

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Gresham-Barlow )  
School District # 10J )  
)  
)

FINDINGS OF FACT,  
CONCLUSIONS  
AND FINAL ORDER  
Case No. 14-054-001

I. BACKGROUND

On January 2, 2014, the Oregon Department of Education (Department) received a written request for a special education complaint investigation from the parent (Parent) of a student (Student) residing in the Gresham-Barlow School District 10J (District). The Parent requested that the Department conduct a special education investigation under OAR 581-015-2030. The Department confirmed receipt of this complaint and forwarded the request to the District.

Under state and 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.<sup>1</sup> This timeline may be extended if the Parent and the District agree to the extension in order to engage in mediation or local resolution or for exceptional circumstances related to the complaint.<sup>2</sup>

On January 7, 2014, the Department's complaint investigator 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 January 21, 2014.

On January 22, 2014, the District submitted a *Response* indicating they disputed all portions of the allegations in the Parent's complaint. On January 28, 2014, the District submitted additional materials. In total, the District submitted the following items:

- A. Letter responding to each allegation in the Request for Response, including list of staff and contact information, [REDACTED];
- B. Draft Student IEP dated [REDACTED];
- C. Draft Student IEP dated [REDACTED];
- D. Special Education Placement Determination, [REDACTED];
- E. Prior Notice About Special Evaluation/Consent For Evaluation, [REDACTED];
- F. Medical Statement of Health Assessment, [REDACTED];
- G. Authorization to Use and/or Disclose Educational and Protected Health Information, [REDACTED];
- H. Statement of Eligibility for Special Education, [REDACTED];
- I. Statement of Eligibility for Special Education (Other Health Impairment 80) [REDACTED];
- J. Statement of Eligibility for Special Education (Communication Disorder 50), [REDACTED];
- K. Statement of Eligibility for Special Education, (Communication Disorder 50) [REDACTED];
- L. Psychological Evaluation, [REDACTED];
- M. Medical Statement of Health Assessment, [REDACTED];
- N. Academic Report, [REDACTED];
- O. Speech & Language Evaluation, [REDACTED];
- P. Email, Re; your question, [REDACTED];
- Q. Physicians Letter, [REDACTED];

<sup>1</sup> OAR 581-015-2030(12) and 34 CFR § 300.152(a)

<sup>2</sup> OAR 581-015-2030(12) and 34 CFR § 300.152(b)

- R. Letter from District to Parent, [REDACTED];
- S. Phone call message, [REDACTED];
- T. Email, Post Op, with attachment: Surgery Discharge Instructions [REDACTED];
- U. Email, Re:, [REDACTED];
- V. Fax of Physicians Letter from Parent to District, [REDACTED];
- W. Tutoring Request Form, [REDACTED];
- X. Email, Re:, [REDACTED];
- Y. Email, [Student], with attached Physicians Letter, [REDACTED];
- Z. Email, Student, [REDACTED];
- AA. Physician Letter, [REDACTED];
- BB. Email, Fwd: Reminder: Tutoring Check In @ Fri [REDACTED];
- CC. Email, [Student] Tutor, [REDACTED];
- DD. Email, [REDACTED];
- EE. Email, [REDACTED];
- FF. Email, Next week, [REDACTED];
- GG. Email, (no subject), [REDACTED];
- HH. Email, [REDACTED];
- II. Email, [REDACTED] IEP, [REDACTED];
- JJ. Email, [REDACTED];
- KK. Student Tutoring Chronology, (undated);
- LL. Gresham-Barlow School District Tutor List-GBSD Certified;
- MM. Email, Fwd: Tutoring for [Student], [REDACTED];
- NN. (Tutor) Student Contact Time Report(s);
- OO. Tutor Contact Information;
- PP. Safety Plan for [Student];
- QQ. IEP Agenda and Meeting Notes, [REDACTED];
- RR. Prior Notice of Special Education Action, [REDACTED];
- SS. Prior Notice of Special Education Action, [REDACTED];
- TT. Notice of Team Meeting, [REDACTED];
- UU. Team Meeting and Agenda Notes, [REDACTED];
- VV. Notice of Team Meeting, [REDACTED];
- WW. Team Meeting and Agenda Notes, [REDACTED];
- XX. Prior Notice of Special Education Action, [REDACTED];
- YY. Email, Re: [Parent], [REDACTED];
- ZZ. Tutoring Procedures;
- AAA. Checklist for tutors;
- BBB. Email, [Student] Second Request, [REDACTED];
- CCC. Letter from [District] to Parent, [REDACTED].

