

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Pendleton School)
District 16 and Oregon Department)
Of Education)
)

FINDINGS OF FACT,
CONCLUSIONS
AND AMENDED¹
FINAL ORDER
Case No. 19-054-013

I. BACKGROUND

On March 15, 2019, the Oregon Department of Education (Department) received a written request for a special education complaint investigation from the legal counsel of a student (Student) residing in the Pendleton School District 16 (District), which was filed jointly with the Student’s Parent (collectively, “Complainants”). The Complainants requested that the Department conduct a special education investigation under Oregon Administrative Rule 581-015-2030. The Complaint included allegations against the District and the Department. 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.² This timeline may be extended if the Complainants and the District agree to an extension to engage in mediation or local resolution, or for exceptional circumstances related to the complaint.³ This order is timely.

On March 25, 2019, the Department's Complaint Investigator (Investigator) sent a *Request for Response* to the District and Department identifying the specific allegations in the Complaint to be investigated and establishing a *Response* due date of April 8, 2019.

On April 8, 2019, the District submitted a *Response* disputing the allegations and explaining in detail the District’s perspective on the issues raised in the Complaint. The District noted that the Parent had withdrawn from the District in November 2018 and transferred the Student to a different school district (North Bend School District) by virtue of their enrollment in Oregon Virtual Academy. The Student’s educational records were transferred to the new district at that time. The District was therefore unable to provide the documents requested, and had only limited information regarding the Student, such as what it retained electronically or through email correspondence. In total, the District submitted the following items:

- 1. District Response in 19-054-013
- 2. Section Cover Sheet for District Response
- 3. Draft IEP, 09/03/2019
- 4. Notice of IEP Team Meeting, 08/30/2019

¹ On May 14, 2019, the Department issued a final order in this matter. On May 30, 2019, legal counsel for the Student requested reconsideration of the final order, which was accepted and resulted in the issuance of this amended final order.

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

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

5. Student IEP, 11/07/2016
6. IEP Progress Report, 02/02/2017
7. IEP Progress Report, 06/13/2017
8. Notice of IEP Team Meeting, 12/05/2016
9. Confidential Statement of Eligibility for Special Education (Emotional Disturbance 60), 11/07/2016
10. Notice of IEP Team Meeting, 10/24/2016
11. Prior Notice of Special Education, 02/17/2016
12. Confidential Statement of Eligibility for Special Education (Emotional Disturbance 60), 02/17/2016
13. Notice of IEP Team Meeting, 02/09/2016
14. Section Cover Sheet for District Response
15. Email, "Re: [Student]" 02/19/2019
16. Email, "[Student]", 02/08/2019
17. Email, "Re: [Student]", 02/15/2019
18. Email, "Re: [Student]", 02/08/2019
19. Email, "Letter of intent", 11/20/2018
20. Meeting notes, 02/22/2018, 09/25/2018, 10/16/2018
21. Special Education Meeting Notes, 09/25/2018
22. Email, "Goals", 08/05/2018
23. Email, "Re: procedural safeguards", 08/31/2018
24. Email, "RE: Request Response", 08/24/2018
25. Letter from District to Parents, 08/23/2018
26. Meeting Notes, [Student]-Transition from Day Treatment to [School], 08/22/2018
27. Email, "Ltct fyi", 05/25/2018
28. Notes, 05/28/2018
29. Meeting Notes, 02/22/2018
30. Meeting invitation, "90-Day Review" for 12/13/2017
31. Notes, 12/13/2017
32. Meeting invitation, "[Student] Meeting" 11/14/2017
33. Lifeways Day Treatment Transition Summary, 11/13/2017
34. Notes, 11/14/2017
35. Meeting invitation, "Revisiting Student Information", 06/01/2017
36. Meeting invitation, "Revisiting Needs", 05/19/2017
37. Email, "Re: [Student]" 05/16/2017
38. Meeting invitation, "[Student] Meeting", 04/13/2017
39. Notes
40. Email, "FW: [Student] Plan and Notes" 05/09/2016
41. Email, "FW: [Student] Plan and Notes" 05/13/2016
42. Meeting Notes, 05/05/2016
43. Behavior Support Plan, 05/09/2016
44. Email, "Meeting Notes", 04/27/2016
45. Section Cover Sheet for District Response
46. [Student] Entry Withdrawal record for Pendleton School District
47. Student's Individual Exit Report, 02/14/2019
48. Student Attendance Records

- 49. Student Behavior Incident reports
- 50. Detailed behavior incident reports
- 51. Section Cover Sheet for District Response
- 52. Abbreviated Day Plans, 09/04/2018, 09/25/2018, 10/16/2018
- 53. Chat of Student Progress Toward Goals
- 54. Copy of payments from District to Lifeways

On April 12, 2019, the Department submitted its response, disputing the Complaint's allegation that the Department failed to fulfill its obligation to ensure a free appropriate public education is available to the Student.

