

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Oregon Department of)
Education and Grants Pass School District 7)

FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 19-054-035

I. BACKGROUND

On September 11, 2019, the Oregon Department of Education (Department) received a written request for a special education complaint investigation from the Parent (Parent) and an Attorney (Attorney) representing a student (Student) who receives special education services from the Grants Pass School District 7 (District). The Complaint included allegations against the District and the Department. The Department confirmed receipt of the Complaint and forwarded it to the District on September 13, 2019.

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.¹ This timeline may be extended if the Parent and the District agree to the extension to engage in mediation or local resolution of the complaint, or for extenuating circumstances. A complaint must allege a violation that occurred not more than one year before the date the complaint was received by the Department.² Based on the date the Department received the Complaint, the relevant period for this Complaint investigation is September 12, 2018 through September 11, 2019.³

On September 27, 2019, the Department's Complaint Investigator (Investigator) sent a *Request for Response* (RFR) to the District and to the Department identifying the specific allegations in the complaint to be investigated and establishing a *Response* due date of October 11, 2019.

On October 11, 2019, the District submitted a packet of materials for the Investigator. These materials included in the submission are listed below:

Response to Allegations, including list of staff knowledgeable about the case
March 22, 2018 IEP Documents
March 4, 2019 IEP Documents
May 21, 2019, Transition to Middle School Documents
June 10, 2019 Eligibility Meeting Documents
August 26, 2019 Planning Meeting Documents
September 30, 2019 FBA & Placement Meeting Documents
IEP Services Documents, including FBA, BSP, Reentry Plans, Data Collection Tools
Home Tutor Time Sheets
Emails between Staff and Parent
Timeline of meetings for Student

¹ 34 CFR § 300.152(a); Oregon Administrative Rule (OAR) 581-015-2030(12).

² 34 CFR § 300.152(b); OAR 581-015-2030(5).

³ The Complainants request that the Department consider and investigate allegations of IDEA violations that occurred beyond one year before the filing of this Complaint. Presently, the IDEA state complaint rules contained within OAR 581-015-2030(5) do not have a mechanism to reach beyond one year to investigate alleged IDEA violations.

After the District staff interviews, the District sent the Investigator additional documents:

Daily data sheets from 2018-2019 SY
Example of current data tracking sheet
2018-2019 IEP Goal Progress Reports
Crisis Evaluation dated January 30, 2019

During the interview, the Parent submitted additional documents:

February 5, 2018 Letter from Parents and Teacher to District and Other Agencies
May 4, 2017 Day Treatment Service Plan
September 11, 2017 ICTS/Wraparound Action Plan

The Investigator determined that on-site interviews were necessary. On October 18, 2019, the Investigator interviewed the Student's Attorney. On October 21, 2019, the Investigator interviewed the Parent, and on October 22, 2019 the Investigator interviewed a Principal, two Special Education teachers, a School Psychologist, and the District Special Education Director. The Investigator also interviewed the Student's Care Coordinator⁴ from a county mental health program.

The Investigator reviewed and considered all 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 the Complaint.⁵ The Complainants' 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 on the Discussion in Section IV. This complaint covers the one-year period from September 12, 2018 through September 11, 2019.

1.	<u>Free Appropriate Public Education</u> The Parent and Attorney allege the District violated the IDEA when it failed to provide specially designed instruction, related services and supports to address the Student's behavioral needs. (34 CFR § 300.101; OAR 581-015-2040)	<u>Not Substantiated</u> The District developed a program around the Student to gather information and provide opportunities for the Student to make behavioral progress and prepare for transitioning safely and successfully into participating in the general education environment.
2.	<u>IEP Team Considerations and Special Factors</u> The Parent and Attorney allege the District violated the IDEA when it failed:	<u>Not Substantiated</u> The District has implemented various positive behavioral interventions and

⁴ This individual and a Skills Trainer from the same program have worked consistently with the Student for the past several years.