The Parent submitted materials for consideration on January 9, 2014; January 13, 2014; and February 5, 2014. The Department's complaint investigator determined that on-site interviews were needed. On January 29, 2014, the complaint investigator interviewed the Parent. On January 29, 2014 the complaint investigator interviewed the District Program Directors of Student Support Services, Middle School Principal, and Class Room Teacher. On February 11, 2014, and February 12, 2014 the complaint investigator interviewed the tutors contacted in this case. During the interviews, both the Parent and the District submitted additional materials for review. The complaint investigator reviewed and considered all of these documents, interviews, and exhibits in reaching the findings of fact and conclusions of law contained in this order. This order is timely.

## II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under 34 CFR §§ 300.151-153 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 in Section III and the Discussion in Section IV. This complaint covers the one-year period from January 3, 2013 to the filing of this complaint on January 2, 2014.<sup>3</sup>

	<b><u>Allegations:</u></b>	<b><u>Conclusions:</u></b>
1	<p><b><u>Alternative Placements and Supplementary Aids and Services:</u></b></p> <p>(a) The Parent alleges that the District violated the IDEA when Student was not provided with a suitable tutor while recovering at home from a medical condition, resulting in Student not having tutoring for a portion of the convalescent period.</p> <p>(b) Parent further alleges that when a tutor was found, and said tutor had a medical condition that prevented the tutor from continuing their work, that District did not provide a replacement tutor for Student in a timely manner resulting in Student not having a tutor for a significant portion of the convalescent period.</p> <p>(c) Parent also alleges that the District violated IDEA when it did not offer alternative placement options for Student during the post-surgery recovery period</p> <p>(OAR 581-015-2245 and 34 CFR 300.115)</p>	<p><b><u>Not Substantiated:</u></b></p> <p>(a) The District obtained three tutors to work with student at home. Parent rejected first tutor and was unable to work with second tutor. A third tutor worked with student in the home for several months.</p> <p>(b) The District attempted to find a replacement tutor during this time. Before a replacement tutor was found, the original tutor was able to resume tutoring. However, Student was unable to receive tutoring for much of the same period of time due to recurrence of Student's health problems. The Department finds that this portion of the allegation is unsubstantiated.</p> <p>(c) The District had no indication that the nature or severity of the student's illness would require a more restrictive alternative placement and was thus under no obligation to offer an alternative placement to student during the temporary convalescence period.</p>
2.	<p><b><u>When IEP's Must Be in Effect:</u></b></p> <p>The Parent alleges District violated the IDEA when it did not provide the in-home tutor with a copy of Student's IEP.</p> <p>(OAR 581-015-2220(3)(a) and (3)(b), 34 CFR 300.323)</p>	<p><b><u>Substantiated:</u></b></p> <p>In its January 21, 2014 response the District disagreed with this allegation because the District considers its failure to provide the tutor with a copy of the IEP to have been a mere omission. There was no indication that the tutor had access to the IEP or was aware of its contents. The District admitted it has since taken corrective action and provided the tutor with a copy of the IEP after the Parent alerted the District. The Department therefore substantiates this</p>

<sup>3</sup> This order does include some facts that are relevant to the case and that happened before January 2, 2012.

		allegation and orders corrective action.
3.	<p><b><u>Denial of Free Appropriate Public Education (FAPE)</u></b></p> <p>The Parent alleges that the Student received no instruction for the entire month of September despite requests to the District dating back to July, that the District failed to provide tutoring in October and November, and that the District refused to provide compensatory education in the form of home instruction for the Student.</p> <p>(OAR 581-015-2040 and 34 CFR 300.101)</p>	<p><b><u>Not Substantiated</u></b></p> <p>There is no indication that student was not receiving educational benefit at this time due to other variables and any missed in-home tutoring was not due to District's failure to provide FAPE.</p>