On April 19, 2019, the Investigator interviewed the Student's legal counsel regarding the allegations in the case. Additional documentation was requested from the Complainants at that time. On April 23, 2019, the Student's legal counsel provided a copy of the Student's educational record that the Parent had obtained from the North Bend School District. The Investigator determined that onsite interviews were not necessary. On May 1, 2019, the Investigator interviewed the District's Director of Special Programs. On May 3, 2019, the Investigator interviewed the Parent. The Investigator reviewed and considered the previously-described documents, interviews, and exhibits in reaching the findings of fact and conclusions of law contained in this order.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this Complaint.⁴ The Complaint's allegations and the Department's conclusions are set out in the chart below. The 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 March 16, 2018, to the filing of this Complaint on March 15, 2019.

1.	<p><u>Free Appropriate Public Education</u></p> <p>Complainants allege that the District violated the IDEA by failing to provide necessary specialized related services to address the Student's needs, and/or appropriately revise the Student's IEP when the Student demonstrated a lack of expected progress.</p> <p>(34 CFR § 300.101; OAR 581-015-2040)</p>	<p><u>Not Substantiated</u></p> <p>The District convened IEP meetings on a regular basis to address the Student's needs, including working with community partners. The District offered the Student a free appropriate public education and worked to revise and improve the Student's IEP in response to both new information and lack of expected progress.</p>
2.	<p><u>Review and Revision of IEPs</u></p> <p>Complainants allege that the District violated the IDEA when it failed to review</p>	<p><u>Not Substantiated</u></p> <p>The District convened the Student's IEP and revised the Student's IEP</p>

⁴ 34 CFR §§ 300.151-153; OAR 581-015-2030.

	<p>and appropriately revise the Student's IEP given issues including but not limited to:</p> <ul style="list-style-type: none"> (a) the Student's lack of expected progress toward IEP goals, (b) the impact of boredom on the Student given the lack of challenging academic instruction, and (c) the District's failure to track antecedents and triggers in documenting the Student's behavior which would have helped the District better support the Student. <p>(34 CFR §§ 300.324(a)(4), (a)(5), (a)(6) & (b)(1); OAR 581-015-2225)</p>	<p>appropriately to address new information and the Student's lack of anticipated progress. During the 2018-2019 school year, the Student's IEP team met every two weeks to adjust behavior interventions.</p>
<p>3.</p>	<p><u>Prior Written Notice</u></p> <p>Complainants allege that the District violated the IDEA when it failed to provide prior written notice of its proposal to change the Student's placement to a shortened school day.</p> <p>(34 CFR § 300.114; OAR 581-015-2310)</p>	<p><u>Not Substantiated</u></p> <p>The District provided prior written notice of the change in placement to an abbreviated school day. Following this, the Student entered day treatment, returning to the District with a similar abbreviated school day schedule after the Parent decided to withdraw the Student from day treatment. The District issue prior written notices on August 28, 2018 and September 4, 2018. Following the Student's transfer to a different school district, the District was no longer in possession of the Student's academic record. Based on the records available, the Department does not substantiate this allegation.</p>
<p>4.</p>	<p><u>Parent Participation</u></p> <p>Complainants allege that the District violated the IDEA when it predetermined the Student's placement by recommending a shortened school day at an IEP meeting where, the Complainants further allege, the District had no intent to consider the Parent's input.</p> <p>(34 CFR §§ 300.500, 300.327, and</p>	<p><u>Not Substantiated</u></p> <p>The IEP Team worked with the Student's therapeutic placement team to determine how to reintegrate the Student to the school environment, following the Student's removal to day treatment. Decisions regarding the length of the Student's school day were directly related to the student's ability to safely and successfully participate in the</p>

	300.501(b); OAR 581-015-2190,)	education environment. The Parent was a consistent part of IEP team decision-making process.
5.	<p><u>Free Appropriate Public Education (Allegation against the Oregon Department of Education)</u></p> <p>Complainants allege that the Oregon Department of Education (Department) violated the IDEA when it failed to ensure that a Free Appropriate Public Education (FAPE) was available to all children residing in the State. Complainants allege that this failure is demonstrated by the District's inability to provide FAPE to the Student and other similarly situated students, specifically those students residing in small and/or rural school districts in Oregon. Complainants assert that the Department has failed to provide the District with the resources to enable the District to provide access to expert behavioral resources comparable to that available in larger urban school districts in Oregon.</p> <p>(34 CFR § 300.101; OAR 581-015-2040)</p>	<p><u>Not substantiated</u></p> <p>The District worked with community partners to find the services and treatment the Student required. That included for a time, community mental health providers accompanying the Student into the academic environment to assist with behavior modification. The Student's community mental health services were successful in addressing the Student's behavior but were ended prematurely. The Student was not denied a FAPE due to a lack of resources available in the District.</p>