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

	<p>a. To include the use of positive behavioral interventions and supports, and other strategies which could address the Student’s behavior which impeded the learning of self or others;</p> <p>b. To review and appropriately revise the Student’s IEP despite the consistent lack of expected progress toward behavioral self-regulation and the Student’s ability to participate in a longer school day.</p> <p>(34 CFR § 300.324(a)-(b); OAR 581-015-2205(3)(a), OAR 581-015-2225(1)(b))</p>	<p>supports with an objective of increasing the Student’s time in a school environment. When the Student did not make expected progress, the District reviewed data, reconvened the IEP Team, and revised its approach.</p>
<p>3.</p>	<p><u>Placement; Supplementary Aids and Services</u></p> <p>The Parent and Attorney allege the District violated the IDEA when it made placement decisions for the Student without:</p> <p>a. Considering and providing a continuum of placements which might be expected to provide the Student with FAPE;</p> <p>b. Including the Parent in the placement decision-making process;</p> <p>c. Choosing placements which conformed to the Least Restrictive Environment (LRE) provisions of OAR 581-015-2240 to 581-015-2255;</p> <p>d. Considering any potential harmful effects of the placements on the Student or on the quality of services which the Student needs; and,</p> <p>e. Considering general curriculum modifications which might support the Student in the general education classroom.</p> <p>(34 CFR §§ 300.115, 300.116, 300.327; OAR 581-015-2245, OAR 581-015-2250)</p>	<p><u>Substantiated</u></p> <p>The District did not consider a complete continuum of alternative placements available to meet the needs of this particular Student. The Department substantiates this allegation and orders corrective action.</p>
<p>4.</p>	<p><u>Prior Written Notice</u></p> <p>The Parent and Attorney allege 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 § 300.503; OAR 581-015-2310)</p>	<p><u>Not Substantiated</u></p> <p>The District provided the Parent with prior written notice each time the IEP team met and decided to continue the Student’s “Homebound tutoring” placement.</p>

		The Department does not substantiate this allegation.
5.	<p><u>Parent Participation</u></p> <p>The Parent and Attorney allege that the District violated the IDEA when it:</p> <p>a. Predetermined the Student's placement by recommending a shortened school day at an IEP meeting where, the Complainants allege, the District had no intent to consider the Parent's input about the Student's placement; and</p> <p>b. Misstated the purpose of an IEP meeting in an oral description of the meeting, failed to provide the Student's Attorney with PWNs of the meeting, and failed to provide the Parent and the Attorney with copies of meeting minutes. As a result, the Parent and the Attorney were unable to determine when the Parent needed the Attorney's assistance at IEP meetings.</p> <p>(34 CFR §§ 300.500, 300.327, 300.322, and 300.501(b); OAR 581-015-2195)</p>	<p><u>Not Substantiated</u></p> <p>The District was receptive to the Parent's input and that of the Student's Attorney. Complainants were afforded an opportunity to meaningfully participate in each IEP team meeting where decisions were made regarding the Student's eligibility, evaluation, placement, and provision of FAPE. The Department does not substantiate this allegation.</p>

Complainants further allege the Department violated the IDEA as follows:

1.	<p><u>Free Appropriate Pubic Education (FAPE)</u></p> <p>The Parent and Attorney further allege that the Department violated the IDEA when it systemically and continually failed to provide the District (and other rural or small Oregon districts) with expert behavioral resources (comparable to those in larger urban school districts) that they need to provide FAPE to students with behavioral needs.</p> <p>(34 CFR § 300.101; OAR 581-025-2040)</p>	<p><u>Not Substantiated</u></p> <p>The Department timely and completely fulfilled its monitoring and supervision responsibilities with respect to the District. Also, there is no indication that the Department does not distribute funding to the District in compliance with law in the same manner it does all other school districts in the State.</p>
-----------	--	--

Issue Outside the Scope of This IDEA Investigation

The Parent and the Attorney have asked the Department to investigate whether the District failed to comply with the requirements of ORS 343.161 (Abbreviated School Day). Besides matters connected with alleged violations of IDEA, this issue is not within the jurisdiction granted under OAR 581-015-2030 and will not be investigated here.