### III. FINDINGS OF FACT

- 1) The Student in this case is 13 years old and resides in the Gresham-Barlow School District 10J.
- 2) Student is eligible for special education services under the categories of other health impairment, communication disorder, and specific learning disability. Student displays cognitive weakness in the areas of comprehension/knowledge, short-term memory, and processing speed. The student's 2013 IEP included goals in the areas of reading, writing, and math. The IEP team also determined the student would take regular statewide assessments with some accommodations.
- 3) The Student's special education placement determination dated June 5, 2013 indicates that the placement team selected the placement of general education classroom with pullout to a resource room for academics, and social and study skills as the student's least restrictive environment.
- 4) The Student attended middle school in the Gresham-Barlow School District until January of 2014, at which point parent removed student from District schools.
- 5) The Student began school in the District at the elementary level. Student has a history of needing and receiving special education services, initially under the category of communication, then autism spectrum disorder, and most recently under the eligibility categories of other health impairment, communication disorder, and specific learning disability.
- 6) In the early summer of 2013, Student's physician discovered that Student suffered from an aberrant coronary artery that would require open-heart surgery. Surgery was then scheduled for August 8, 2013. In a letter dated, August 21, 2013, Student's physician indicated that the recovery time at home would last from between 4 to 6 weeks, and recommended tutoring at home for Student during this time.
- 7) On July 10, 2013, Parent sent an email to District inquiring about tutoring for Student due Student's medical condition. This email discussed tutoring in the context of the District providing tutoring services under a preexisting mediation agreement between District and Parent which was dated August 23, 2010 and expired on August 20, 2013. During this email exchange the District requested documentation from Student's physician, and confirmed that "tutoring...for medical

reasons certainly can happen.”

- 8) On August 21, 2013 the District requested that Parent obtain an additional letter from Student’s physician indicating Student’s current medical condition and anticipated length of recovery time that was needed in the home.
- 9) On August 21, 2013, the District sent Parent a letter clarifying that tutoring could be provided to Student, but would not be provided in accordance with the preexisting mediation agreement. Instead, tutoring would be provided once the school year started in accordance with a time frame established by the Student’s physician. In this letter the District noted the physician’s letter dated July 10, 2013. The District notes that, “The doctor’s statement appears to have the main purpose of recommending homebound tutoring for [Student] until...well enough to return to school.” The letter goes on to specify that, “Tutoring will be provided for both [Student’s] general education and special education needs while [Student] is unable to attend school. Tutoring will be arranged by the school upon receipt of the additional letter from [Student’s] doctor stating that [Student] is unable to attend school, the reason, and indicating the amount of time [Student] is expected to be on bed rest.”
- 10) The Parent submitted a letter from Physician dated September 6, 2013 which states that “Student is currently admitted to the hospital. At this time we do not know when [Student] will be discharged or when [Student] will be well enough to start school. We will update as needed when a timeline is in place...” However, there is no indication in the record that District was provided with a copy of this letter.
- 11) The first day of school for Student’s grade level was September 10, 2013.
- 12) On September 9, 2013, District received a phone message from parent saying student would return to school on the first day of school, and that the Student had some restrictions such as no running and no PE, and that Parent would meet with the case manager to let her know of the restrictions.
- 13) On September 12, 2013, following an in-person meeting between Parent and District, Parent sent an email to District with the hospital’s Post-Cardiothoracic Surgery Discharge Instructions. These instructions note that Student cannot carry heavy items like backpacks or books and illustrate why regular school attendance may be difficult for Student post-surgery.
- 14) Parent sent District numerous email updates regarding Student’s medical progress and setbacks. These emails are dated September 13, 2013, September 19, 2013, September 24, 2013, and September 26, 2013. Many of these email updates relate to Student’s condition worsening, or other sickness brought on as a result of the August surgery. Student was medically unable to return to school or receive instruction during this period due to illness. Parent produced a note from the Physician dated September 23, 2013 which stated “Please allow Student to continue with half days of school this week as [Student] continues to recover.” However, there is no documentation or indication in the record that this note was shared with District.
- 15) On September 30, 2013, Parent sent an email to District stating that Student continued to have additional medical complications and that Student’s physicians “...wouldn’t think it is beneficial for student to go back to school before treatment was over, and [Student] was monitored a bit after, to ensure [Student] was not going to have a relapse of pneumonia.” In this email, Parent also stated Student was taking two antibiotics and two other medications to help with the recovery. Finally, in this email Parent stated “I would really love it if [Student] could have a tutor to help with school work at home, so [Student] doesn’t fall too far behind.”

