without an adult assistant send him directly to the EGC classroom).
- Give the student time to process staff directions.

Behavior: *What can be done to increase expected behaviors or to teach a replacement behavior?*

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<sup>5</sup> The student was also invited to the meeting but did not attend.

- Practice expected behavior in class (needs to know what is specifically expected).
- Verbal praise when the student appropriately follows through with a task.
- Tangible reinforcer given when the student is successful and appropriately follows school rules.

Consequence (problem behavior occurs): *What should happen when a problem behavior occurs?*

- 1) Re-direction (Verbal warning)/Visual reminder of school rules.
- 2) Opportunity for a break away from classroom (walk or administrator's office)
- 3) If behavior continues, phone call home to parent.
- 4) If behavior continues, student will be sent to administrator's office to determine further disciplinary procedures. (lunch detention, in-school detention, etc.)

**If [the student] is disrespectful to others (cursing, yelling, and disrupting other student's learning or making physical signs of threat to teacher or student's (sic)) and is not able to be re-directed by staff, the following consequences will follow:**

- 1) Immediate removal from class and sent to the office.
- 2) Meet with administrator to determine consequence for inappropriate behavior.
- 3) Case manager or administrator informs parent of student behavior and discipline action.

Consequence (desired or replacement behavior occurs): *What should happen when the student is following school rules?*

- Reward program to earn tangible reinforcers.
- Positive phone call home.
- Verbal praise given throughout the day when school staff observes appropriate behavior.
- The student will earn extra classroom privileges for behaving appropriately and following the school rules throughout the school day.

6. The student began attending at a District high school on September 27, 2010. District staff report that the school team implemented the BSP reviewed at the September 23 meeting, providing the supports described in that plan and putting additional assistance in place to ensure that the student's supports were implemented. The District notes that, when the student returned to the school setting, the case manager began to implement supports. The District did not implement any of the consequences identified in the BSP between the start of the 2010-11 school year and the filing of this complaint on October 4, 2010.
7. The parent and student report that there was a peer, a female student, in the student's class that the student had contact with, talked to in class, and talked with about an upcoming school dance. The parent and student assert that, on the student's third day back, District staff told the student not to have any more contact with the peer at the request of the peer's parents.
8. The parent and student report that, near the beginning of the 2010-11 school year, the student continued to receive services in the EGC classroom while the peer was removed and received instruction in the library. The parent and student report that the student did not violate the general code of conduct or the specific directive to

avoid any contact with the peer and that the school did not take any disciplinary action with respect to the student.

9. The student reported that staff did not provide a visual reminder concerning school and classroom rules until his fifteenth day at school. Once provided, the visual reminder did not indicate that the student was to avoid contact with the particular peer.
10. The District reports that, on October 1, 2010, the parent contacted the school and spoke to an assistant principal regarding parental concerns about the student, a female student, and the upcoming school dance. The assistant principal reported discussing these concerns with the parent and stating that the student could contact him at the school dance if there were any concerns while attending. District staff assert that they shared all relevant information with the parent at the September 23 IEP Team meeting, providing input based on their understanding and knowledge of the student at that time. The District also notes that its staff are prohibited by law from sharing information about other eligible students.
11. The parent and student contend that the District's course of action with respect to the peer constituted a change in the student's educational plan and that the student should have received visual reminders of the directive that he avoid contact with the peer.

#### IV. DISCUSSION

##### 1. Implementation of IEP

The parent alleges that the District did not appropriately implement the student's September 2010 IEP. Specifically, the parent alleges that the District should have provided the student with the visual reminder described in the student's BSP and should have provided an updated visual reminder including the new rule concerning contact with the particular peer. The parent also contends that, pursuant to the student's BSP, the District should have contacted him concerning any problem behavior related to the student's interactions with the peer.

A written IEP must be in effect for each eligible child at the beginning of each school year.<sup>6</sup> School districts must implement the services, modifications, and accommodations identified on each student's IEP.<sup>7</sup>

Under the standard adopted by the Ninth Circuit in Van Duyn v. Baker School Dist., 502 F.3d 811 (9th Cir. 2007), it is necessary to determine whether there was a material failure to implement the student's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to an eligible child and the services required by the child's IEP.<sup>8</sup> In Van Duyn, the Court provided some guidance

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<sup>6</sup> OAR 581-015-2220 (1)(a).

<sup>7</sup> OAR 581-015-2220 (1)(b).

<sup>8</sup> Van Duyn, 502 F.3d at 815.

on this issue, stating that an eligible child's educational progress, or lack of progress, may be probative of whether there has been a material failure to implement required services.<sup>9</sup>

Upon the student's enrollment, the District placed the student in an EGC classroom at a District high school and provided the student with services and accommodations designed to implement the IEP. Those accommodations included the implementation of a BSP that indicated the use of visual reminders to clarify rules and expected behavior for the student during the school day. The use of visual reminders was one of several options listed on the BSP as strategies for preventing unwanted behaviors at school.

The District did not have any such visual reminders in place when the student began attending school in September 2010. In fact, the District did not provide a visual reminder for approximately 15 days after the student began attending a District school. However, the facts in this case lead the Department to conclude that the District's delay in providing visual reminders did not have any adverse affect on the student.