III. FINDINGS OF FACT

1. The Student in this case is nine years old and resides in the District. The Student withdrew from the District in November 2018 and is currently enrolled in the North Bend School District through the Oregon Virtual Academy (ORVA).
2. The Student began schooling in kindergarten in the District during the 2015-2016 school year. During kindergarten, the Student exhibited issues with behavior regulation. In response to Parent request, the District evaluated the Student for special education eligibility.
3. The District, through InterMountain Education Service District (IMESD), arranged for the Student to be evaluated by a school psychologist. On January 26, 2016, the school psychologist completed a report on the Student noting that the Student "has experienced some difficulties at school in terms of [the Student's] behavior. [The Student] has engaged

in a variety of aggressive behaviors toward other students and has been disrespectful toward adults. [The Student's] teacher . . . has noted that [the Student] appears to have a "short fuse" and . . . becomes quickly annoyed or irritated with others and then responds with aggression toward them."

4. The school psychologist concluded that the Student ". . . struggles with self-regulation and management of [the Student's] emotions and behavior. Emotionally [the Student] becomes easily annoyed and irritated in response to a variety of a factors that often involve other students saying or doing things that bother [the Student]. [The Student] demonstrates a very low tolerance in these situations and quickly becomes upset. [The Student's] responses range from upset/angry verbal threats to hitting/kicking/hurting others. [The Student] often presents with an unhappy and pessimistic attitude. When [the Student] is redirected by an adult regarding misbehaviors, [the Student] oftentimes becomes defiant, argumentative, and noncompliant and exhibits a lack of respect for adult authority."
5. The school psychologist noted that the Student appears to experience developmental deficits such as: (1) Difficulty managing emotional responses to frustration and irritability on a chronic basis; (2) Difficulty appreciating how behaviors affect others and how others perceive the Student; (3) Difficulty empathizing with others or appreciating another's point of view; (4) Difficulty thinking before responding in order to consider the outcomes and consequences of actions (impulsive thinking); and (5) Difficulty ignoring non-relevant stimuli (distractibility).
6. The School Psychologist opined that the Student may experience Attention Deficit Hyperactivity Disorder (ADHD), which could be addressed through interventions, supports, and a Behavior Support Plan.
7. The Parent provided the District with a medical assessment from a Family Nurse Practitioner, dated January 20, 2016. The medical assessment noted that the Parent and the District suspected "Asperger's or some other behavioral syndrome" and that "kindergarten has seemed to cause [the Student] to be overwhelmed and overstimulated. [The Student's] learning abilities are above average in the classroom but [the Student] has meltdown (sic) when [the Student] entered kindergarten with 28 other kids in the class when going outside and has been sent home on more than 1 occasion."
8. On February 17, 2016, the District held an eligibility meeting for the Student. At the meeting, it was discussed that the Student "blurts out often, appears to be attending, wiggly and squirmy on the carpet, is slow to get organized," and that aggressiveness, disrespect, and inappropriate language are the biggest concerns at school, and have increased considerably.
9. On February 17, 2016, the District sent the Parent a Prior Written Notice (PWN) refusing to find the Student eligible for Special Education Services under the category of Emotional Disturbance.
10. The PWN noted that the Student "may be experiencing symptoms of Attention Deficit Hyperactivity Disorder. [The Student] exhibits a large number of behaviors that are

characterized as hyperactive, impulsive and easily distractible, with fewer symptoms of inattention being noted. [The Student] may benefit from a more structured behavior support plan that focuses on supporting [the Student] to be respectful to adults and to teach him more appropriate ways to manage and cope with . . . angry/upset feelings.”