- 16) On September 27, 2013, Parent provided District with a copy of a physician's letter dated September 26, 2013, which asked that Student be medically excused from attending school due to a recurrence of pneumonia, until further notice.
- 17) On October 1, 2013, District informed Parent, via email, that tutoring was approved for a three-week period, through October 22, 2013. This email indicated that the three-week period was chosen because the letter from the physician did not indicate a specific time frame.
- 18) On October 1, 2013, District prepared a Tutoring Request Form for Student. This form indicated that tutoring was approved through October 22, 2013, and that an extension would require an updated medical statement or information from a physician. This form also asks the preparer to note whether or not the Student has an IEP and, "If yes, provide tutor with a copy to use for instruction."
- 19) The practice of District staff is to approve tutoring for three-week segments of time, which can be extended as needed by the parent submitting additional letters from a physician indicating that the tutoring at home continues to be necessary for the student.
- 20) On October 5, 2013, District contacted first tutor. Tutor and Parent were unable to come to an agreement for tutor to provide the tutoring because Parent expressed concern with the fact that tutor also worked as a substitute teacher occasionally, and Parent indicated that this potential of other work for the tutor may conflict with Student's potential tutoring needs. There is no indication that the Parent attempted to schedule any tutoring sessions with this available tutor to substantiate scheduling conflicts.
- 21) On October 12, 2013 Parent sent an email to District inquiring whether another tutor had been located. On October 15, 2013 Parent resent the above email to District inquiring about the tutor. District responded to Parent by phone.
- 22) District called other potential tutors and left messages for them to call District back regarding setting up tutoring for Student.
- 23) On October 16, 2013 the second tutor called Parent. Parent and tutor were unable to work together because of potential scheduling difficulties though no evidence indicates attempts to schedule any session. Parent and District have differing opinions on why this tutor and Parent were unable to arrange tutoring together.
- 24) On October 17, 2013, Parent sent another email to the District. In this email, Parent noted that tutoring was initially approved through October 22, 2013, that Student is healthy enough for tutoring at home but for only less than 2 ½ hours at a time and indicated that another tutor was rejected due to wanting to work with Student two days a week for 2 ½ hours of time. Parent inquired whether tutoring would be extended beyond October 22, 2013, considering the previously approved tutoring time frame and delay for the provision of services due to the Parent's rejection of the first two tutors who were provided to work with Student. In this email, Parent also stated that "no one who has been recently ill, or knowingly exposed to someone ill, is allowed in the home." Parent also stated that "We also have extreme horse hair and cat hair allergies in the home..." which further limited the pool of potential tutors to work with Student.
- 25) On October 17, 2013, Parent and a third tutor made contact and agreed on tutoring time and sessions for Student.
- 26) On October 17, 2013, Parent sent email to District memorializing that Parent and the second tutor discussed tutoring the night before. Parent raised the concern of whether the time frame for

tutoring would be extended and parent requested compensatory tutoring and a "plan that addresses the long term plan of transition."

- 27) On October 18, 2013, District responded by email noting that doctors often provide the anticipated duration of student absences when students must be away from school for medical reasons, but the Student's doctor's notes which were provided had no clear dates for absence time or duration for needed home tutoring. The District noted the understanding that Student's recovery time was expected to be relatively short in duration while Student recovered from the most recent illness. District thus requested another physician's letter clarifying the continued need for home tutoring beyond October 22, 2013. Parent responded to this message that it was always the goal to get Student on a schedule where Student could thrive and not "think about health so much." In this message, Parent stated Student had been to school two times that school year for part days, and inquired as to a transition "while [Student] works up to a full day of school."
- 28) On October 24, 2013, Parent sent copy of a October 21, 2013 physician's letter to District which indicated Student was not ready to return to school and that an October 30th appointment was set to determine if Student was ready for school attendance. The note further indicated Student would need continued home support.
- 29) On October 25, 2013, the District sent Parent and other District staff an email memorializing a phone call with Parent. That email noted that home tutoring was extended through November 1, 2013, and that a tutor was found who works with the family schedule. The message further states that Parent said Student was only able to work with a tutor for one hour per day, due to extreme fatigue, so tutoring would be for five hours per week at this time based on the Student's needs. District noted the belief that reasonable efforts were made to find a tutor, but expressed concerns that Student was falling behind peers, so may need extra tutoring to catch up to peers, so district would speak to Parent when Student was feeling better to look at increasing tutoring hours for a week or two, to prepare Student for school reentry.
- 30) On October 28, 2013, Parent sent an email to District informing District that tutor had an upcoming surgery and asking whether tutor would be replaced to avoid a gap in tutoring for Student.
- 31) On October 30, 2013, Parent sent an additional physician's letter to District providing updated status and information regarding Student's health and continued need for home tutoring.
- 32) On November 1, 2013, the tutor who was providing the tutoring to Student had surgery. Tutor was unable to continue tutoring Student while recuperating from this surgery.
- 33) At the beginning of November Student began to attend school for one hour per day. Tutoring continued at home. District created an internal schedule of tutoring and school instruction going forward in accordance with the latest physician's letter which indicated that Student could physically attend some classes at school.
- 34) On November 5, 2013, District sent an email to Parent acknowledging a need for a replacement tutor due to the tutor's medical unavailability and the intention to work on finding a replacement tutor.
- 35) On November 7, 2013, District called a potential replacement tutor. District reported that this potential tutor did not return the phone call.
- 36) On November 10, 2013, District called other potential replacement tutors. The District reported that these potential tutors also did not return the calls.