The Parent requests the following action be implemented as a resolution to the Complaint:

In order to adequately compensate the Student for the many days of instruction and necessary services that [] has lost, the Department should order the following relief:

1. The District must return [the Student] to an appropriate full school day program, whether within the District or outside of it, before February 1, 2020.
2. In order to achieve the above (Remedy #1) result, the District must provide compensatory education by contracting with an adequately experienced and mutually acceptable behavioral expert skilled in working with [students] who experience behavioral challenges and ASD as a co-morbid disability. The expert will work with relevant [District] staff for up [to] one year unless the parties agree that further expert assistance is no longer needed. Prior to such an agreement or the completion of one school year in a full day program, the expert will support and provide any necessary training to [District] staff until the expert concludes that [the Student] is adequately supported in a full day school program in which [the Student] can make meaningful progress toward IEP goals "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances". The expert will determine the appropriate level and nature of support needed to ensure [the Student's] successful return to [the District] or another program and [the District]. The expert will additionally determine the nature and extent of other compensatory education that is required to restore [the Student] to the condition [the Student] would have been in if provided a FAPE during the past three years. The District will assume any costs associated with the expert's work or implementation of the expert's recommendations.
3. The District must pay up to twice its normal rate of compensation, if necessary, to hire and train a competent and appropriate Instructional Aide (IA) if the provision of IA support is deemed necessary by the expert. In that event, the expert will provide whatever training and support to the IA that the expert believes is needed for up to one entire school year.
4. The Department must issue a finding that it has failed to meet its responsibility under 34 C.F.R. 101 to create and oversee a comprehensive educational system capable of ensuring that students with disabilities and serious behavioral problems receive a FAPE when they reside in rural districts far from behavioral experts and suitable day treatment programs.
5. Pursuant to C.F.R 300.149 et. seq., complainants additionally request that ODE create a network of behavioral support experts sufficient to serve all rural students with severe behavioral issues that cannot be addressed by local resources or programs, such that those experts will be available for up to one semester and numerous enough to be available within two weeks of establishing that the needs of a particular student qualified for network services. In requesting this relief, complainants note that C.F.R 300.151 provides that: '(b) Remedies for denial of appropriate services. In resolving a complaint in which the SEA has found a failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, must address – (1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and (2) Appropriate future provision of services for all children with disabilities."

6. Any other relief that the Department believes is necessary to restore [the Student] to the position [the Student] would have been in if [the Student] had been provided the FAPE that is [the Student's] right under state and federal law.

III. FINDINGS OF FACT

1. The Student is eleven years old and is in the sixth grade. The Student is eligible for special education as a student with an Emotional Disturbance, established on March 4, 2019. The Student is described as being naturally curious and a strong reader with a good vocabulary. The Student is interested in science, monsters, board games, and enjoys horseback riding.
2. The Student became eligible at the age of two for Early Childhood Special Education (ECSE) in another state under the category of Developmentally Delayed with Apraxia (low tone), Speech Apraxia and Sensory Seeking Behavior. After the family moved to Oregon, when the Student was in kindergarten, the District found the Student eligible with a Communication Disorder. The Student received Speech Language services, and consultation in Occupational Therapy (OT) and Physical Therapy (PT) services.
3. An incident occurred in December 2015 (second grade) where the Student injured an instructional assistant. After that, the Student was placed on Homebound Tutoring. The Student has continued to receive instruction in a Homebound Tutoring placement since that time, except between September 2017 and March 2018, when the Student attended a Day Treatment program⁶ through the county mental health program.
4. The IEP Team met on March 22, 2018 to revise the Student's IEP. The Team noted the Student had behavior, communication, and assistive technology needs. In the Present Level of Academic Achievement and Functional Performance the Team noted the Student: (1) Made progress in day treatment in their ability to interact positively with peers during non-academic times; (2) Continues to struggle with participating in non-preferred activities or work assignments; (3) Struggles with transitions, changes in routine, and new people in the environment; (4) May act out physically or verbally when agitated; (5) Benefits from a daily visual schedule, immediate reinforcers, being given choices, extra processing time, brief tasks, comfort items, and the presence of accepted familiar adult support; (6) Demonstrates sensory integration issues including tactile and auditory sensitivity; (7) Is skilled in and prefers reading brief nonfiction articles followed by multiple choice questions; (8) Can add two-digit numbers with regrouping, subtract without regrouping, and is learning to use a calculator, tell time and count small groups of coins; and (9) Is very avoidant of writing tasks.
5. The Team wrote two social/emotional goals and a communication goal⁷ and decided the Student should receive 60 minutes of specially designed instruction in communication per month, and 300 minutes of specially designed instruction per week in behavior/social and emotional skills. The Team considered three placement options: (1) "Homebound/Tutoring";

⁶ While in Day Treatment, the Student attended school for five hours per day. The Student received skills training, worked with an individual therapist, and received academic instruction. The Student's Care Coordinator told the Investigator that while the Student exhibited behavioral outbursts in this setting, the team there was able to manage the Student's behavior, and the Student attended school daily on a regular basis.