11. On February 22, 2016, the District implemented a Behavior Support Plan for the Student. The plan included the following strategies: (1) Verbal reminders of expectation before transitions; (2) Instruction and reflection interventions; (3) Teaching methods to include managing strong emotions interventions; (4) Verbal and visual reminders; and (5) Minor physical violations (pushing or shoving) would result in loss of talk time, major physical violations (choking or punching) would result in removal to the office and Parent contact.
12. On May 5, 2016, the District and Parent met to discuss the Student’s behavior needs. The Parent asked the District to revisit eligibility for special education, and that the Parent has notes on the school psychologist’s report, and specific information they wanted the District to review. The District asked the Parent to provide this information before the District would revisit its eligibility determination. The team reviewed the revised behavior plan at this meeting.
13. The District implemented a revised behavior support plan on May 9, 2016. New goals were attempted based on observations of District staff. The District set a goal that the Student would exhibit 80% positive behaviors.
14. The District began compiling data on the Student’s behavior with the revised behavior support plan. Additional interventions and strategies were added in an attempt to address the Student’s behavior.
15. On October 6, 2016, the Student was referred for evaluation for eligibility for special education.
16. On October 24, 2016, the District sent the Parent notice of an IEP meeting scheduled for November 4, 2016.
17. At a November 7, 2016 meeting, the District found the Student eligible for special education under the category of Emotional Disturbance due to the Student’s inability to establish and maintain satisfactory interpersonal relationships with peers and teachers, and inappropriate types of behaviors or feelings under normal circumstances.
18. The Student’s November 7, 2016 IEP included measures to address behavior concerns with a variety of interventions, including 80 minutes per week of specially designed instruction in behavior, a behavior plan, shortened work periods, and consultation with the Learning Center. The Student’s IEP included an abbreviated school day placement in the resource room, less access to the general education environment, with the team reevaluating the Student’s needs every two weeks to reevaluate the appropriateness of an abbreviated school day.
19. The Student’s IEP more fully described the Student’s behavior, noting that the Student “is

not able to control that immediate anger reaction to a direction that [the Student] does not like or a redirection. [The Student] does not stop talking . . . behavior spirals out of control quite quickly. During activities like recess and PE [the Student] has difficulty keeping . . . hand to [themselves] and will hit students. Due to the fact that [the Student's] behaviors of talking out, tossing furniture, and clearing desks impacts the learning environment of other students, [the Student] is asked to leave the general education learning environment. In turn that affects [the Student's] ability to establish a positive relationship with . . . peers, teachers, practice skills being in a whole group, practice skills being in a small group, and participating in a discussion where all parties do not always agree. [The Student] requires specially designed instruction in order to make progress toward appropriate behavior in all school settings.”

20. On December 5, 2016, an IEP team meeting convened to review and revise the Student's IEP.
21. On February 2, 2017, the District documented an IEP Progress Report finding the Student making positive progress toward the Student's IEP goals in behavior. The Student was able to maintain appropriate behavior around general education peers 80% of the time. The Student had a difficult time in larger group settings and long classroom lines. The Student continued to require adult support for transition times. While behavior showed improvement, the Student's case manager noted that there was little success in transitioning in and out of the general education classroom, with the Student requesting not to return that day.
22. The Student's family worked with Umatilla County CARE program to connect the Student with mental health services. The county program eventually connected the Student with Lifeways, a psychiatric day treatment program through the InterMountain Education Service District.
23. Lifeways Day Treatment is generally a year-long program to help students learn the requisite skills needed for success in the classroom environment.
24. The Parent reports that the District and Lifeways collaborated to determine that the Student was eligible for the Lifeways program. The Parent further reports that they disagreed with the eligibility determination for the Student to participate in a psychiatric day treatment program.
25. On April 4, 2017, the District sent the Parent a PWN documenting the change in placement for the Student, noting that the Student “was not experiencing success with a full day of school and [the Student's] grandma requested additional adult support.” The same notice documents that the Student receives adult support throughout all times of day, except for recess, which would be added April 19, 2017. The PWN also states the Student was receiving medication management support through Lifeways.
26. The Student participated in an abbreviated school day placement. Between April 17, 2017 and June 5, 2017, the Student also participated in day treatment through Lifeways.

27. The Student's IEP team met on May 18, 2017 to review the Student's IEP.
28. On October 23, 2017, the District developed an annual IEP for the Student. The IEP noted that: (1) the Parent was concerned with how often the Student was refusing to participate in academics; (2) the Student was performing at grade level in math and reading; (3) the Student's disability affects the Student's involvement and progress in the general education curriculum; (4) the Student refused to participate in class, becoming loud and argumentative when it is time to do work, resulting in missed instruction; (5) the Student left the classroom and refused to work three out of 14 school days in October, and 5 out of 14 school days previously; and (6) The Student's would receive 20 minutes daily of specially designed instruction to address social and emotional behavior needs.
29. Pursuant to the Student's October 23, 2017 IEP, the Student's selected placement was described as follows: "[The Student] has been placed by [the Student's] family in Lifeways Day Treatment, a therapeutic Long Term Care and Treatment to address [the Student's] mental health therapy needs.
30. Beginning March 6, 2018, the Parent made the decision, against the advice of Lifeways treatment staff, to transition the Student back into the District. The District began making plans to accept the Student back into the District.
31. The Student began attending classes again in the District in March 2018 with a 1:1 life skills trainer provided through Lifeways. That trainer was a Qualified Mental Health Associate (QMHA).
32. Between March 2018 and May 2018, the Student proceeded with transitioning back to a District school on an abbreviated school day. The Student discontinued going to Lifeways on or about May 29, 2018 and attended a District school.
33. On May 23, 2018, the IEP Team met to discuss the Student's progress. During this meeting the team discussed the Student's psychiatric needs, community therapist, and the Student's progress toward maintaining behaviors that would indicate success in the school environment. During this meeting the Student was meeting behavior goals approximately 67% or less of the time.
34. At the May 23, 2018 IEP, the Team noted that two adults were supporting the Student in the classroom, that the Student was working on identifying emotions in the moment to help calm the Student, and that the Student's attention to a task or activity would only be sustained for 10-15 minutes at a time. The team decision was for the Student to remain on an abbreviated school day, to coach the Student on skills the Student learned at Lifeways, and build confidence to increase the Student's instructional time.
35. At an August 22, 2018 IEP Team meeting, the team determined that a step-up plan with an abbreviated school day was the best placement for the Student. The Parent disagreed with this placement decision, preferring a full school day at the start of the school year. The Parent presented a written request for the Student to attend a full day of school. The District responded by scheduling an IEP team meeting for September 4, 2018.