- 37) Between November 11, 2013, and November 15, 2013, Parent sent a series of emails updating District regarding Student's deteriorating health, and inability to attend school.
- 38) On November 13, 2013, the previously utilized tutor who had surgery while working with Student was capable of continuing the tutoring. During much of November, Student was physically incapable of receiving tutoring because of severe medical conditions.
- 39) On November 25, 2013, Parent sent an email to District requesting a copy of the District Policy regarding home instruction. On November 26, 2013, District responded with a link to the District Policy on the District web site. (District Policy IGBAE-AR)
- 40) On November 26, 2013, Parent sent District and an email posing several questions. Of relevance to this matter, Parent asked how long Student had access to tutoring before another physician's letter is required by the District; why the tutor was not provided a copy of Student's IEP; and why when the tutor was required to cease tutoring due to tutor's own surgery, a replacement tutor wasn't provided?
- 41) On November 26, 2013, District responded to the email in relevant part explaining that, a secretary tracks tutoring dates for all students in the District, alerting staff of the pending expiration of a given approved tutoring time based on the time frame in a physician's letter; that the District does not know why the tutor was not provided with a copy of Student's IEP, but that the tutor should have been provided with a copy; and that no replacement tutor could be found before the original tutor informed the District that the tutor could return to work following surgery.
- 42) On November 26, 2013, Parent confirmed that the tutor had yet to be provided with a copy of Student's IEP. District responded that the tutor would immediately be provided a copy of the IEP.
- 43) On December 4, 2013 Parent sent District another email confirming that the tutor had not yet been provided with a copy of the IEP. The District, via email, provided the tutor with a copy of Student's IEP on the same day.
- 44) On December 17, 2013, District informed Parent via email that compensatory tutoring time for Student would not be considered due to District's previous reasonable efforts to provide tutors expediently to Student, and the current schedule of 5 hours per week of tutoring which was discussed would remain in effect per the reported needs of Student. District further noted that as Student prepares for re-entry to school the need for more tutoring time would be reviewed.
- 45) On December 17, 2013, Parent, via email, requested a Prior Written Notice of the District's refusal to provide any compensatory tutoring.
- 46) On December 20, 2013, District provided Parent with a Prior Written Notice of Special Education Action, marking the District's formal refusal to offer additional tutoring/home instruction. District did offer to increase the tutoring time allowed to Student by several hours in the weeks leading up to Student's return to school.
- 47) On February 2, 2014, Parent sent District and email informing District that Parent was removing all of the family's children from schools in the District, including Student. Parent the intention to utilize homeschooling or online schooling.
- 48) On February 6, 2014, District sent an email to Parent to clarify whether Parent continued to desire home instruction for Student, and which clarified that the continuation of home instruction would require an additional letter from a physician. The District reported that their home tutoring services are tracked in part by the tutor submitting time sheets for payment and then seeking



clarification regarding the need for continued tutoring. District explained that part of the tracking of tutoring at home is the responsibility of the tutor who generally is incentivized to inform the District of the tutoring dates and process in order to obtain their payment for the tutoring services.

#### IV. DISCUSSION

##### 1. Alternative Placements and Supplementary Aids and Services:

The Parent alleges that the District violated the IDEA when Student was not provided with a suitable tutor while recovering at home from a medical condition, resulting in Student not having tutoring for a portion of the convalescent period. Parent further alleges that when a tutor was found, and said tutor had a medical condition that prevented the tutor from continuing to work, that District did not provide a replacement tutor for Student in a timely manner resulting in Student not having a tutor for a significant portion of the convalescent period. Parent also alleges that the District violated IDEA when it did not offer alternative placement options for Student during the post-surgery recovery period.