⁷ (1) Student will demonstrate cooperative student behavior during structured and unstructured situations 3 out of 5 opportunities; (2) Student will demonstrate effective use of learned coping strategies during structured and unstructured activities 3 out of 5 opportunities; (3) Student will improve articulation skills by speaking clearly and at an understandable pace and by meeting the short-term objectives.

(2) “Regular education with 21-60% removal to receive special education services”; and (3) “Regular education with less than 20% removal to receive special education services.” The latter two placement options were rejected for the same listed reason: “Does not provide enough special education support and small group instruction to address current behavioral needs.” There is no description of how the Team arrived at the proposed percentage removals for delivery of special education services.

6. In the dialogue boxes on the placement form, the Team considered that “supported opportunities to participate with non disabled peers” would be a modification or supplementary aid or service to mitigate the “possible harmful effects on the Student and/or the Services to be provided.”⁸ The Team selected the homebound/tutoring option. In the Non-participation justification section of the IEP, the Team noted the Student was removed from participation in the regular classroom 100% of the time but would have the opportunity to eat with peers. The Team explained the reason for this removal by saying, “Student is placed on home bound tutor”.
7. In or about March 2018 the Student left the Day Treatment program and returned to the District. The Student resumed an abbreviated school day schedule, working with a tutor on a 1:1 basis in a separate classroom with minimal contact with peers. The Student maintained this schedule until the end of the 2017-2018 school year, then resumed it at the beginning of the 2018-2019 school year. The Student remained on an abbreviated school day schedule for the entirety of the 2018-2019 school year.
8. On December 19, 2018, the Parent consented to the Student being evaluated for continued eligibility for special education. The District proposed to assess the Student in the areas of “Behavior/Social-Emotional,” “Communication,” and “Fine/Visual Motor Development and Self-Help Skills.”
9. On the way to school on January 16, 2019, the Student hit a teacher on the school bus with the Student’s backpack. Once at school on the same day, the Student was physically aggressive toward staff, ran through the school and was not responsive to staff requests to remain safe. The Student made threatening statements toward staff, including multiple statements about killing.
10. The District told the Parents the Student could not attend school until the Student had undergone a threat assessment.⁹ The Student went for a Crisis Evaluation on two separate dates, January 24, 2019 and January 30, 2019. The Student refused to discuss the incident, kicked the therapist, threw things, and left the room on both occasions. A skills trainer attended the session with the Student on January 30, 2019. The therapist concluded the Student was “not able to engage in any form of a conversation that would give way to any form of acknowledging any of [the Student’s] behavior, actions or choices and was observed as defiant/verbally combative.” The therapist made no comment or drew no conclusion as to the level of risk the Student posed in a school setting. As a result of the incident, the Student missed several tutoring sessions between January 22, 2019 and February 12, 2019. The investigative record does not contain any school discipline or suspension records to account for the Student’s removal.

⁸ The Team noted this for the first two placements considered (homebound and regular education with 21-60% of special education services. For the considered placement of regular education with less than 20% of pull-out special education services, the team considered that “schedule with classroom teacher to minimize effects of transitions” would be a modification.

⁹ Crisis Evaluation is conducted by county mental health staff.