36. The team reconvened on September 4, 2018 to discuss the Student's first week of school, particularly the Student's behavior and baseline data in the area of "safe body and words," "uses calming corner as needed, and "[e]ngages in learning." The team discussed step up plan goals, criterion and next steps.
37. The Student's "Abbreviated Day Plan" contemplated that the Student's school day would be extended depending on the team's decision, also noting a criterion of 80% or greater for the Student's behavior goals.
38. The Student began the 2018-2019 school year on an abbreviated day and between September 4, 2018 and November 13, 2018, the Student also attended day treatment through Lifeways. The Student's Abbreviated Day Plan describes the Student's strengths, lagging skills, step-up plan goals, criterion and steps, and supports and instruction needed to meet goal criterion. The Student's IEP team met every two weeks to follow the Student's progress.
39. During a September 25, 2018 IEP Team meeting, the District discussed the Student's abbreviated school day and lack of expected progress toward IEP behavior goals. The Parents voiced a preference for a full school day at that meeting. The team further discussed the Student's readiness for a longer school day, with one of parent noting that the Student was not ready to have a full school day put in place.
40. The District continued to collect data regarding the Student's progress toward IEP behavior goals and employed agreed-upon interventions to address the Student's behavior. Despite this, the data collected by the District showed a distinct downward trend in the Student's behavior from the beginning of the school year.
41. The Student's IEP team met every two weeks to discuss and adjust strategies to address the Students behaviors. These included monthly Child Family Therapist meetings at Lifeways with the team supporting the Student's medical needs.
42. The Parent reports frustration with the District modifying the Student's behavior goals. The Parent opines that the District altering the Student's goals were an attempt by the District to erect insurmountable barriers to the Student returning to a full school day.
43. On or about November 13, 2018, the Student withdrew from the District.
44. On November 20, 2018, the Parent informed the District of their intent to enroll the Student in online schooling through a different school district. The Parent reiterated this intent by a letter dated November 12, 2018.
45. The Parent reports that the decision to choose the online school program was due in part to the Student's own frustration with the abbreviated school day. The Parent reports that the Student expressed a preference not to attend school at all unless a full day was offered.
46. On February 8, 2019, the Parent inquired whether the Student could re-enroll, or attend

two school districts simultaneously. While enrolled in another district, the Parent requested that the District convene an IEP meeting. The District declined to do so given the Student was enrolled in another school district.

47. On March 15, 2019, the Department received this complaint.
48. On April 8, 2019, the District submitted its response to the Complainants' allegations. As part of its response, the District noted that the Student's records were transferred to the North Bend School District, who administers the Oregon Virtual Academy, the Student's current district of attendance. The District was no longer in possession of many records. As a result, its response was based off of staff memory and electronic records in the possession of the District.
49. On April 23, 2019, the Investigator obtained a copy of the Student's education records from the Student's legal counsel.

IV. DISCUSSION

A. Free Appropriate Public Education

Complainants allege that the District violated the IDEA when it failed to provide necessary specialized related services to address the Student's needs, and/or appropriately revise the Student's IEP when the Student demonstrated a lack of expected progress. Complainants allege that District provided the Student with as little as one hour of education per day during the Complaint period as a result of the District failing to create an effective Behavior Support Plan. Complainants allege that this failure on the part of the District resulted in the District reacting punitively by abbreviating the Student's school day, and implementing a "step-up" plan that conditioned increased instructional time on meeting behavior goals that were never met. Complainants allege that the abbreviated school day placed the Student in a more restrictive environment than the Student would have if provided a full school day. Finally, Complainants allege that the District failed to recognize and respond appropriately to the actual underlying causes of the Student's behaviors with appropriate experts, or address the Student's boredom resulting from assigned work that was not sufficiently challenging.