The IDEA recognizes the necessity of a variety of educational settings while also instructing that children with disabilities need to be educated in regular classrooms with nondisabled peers to the maximum extent possible.<sup>4</sup> To this end, provisions must be made for supplementary aids and services to be provided to eligible students in conjunction with regular class placements.<sup>5</sup> Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment<sup>6</sup> should occur only if the nature or severity of the child's disability is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily.<sup>7</sup> The legal requirements governing alternative placements and supplementary aids and services which should be provided in conjunction with regular class placement can be found at OAR 581-015-2245 and 34 CFR 300.115. These regulations state that school districts must ensure that a continuum of alternative placements is available to meet the unique needs of children with disabilities for their special education and related services. The continuum of alternative placements is the range of potential placements in which a district can implement a student's IEP. The continuum begins with the regular classroom and continues to get more restrictive at each placement that could be offered to the child on the continuum.<sup>8</sup>

In Oregon, the placement of a child with a disability must be determined by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.<sup>9</sup> A student's placement should be made in conformity with the IDEA's Least Restrictive Environment (LRE) provisions, based on the child's current IEP, and as close as possible to the child's home.<sup>10</sup> The alternative placements described above must be available to the extent necessary to implement the IEP of each child with a disability.<sup>11</sup> Under the IDEA, placement options and LRE requirements are intertwined. Compliance with the LRE requirements of IDEA is an important part of determining "appropriateness" of placements for students with disabilities, including potential alternative placements.

Generally a placement is deemed more restrictive as it veers away from the regular education classroom environment. The IDEA's key placement requirement is that educational placements

<sup>4</sup> 34 CFR 300.114(a) and OSEP Memorandum 95-9 (OSEP 1994).

<sup>5</sup> OAR 581-015-2245(2)

<sup>6</sup> Regular education environment includes regular classrooms plus settings in schools such as lunchrooms and playgrounds in which children without disabilities participate. See 34 CFR 300.117.

<sup>7</sup> 34 CFR 300.114(a)

<sup>8</sup> 34 CFR 300.115(a)

<sup>9</sup> OAR 581-015-2250(1)(a)

<sup>10</sup> OAR 581-015-2250(1)

<sup>11</sup> OAR 581-015-2250(2)

should be based on a student's individual needs.<sup>12</sup> LRE for a child with a disability must be determined on an individual basis, based on a child's IEP. It is important to note that both an IEP's components and a student's placement determination must always be decided by a team of individuals.<sup>13</sup> These teams are not required to embrace the sole opinion of outside providers or physicians, to the extent that one piece of data may be allowed to drive a decision that would destroy the concept of team based decision making.<sup>14</sup> In addition to LRE and team based decision making requirements, state law is clear that the alternative placement options set forth in the IDEA are available only to the extent necessary to implement the IEP of each child with a disability.<sup>15</sup>

The evidence provided in the records shows that there were many back and forth conversations between Parent and District during the fall of 2013 regarding the temporary declining health needs of this Student; however, the record does not indicate any information that would lead the District to believe that the nature or severity of these conditions would be permanent in nature or warrant a more restrictive placement in order to make progress toward the IEP goals. Indeed, both parties stated that retuning Student to the regular school environment was the main priority and many of the physician's notes provided during this time frame stated that Student could attend some school. Student also attended school for a few hours in September. The record is unclear as to when exactly during this time frame Student could physically have even been able to work with a tutor, due to various other health problems, and no clear dates on any of the physician's statements. Additionally, nothing on the Student's current IEP would appear to require the use of a more restrictive alternative placement option. Despite the fact that Parent provided District with numerous vague doctor's notes stating that Student was ill and unable to attend school for some undisclosed periods of time, the District was not required based on this fact alone, to change the Student's placement to a more restrictive alternative placement. An IEP team would have to meet in order to discuss the changing needs of a student in order to determine if a more restrictive alternative placement would be appropriate for a child and then discuss how to deliver instruction in the least restrictive environment.<sup>16</sup>

In this case, the District attempted to help the Student make progress toward the existing IEP goals while temporarily convalescing in the home environment. Based on these facts, no legal requirements existed for District to provide Student with an alternative placement for instruction during the fall of 2013. It is important to note that general home based tutoring offered to all students in a district with temporary illnesses is not the same educational offering as a home based placement on the continuum of placements for IDEA purposes. In this case, the Student's IDEA placement did not change during the temporary convalescent periods. Rather, district attempted to provide Student with tutoring services to make progress toward IEP goals until Student could return to the general education classroom at the neighborhood school, which was found to be the LRE for the Student and in accordance with the 2013 IEP.