The parent contends that the removal of the peer from the student's classroom was a consequence resulting from the student's interactions with the peer. However, the Department finds that the removal of the peer was the result of a request by the peer's parents, not a disciplinary action against the student or the peer. The Department also finds that the peer's removal did not have any adverse educational impact on the student; only the peer's placement became more restrictive as a result of the District's actions. Therefore, the Department concludes that the District's failure to provide the student with a visual reminder concerning the requirement that the student avoid contact with the other student did not constitute a violation of the IDEA.

Despite the conclusion that the failure to provide a visual reminder specific to the request that the student not contact the peer did not constitute a violation of the IDEA, the Department must still address whether the 15-day delay in providing any visual reminders of school rules constituted such a violation. The Department bases its conclusion on the relative brevity of the delay in implementation and the lack of any adverse impact on the student.

The length of the delay in implementing the visual reminder accommodation is reasonable given the circumstances of the student's September 23, 2010 IEP Team meeting; the student re-enrolled in the District soon after the start of the school year. In many cases, IEP Team meetings are scheduled weeks in advance of the anticipated implementation date of the student's IEP in order to provide District staff time to make adjustment necessary to implement the new IEP. In this case, the student's enrollment in the District after the start of the school year denied the District the benefit of planning and preparing for implementation of the student's IEP prior to the start of the school year. Therefore, the Department finds that the District's implementation of the student's visual reminder accommodation 15 days after the student began attending school in the District was reasonable under the circumstances.

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<sup>9</sup> Van Duyn, 502 F.3d at 815.

Additionally, no information was presented indicating that the student faced any disciplinary action or changes in educational program or placement from the District during the timeframe in question for violations of school rules. The student's BSP was intended to deter the student from engaging in unwanted behaviors at school. Absent any evidence that the student violated school rules during the timeframe in which the visual reminders were not provided, the Department is unable to conclude that the failure to provide the accommodation for 15 days constituted a material failure to implement the student's IEP.

The parent also alleges that the District violated the IDEA by failing to contact the parent with regard to the student's interactions with the peer. As discussed above, the District's actions with regard to the female student were based on a parental request and were not a disciplinary action. As such, the student's BSP did not require District staff to contact the parent, and the District chose not to share information about the peer with the parent. The Department does not substantiate the allegation that the District's failure to contact the parent constituted a failure to implement the student's IEP.

## **2. Parent Participation – IEP Team Considerations and Special Factors:**

The parent alleges that one of the student's teachers withheld information from the participants at the September 23, 2010 IEP Team meeting needed by the team to plan appropriate services for the student. Specifically, the parent asserts that one of the student's teachers knew of the potential for a problem to arise between the student and the peer and should have apprised the participants at the meeting of the potential problem.

The IDEA requires parental involvement in decisions concerning the educational program or placement of students, including decisions concerning strategies to address behavior and the extent to which a student will be placed with peers.<sup>10</sup> Meaningful parental involvement in these decisions is dependent on the parent having access to relevant information from teachers and other District staff who observe the student in an educational setting. In this case, the parent alleges that the District violated the IDEA by failing, at the September 23, 2010 IEP Team meeting, to provide information relevant to decisions concerning the student's behavior and placement.

Neither party disputes that the student's interactions with the specific peer were not discussed at the September 23, 2010 IEP Team meeting. Therefore, the Department must determine whether the District's failure to discuss the issue denied the parent an opportunity to participate in the decision-making process by failing to provide the parent relevant information about the student's behavior at school. The Department does not substantiate this allegation.

The Department agrees with the District's position that District staff are precluded from sharing personal and confidential information about other students with the parent but

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<sup>10</sup> OAR 581-015-2190; OAR 581-015-2200; OAR 581-015-2205.

does not base its conclusion on the requirements of confidentiality. Had a member deemed it relevant, the IEP Team could have discussed the student's interactions with the particular peer in terms vague enough to protect privacy but direct enough to inform team decision-making. However, the Department concludes that the IEP Team had no reason to discuss the student's interactions with the peer at the September 23, 2010 IEP Team meeting.

The IEP Team developed the September 23, 2010 IEP with a BSP for the student that included the use of strategies, positive behavioral interventions, and supports to address behaviors as anticipated by the team. The Department found no evidence indicating that the student's interactions with the specific peer resulted in any disciplinary action or placement changes for the student through the filing of this complaint. Therefore, the Department concludes that the absence of any discussion of these interactions at the September 23, 2010 IEP Team meeting was reasonable. Though the situation involving the peer and the peer's removal affected the student, it did not impact the student's educational program or placement such that the participation of the student or parent was required. The Department does not substantiate the allegation that the District violated the IDEA by failing to address the issue at the IEP Team meeting.

## **V. CORRECTIVE ACTION<sup>11</sup>**

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Case No. 10-054-029

The Department does not order any corrective action as a result of this investigation.

Dated: December 3, 2010

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

Mailing Date: December 3, 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.

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<sup>11</sup> 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).