School districts are required to provide a free appropriate public education to all school-age children with disabilities for whom the district is responsible.⁵ A student's IEP must be revised periodically, but at least yearly, to determine whether the annual goals for the child are being achieved.⁶ A school district must revise a Student's IEP as appropriate to address any lack of expected progress toward annual goals.⁷ IEPs may be revised as the result of reevaluations, information provided about the child by the parents, the child's anticipated needs, or other matters.⁸

⁵ OAR 581-015-2040(1).

⁶ OAR 581-015-2225(1)(a).

⁷ OAR 581-015-2225(1)(b)(A).

⁸ OAR 581-015-2225(1)(b)(B), (1)(b)(C), (1)(b)(D), and (1)(b)(E).

The District developed several IEPs for the Student, beginning November 7, 2016. The October 23, 2017 IEP included additional observation data after the initial IEP from November 7, 2016. The Student was at grade level in math and reading. During the 2017-2018 school year, the Student attended psychiatric day treatment at Lifeways, facilitated through the InterMountain Education Service District (IMESD). In March 2018, the Lifeways treatment opined that was that the Student was not yet ready to transition back to school, but the Parent insisted the Student return to school. In an effort to facilitate a successful return to the school environment, the Student's IEP team convened to discuss the Student's progress, psychiatric needs, community therapist, and the Student's progress toward maintaining behaviors that would indicate success in the school environment. During this meeting the Student was meeting behavior goals approximately 67% or less of the time. The Student was on an abbreviated school day with two adults supporting the Student in the classroom so that the Student could work on identifying emotions in the moment in an effort to help calm the Student. The District implemented various supports to encourage the Student's success in transitioning back to school from Lifeways.

When the 2018-2019 school year began, the Student attended a District school on an abbreviated school day schedule. On September 4, 2018, the District developed an Abbreviated Day Plan that described the Student's strengths, lagging skills, step-up plan goals, criterion and steps, and supports and instruction needed to meet goal criterion. The Student's IEP team met every two weeks to follow the student's progress. The Student also had a 1:1 Qualified Mental Health Assistant (QMHA). On September 25, 2018, the Student's IEP team met to discuss the Student's behavior, noting that by the fourth week of school the Student showed no eagerness to learn, did not utilize calming strategies, and was utilizing safe body and words only 28% of the time. The IEP Team acknowledged the Student's performance was declining and discussed strategies to improve the Student's behavior. One of the Student's parents agreed that the Student was not ready to have their school day increased. On October 16, 2018, the IEP team met again to discuss the effectiveness of new interventions such as drawing as an incentive. That intervention was becoming an obstacle as the Student chose drawing over engaging in instruction. The team added additional strategies to address the Student's behaviors. In November 2018, the Parent withdrew the Student from the District.

The available record shows that the IEP team met regularly, in conjunction with community service providers to address the Student's needs. At those meetings the IEP team discussed different strategies to support the Student. Included with the IEP team meetings were Child Family Therapist (CFT) meetings at Lifeways to address the Student's mental health needs. The Student's behaviors continued to show a downward trend despite different appropriate interventions attempted both through the District and through outside therapy. During the relevant period, the District offered the Student a free appropriate public education and worked to revise and improve the Student's IEP in response to both new information and lack of expected progress. For these reasons, the Department does not substantiate this allegation.

B. Review and Revision of IEPs

Complainants allege that the District violated the IDEA when it failed to review and appropriately revise the Student's IEP given issues including but not limited to: (a) the Student's lack of expected progress toward IEP goals, (b) the impact of boredom on the Student given

the lack of challenging academic instruction, and (c) the District's failure to track antecedents and triggers in documenting the Student's behavior which would have helped the District better support the Student.

A student's IEP must be revised periodically, but at least yearly, to determine whether the annual goals for the child are being achieved.⁹ School districts must revise IEPs as appropriate to address any lack of expected progress toward annual goals.¹⁰ IEPs may be revised as the result of reevaluations, information provided about the child to or by the parents, the child's anticipated needs, or other matters.¹¹ In the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior.¹²