It is also important to note that general education tutoring offered by districts to help students while recovering at home is not necessarily an IDEA item appropriate for investigation under OAR 581-015-2030. However, for the purposes of this investigation, the record indicates that District offered Parent the first tutor to help Student with home services within six school days of the first request. The Parent chose not to work with this tutor during October and did not attempt to schedule any tutoring sessions. Likewise, the Parent and second tutor were not able to work together at this time. Shortly thereafter, District was able to find a third tutor which met Parent's criteria and District arranged for tutoring to help the Student. District also offered to provide additional tutoring if needed to transition Student back into school. Based on the emails from Parent to District which described a continued decline in

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<sup>12</sup> *Letter to Vergason* (OSERS 1991), *Letter to Goodling* ( OSERS 1991), *Letter to Lott* (OSEP 1989).

<sup>13</sup> See OAR 581-015-2210 and 581-015-2250

<sup>14</sup> See *T.S. Parent & Guardian of S.S. v. Ridgefield Bd. of Educ.*, 808 F. Supp 926 (D. Conn. 1992); *G.D. v. Westmoreland School Dist.*, 930 F. 2d 942, 947 ( 1<sup>st</sup> Cir. 1991)

<sup>15</sup> OAR 581-015-2250(2).

<sup>16</sup> See OAR 581-015-581-015-2225(1)(b)

Student's health and vitality paired with nine vague and varying physician's letters spanning over a four month period during the fall of 2013, it is impossible to determine how many hours of instruction the Student would actually have been able to benefit from during this time frame. It appears that most of September Student was unable to receive any instruction due to severe illness, sporadic recurrences, and lethargy which parent reported were problematic for Student in October. The District's tutoring logs indicate that Student received 7.5 hours of tutoring in October, 6.5 hours of tutoring in December, and 4.5 hours of tutoring in January which was before Parent withdrew student from the District.

This allegation is not substantiated and no corrective action is ordered.

## **2. When IEP's Must Be in Effect:**

The Parent alleges District violated the IDEA when it did not provide the in-home tutor with a copy of Student's IEP.

The legal requirement regarding accessibility of IEP's can be found at OAR 581-015-2220(3)(a), (3)(b), and 34 CFR 300.323. Each school district must ensure that a child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation.<sup>17</sup> The school district must inform each teacher and provider of his or her specific responsibilities for implementing the child's IEP and the specific accommodations, modifications and supports that must be provided for or on behalf of the child in accordance with the IEP. Furthermore, OAR 581-015-2220(1)(b), requires that school districts must provide special education and related services to a child with a disability in accordance with an IEP.

The record shows that District did not provide the tutor with a copy of the Student's IEP at the start of the tutoring work with Student, nor is there any indication that this tutor was aware of the contents of the student's IEP, nor that the tutor had access to the IEP. The District policy notes that District provides tutors with a checklist for all tutoring assignments. This checklist includes the instruction that the tutor is to "obtain [S]tudent's IEP/504 plan (if applicable) and any related information." In this case, the District informed the tutor that Student had an IEP when the District first contacted the tutor on October 17, 2013. It is unclear what else regarding the IEP was relayed to tutor at this time. The first tutoring session occurred on October 21, 2013. Over one month later, on November 26, 2013, Parent informed District that the tutor did not have a copy of Student's IEP. On December 4, 2013, the District provided the tutor with a copy of Student's IEP after multiple requests to do so from Parent. While the tutor in this case was experienced in special education instruction, there is no indication that tutor had any access to the specifics of Student's IEP, and therefore could not tailor the instruction to Student's specific needs, or support Student's IEP goals.

The Department therefore sustains this allegation based on the documentation submitted and interviews with District staff, and orders corrective action.

## **3. Denial of FAPE**

The Parent alleges that Student received no instruction and made no progress toward the existing IEP goals for the entire month of September despite requests dating back to July. Parent further alleges the District failed to provide tutoring during October and November, and that the District refused to provide compensatory education in the form of home instruction for the Student for the tutoring sessions which were missed. Parent alleges that District's actions amount to a denial of free appropriate public education (FAPE).