The records reflect that the IEP team met numerous times to address the Student's behaviors. The Student was found eligible for special education under the eligibility category of Emotional Disturbance. Emotional Disturbance is a condition exhibiting one or more symptoms such as an inability to learn that cannot be explained by intellectual, sensory, or health factors.¹³ The condition may also manifest as inappropriate behaviors or feelings under normal circumstances, and a generally pervasive mood of unhappiness under normal circumstances.¹⁴ The Student's IEP team meeting notes document increasingly serious, and increasingly disruptive behaviors in the educational environment, including acts of violence toward other students. This ultimately led to the Student receiving treatment in a psychiatric day treatment program for much of the Student's second grade year. The Student returned to school against the advice of the Student's psychiatric treatment team. The Parent disagrees with the Student's abbreviated school day placement, observing that the Student also experiences "meltdowns" at home. District documents noted that following transfer back from psychiatric treatment, the Student was unable to identify triggers to behavior. The record in this case is silent with regard to whether the Student's placement was primarily educational or evidence of psychiatric crisis prompting placement.¹⁵ While school districts are required to ensure that a continuum of alternative placements is available to meet the individual special education needs of all children with disabilities,¹⁶ such placements must be distinguished from psychological services that are medically necessary.¹⁷ Psychiatric Day Treatment Programs can be a placement in a protected environment to protect the health and safety of themselves and others.¹⁸ While the Parent expressed frustration with changes to the Student's IEP goals, the record demonstrates that such changes were required to address the Student's needs as they manifested. Interviews with District staff reflect that the District did not receive additional information regarding the Student receiving medical and psychological treatment through Lifeways.

⁹ OAR 581-015-2225(1)(a).

¹⁰ OAR 581-015-2225(1)(b)(A).

¹¹ OAR 581-015-2225(1)(b)(B), (1)(b)(C), (1)(b)(D), and (1)(b)(E).

¹² OAR 581-015-2205(3)(a).

¹³ OAR 581-015-2000(4)(b)(E)(i).

¹⁴ OAR 581-015-2000(4)(b)(E)(iii) & (4)(b)(E)(iv)

¹⁵ *Munir v. Pottsville Area Sch. Dist.*, 2012 WL 2194543 (M.D. Pa.2012).

¹⁶ OAR 581-015-2005(1)(a).

¹⁷ *Clovis Unified v. Office of Administrative Hearings*, 903 F.2d, 635 646 (9th Cir. 1990).

¹⁸ OAR 581-015-2570(2)(b).

The record does not include psychiatric assessments or a medical statement beyond that provided by a Family Nurse Practitioner. While such information may exist, it was not available during this investigation. Nevertheless, the District actively worked with the Student's community mental health providers to make appropriate adjustments to goals and interventions to address the Student's behaviors. The IEP Team met frequently, often with the team from Lifeways to address and support the Student. During the Complaint period, the District convened the Student's IEP team and revised the Student's IEP appropriately to address new information and the Student's lack of anticipated progress. Based on the information available, the Department does not substantiate this allegation.

C. Prior Written Notice

Complainants allege that the District violated the IDEA when it failed to provide the Parent with prior written notice of its proposal to change the Student's placement to an abbreviated school day. Complainants allege that the District failed to provide a prior written notice documenting its refusal to increase the Student's school day each time the Parent made such a request.

A school district must provide prior written notice to the parent of a child when the district proposes to initiate or change the identification, evaluation, or educational placement of the child.¹⁹ A school district is also required to provide prior written notice when it refuses to change the educational placement of the child or the provision of FAPE.²⁰

The Student's placement was changed to an abbreviated school day during the 2016-2017 school year. A prior written notice dated April 13, 2017 documents the change. The IEP team rejected a full day of school at that time because the Student "continue(d) to have difficulty following directions, using kind words, keeping . . . hands and feet safe, and completing tasks as assigned." An additional prior written notice dated October 23, 2017 documents this team decision to continue the Student's abbreviated school day program. At the time, the Student's IEP Team was working in conjunction with staff from the Lifeways psychiatric day treatment program to determine the Student's needs. The Student participated in an abbreviated school day program in the District between April 17, 2017 and June 5, 2017, and September 4, 2018 through November 13, 2018 while also periodically attending day treatment through Lifeways. The Parent withdrew the Student from the District in November 2018 and enrolled the Student in a different district. There was insufficient information in the record to determine whether there were other dates when the District should have provided a prior written notice in response to a Parent request.

The District provided the Parent with prior written notice of changes in the Student's placement. The Student's placement with the District remained unchanged during the Complaint period, with the exception of the Parent's decision to end the Student's day treatment with Lifeways. IEP team meeting notes document that the Parent voiced a preference for a full school day on several occasions. This matter was discussed during IEP team meetings and the Student's IEP team decided to continue with an abbreviated school day program. For example, at an August 23, 2018 IEP team meeting, the Parent presented a written request for the Student to attend a

¹⁹ OAR 581-015-2310(2)(a).

²⁰ OAR 581-015-2310(2)(b).

full day of school. The District responded by scheduling an IEP team meeting for September 4, 2018. On August 28, 2018 and September 4, 2018, the District sent the Parent prior written notices regarding the Student's placement and provision of FAPE.

It is unclear from the record whether the Parent formally requested a change of placement that the District rejected and then failed to provide prior written notice, if the Parent objected generally to the IEP as formulated, or the documents exist, but are unavailable. The District notes that while it has a regular practice of complying with the IDEA's requirement to provide prior written notice, its student information system does not archive prior written notices. The District transferred the Student's educational records, including prior written notices, to the Student's new school district. Given these observations and based on the information in the record, the Department does not substantiate this allegation.

D. Parent Participation

Complainants allege that the District violated the IDEA when it predetermined the Student's placement by recommending an abbreviated school day at an IEP team meeting where, Complainants further allege, the District had no intent to consider the input of the Parent. Complainants allege that the District predetermined the Student's placement with the intent to ensure that the Student spent the fewest hours possible in District classrooms. The Parent points to comments made by District staff to the Parent outside of IEP meetings as evidence of this.

A school district 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.²¹ A school district must provide parents with a written notice of the meeting sufficiently in advance to ensure that one or both parents will have an opportunity to attend.²² A school district must consider the concerns of the parent among other indicators of the student's academic, developmental and functional needs.²³ "Predetermination occurs when an educational agency has made a determination prior to the IEP meeting, including when it presents one educational placement option at the meeting and is unwilling to consider other alternatives . . . A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement . . . Predetermination violates the IDEA because the Act requires that the placement be based on the IEP, and not vice versa."²⁴

Complainants assert the District would not consider increasing the length of the Student's school day. Evidence in this case shows that the IEP Team discussed the Student's lack of progress toward IEP behavioral goals and District efforts to implement different interventions to improve the Student's progress. There is no evidence in the records that the Parent was not provided notice of IEP meeting, or that the Parent was not provided with procedural safeguards. Meeting minutes show broad agreement among participants that the Student was not meeting goals set for increasing the Student's school day. The IEP Team in this case included service

²¹ OAR 581-015-2190(1).

²² OAR 581-015-2190(2)(a).

²³ OAR 581-015-2205(1)(a)-(d).

²⁴ *Smith v. Cheyenne Mountain School District 12 and the Colorado Department of Education*, 71 IDELR 185 (D. Colo. 2018).

providers from outside of the District, who were also in agreement. The District has demonstrated that its objective was to increase the Student's school day based upon observed improvement in behaviors, use of skills the Student learned at Lifeways, and increased ability of the Student to participate safely and responsibly in school with District staff support. However, the Student's team observed that the Student's behaviors increased over time, which supported continuing the selected placement of an abbreviated school day. The Parent reports that their recollection of IEP meetings was quite different and that notes that the Parent took during these meetings differed greatly from what the District recorded. While the Parent may have understood the causes of the Student's behavior differently, there is no evidence to indicate that the Parent was not provided an opportunity to meaningfully participate in the process of developing the Student's IEP and deciding upon the Student's placement. The Department does not substantiate this allegation.

E. Allegation Against the Oregon Department of Education, Failure to Provide FAPE

Complainants allege that the Oregon Department of Education (Department) violated the IDEA when it failed to ensure that a Free Appropriate Public Education (FAPE) was available to all children residing in the State. Complainants allege that this failure is demonstrated by the District's inability to provide FAPE to the Student and other similarly situated students, specifically those students residing in small and/or rural school districts in Oregon. Complainants assert that the Department has failed to provide the District with the resources to enable the District to provide access to expert behavioral resources comparable to that available in larger urban school districts in Oregon.

Complainants note that 34 CFR § 300.101 requires that each state must ensure that FAPE is available to each eligible child.²⁵ States must ensure that FAPE is available to any individual child with a disability who needs special education and related services.²⁶ The determination that such a child is eligible must be made on an individual basis by a group responsible, within the child's local education agency, for making eligibility determinations.²⁷

Complainants assert that the District was unable to provide the resources required to address the serious behavioral issues such as those exhibited by the Student, due to the misfortune of living in a small/rural school district that lacks the expert behavioral resources. Districts are required to ensure that a continuum of alternative placements is available to meet the needs of children with disabilities.²⁸ Here, the District worked with the Umatilla County CARE Program and Lifeways to support the Student's unique needs. As was mentioned above, the record in this case may be incomplete, however based on the information available the Department is unable to substantiate the Complainants' allegations against the District, and as a result, does not substantiate the allegations against the Department.

²⁵ 34 CFR § 300.101(b)(1)(i).

²⁶ 34 CFR § 300.101(c)(1).

²⁷ 34 CFR § 300.101(c)(2); OAR 581-015-2040(1).

²⁸ OAR 581-015-2245(1).

V. CORRECTIVE ACTION²⁹

*In the Matter of Pendleton School District 16 and Oregon Department
Of Education
Case No. 19-054-013*

The Department does not order corrective action in this matter.

Dated: this 25th Day of July 2019

Candace Pelt, Ed.D.

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

Mailing Date: July 25, 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).)

²⁹ 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)).