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<sup>17</sup> 34 CFR 300.323(d)

The legal requirement regarding free appropriate public education (FAPE) can be found in OAR 581-015-2040 and 34 CFR 300.101. School districts must provide special education and related services to all resident school-aged children with disabilities. In determining whether a District has denied Student a FAPE, there is a two-part test. First, the District must comply with the procedures set forth in the IDEA, and second the student's IEP must be reasonably calculated to enable the student to receive educational benefits.<sup>18</sup> While harmless procedural errors do not constitute a denial of FAPE,<sup>19</sup> "...procedural inadequacies that result in the loss of educational opportunity...clearly result in the denial of FAPE."<sup>20</sup> The IDEA requires school districts to provide a "basic floor of opportunity" to disabled students, consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit" to the child with the disability.<sup>21</sup> A student's IEP need not address every medical diagnosis that a student receives or every condition that a student has. Instead the IEP must address the unique special education and related service needs that arise from a student's qualifying disabilities.<sup>22</sup>

As noted above, the Student in this case did miss some tutoring time in the fall of 2013 for a variety of reasons. Many of the missed sessions had to do with the Parent's reported illness of the Student, other missed sessions occurred due to the Parent's refusal to work with the first tutor and the inability to make arrangements with the second tutor. The third tutor obtained by District, who was able to work with Student was ill for several weeks, and District tried to find a fourth tutor to work with Student so Student may have missed a few hours of tutoring at this time. However, the third tutor was able to resume working with Student before a fourth tutor could be located. None of these issues show the District violated the IDEA's substantive FAPE requirements. There is no indication that Student was not able to progress toward IEP goals during the fall of 2013, rather a host of other variables interfered with the Student's instruction. Additionally there is no indication that Student was not afforded the "basic floor of educational opportunity" when Student was unable to attend school for medical convalescence periods which were meant to be temporary in nature, but which were continuously extended by Parent or physician.

In this case Parent rejected District's offer of FAPE when Parent both refused to send Student to school during the periods of time when Student could physically attend school, and also when Parent rejected the first tutors who were provided expediently to work with Student in October. The few hours of missed time due to the third tutor's illness and recovery time were de minimus and additionally, Parent had already relayed to tutor that no ill individuals or individuals who had been around illness could work with Student in the home, thus constructively preventing the third tutor from working with Student shortly after going to the hospital. Therefore, Parent demonstrated many rejections of any potential offer of FAPE which district could provide Student. Additionally, no indication was given to District to notify them of the nature or severity of an illness which would warrant lengthy recovery or a needed IEP team meeting to review Student changed needs, and it appears that some of the physician's notes were not given to District. The medical discharge instructions provided to Parent and District after the Student's open heart surgery indicated that children who have had this sort of heart operation do not have to stay in bed permanently and they may get up as tolerated. The instructions say the child should be given a few days to rest quietly at home. These instructions also say a child may go outside, ride in cars with a seatbelt, and further note that activities which could cause a fall or injury to the chest should not be engaged in for four to six weeks after the operation. There is nothing in these instructions that would indicate a child who has undergone this procedure is unable to attend school or receive their typical instruction permanently or for many months on end. The District therefore appropriately continued to use the existing IEP and to offer academic tutoring to Student during the temporary recovery period.

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<sup>18</sup> Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (U.S. 1982)

<sup>19</sup> L.M v Capistrano Unified Sch. Dist., 556 F.3d 900, 910 (9<sup>th</sup> Cir. 2008)

<sup>20</sup> Shapiro v. Paradise Valley Unified Sch. Dist. No. 69, 317 F.3d 1072, 1079 (9<sup>th</sup> Cir. Ariz. 2003)

<sup>21</sup> Rowley, 458 U.S. at 200

<sup>22</sup> North St. Paul- Maplewood Indep. Sch. Dist. #622, 110 LRP 40253 (SEA MN 06/07/10).

The Department therefore does not sustain this allegation and orders no corrective action

**V. CORRECTIVE ACTION<sup>23</sup>**

*In the Matter of Gresham-Barlow School District #10J  
Case No. 14-054-001*

Actions	Submissions <sup>24</sup>	Due By
The District will adopt procedures which will include the requirements that the District provide tutors and other staff members responsible for the provision of FAPE, access to a student's IEP in accordance with OAR; that instructional staff and other relevant staff are informed of their specific responsibilities in implementing the IEP; that a specific District position will be designated to be responsible for this oversight .District will train all relevant staff on these procedures and requirements.	Submit written procedures and a training schedule to provide professional development to appropriate staff.  Upon ODE approval of procedures and proposed training schedule for administrators and case managers, submit evidence of completed training, including agenda and dated sign-in sheet with name and position of those trained.	June 11, 2014

Dated: this 3rd Day of March 2014

*Ria Arnold for Sarah Drinkwater*

Sarah Drinkwater, Ph.D.  
Assistant Superintendent  
Office of Learning - Student Services

Mailing Date: March 3, 2014

<sup>23</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)).

<sup>24</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: [raeann.ray@state.or.us](mailto:raeann.ray@state.or.us); fax number (503) 378-5156.