11. The Student's Attorney began working with the family on February 7, 2019 and requested the Student's records from the District on that date.
12. In March 2019, the District conducted a Functional Behavior Assessment. The report documents the Student's "Problem Behaviors" as including a "tendency to escalate to verbally and physically aggressive behaviors, or to run from the designated location without permission or supervision from adults" and that behaviors may "include punching, kicking, throwing things, overturning furniture, making stabbing, or shooting gestures at others, threatening to throw objects at others, etc." The report indicates that the Student "struggles to verbally process [their] behavior, emotions, and triggers" and that the Student exhibits skill deficits in "communicating . . . needs and emotions" when escalated." In the report, the team hypothesizes that the Student's behavior is partially a result of the Student's "difficulties with communicating, problem solving and flexible thinking when faced with some form of stressor." The District School Psychologist recommended several interventions and strategies.
13. Between January and March 2019, two attempts were made to test the Student for continued Communication Disorder eligibility—January 9, 2019 and January 16, 2019. The evaluator notes that the Student refused to participate in a standardized assessment and hearing screening, so an informal speech/language sample was taken, followed by a file review, review of therapy data, and educator interview.
14. The three page Speech and Language Evaluation Report focuses on the Student's performance in the area of articulation. The evaluation reports on the Student's speech intelligibility, cooperation in responding to cues for tongue placement, and input from the Student's tutor about the Student's ability to be understood in normal conversation. The evaluator concludes that the Student's "articulation errors do not appear to have an adverse impact on [the Student's] academic performance." The evaluator goes on to conclude that the Student "does not appear to meet the minimum eligibility requirements of a student with a communication disorder in the area of articulation."
15. On February 11, 2019, the District sent a notice to inform the Parent that a meeting would be held on March 4, 2019 to discuss whether the Student continued to be eligible for special education and to develop or review the Student's IEP. At the March 4, 2019 meeting,¹⁰ the Team reviewed evaluation results and concluded the Student was no longer eligible as a student with a Communication Disorder but continued to be eligible for special education in the area of Emotional Disturbance. The Parent, Parent's Attorney, and Care Coordinator disagreed with the decision to no longer find the Student eligible under the category of Communication Disorder.
16. As part of the eligibility discussion, the Student's Attorney requested the District conduct an evaluation for Autism Spectrum Disorder, and to assess whether the Student needed a communication device.¹¹ In discussing the evaluation results, both the Speech Language Pathologist and the School Psychologist noted the Student often refused to participate in testing activities.

¹⁰ This is the first meeting the Student's attorney attended. The District's attorney was also present (both by telephone).

¹¹ When the Student began kindergarten in the District, the Student was using a small communication device provided by a different school district's early childhood special education program. District staff told the Parents the Student did not need the device and did not allow the Student to use it at school. Staff reported, "We can understand the Student." During the March 4, 2019 IEP Team Meeting, there was discussion that the Student did not use the device.

17. The Team revised the Student's IEP and made some additions. These are summarized below:
 - a. The Parent expressed concern that the Student was not receiving a free appropriate public education due to the brevity of the Student's school day, how long the Student had been on an abbreviated school day, and the lack of access to the Student's peers;
 - b. The Parent asked the District to consider assigning a 1:1 educational assistant (trained in and supervised by an educator with behavioral and autism strategy expertise) so the Student could attend full school days;
 - c. The Parent expressed concern because the District had not provided the Parents with incident reports describing behavioral escalations and containing crucial information about circumstances that precede or trigger the escalation;
 - d. The Parent expressed concern that the District had neglected the Student's need for "effective Assistive Technology and/or Augmentative Communication";
 - e. The Team developed two new goals: (1) When the Student is frustrated the Student will move to one pre-determined break spot for 10 minutes and return from the break at the end of the 10 minutes 80% of the time; (2) The Student will engage in adult selected academic tasks for 10 minutes 70% of given opportunities; and
 - f. The Team agreed to 60 minutes per week of specially designed instruction in social skills; 30 minutes per year of speech/language consultation; and two hours per year of occupational therapy consultation.
18. The March 4, 2019 IEP notes as a "Special Factor" that the Student has communication needs.
19. District staff expressed its desire that the Student's time and exposure in a school setting be increased. The Parent's Attorney requested that the Student's school day be expanded and that the Student be placed in a school building with peers. District staff also referred to the Student's Re-Entry Plan, with an objective to set the Student up for success, while considering the Student's safety and the safety of others.
20. The Team considered the following four possible placements for the Student: (1) "Full time regular education with special education service provided in a regular setting"; and (2) Regular education with less than 20% of pull-out special education services"; (3) "Regular education with 21-60% of special education services"; and (4) "Homebound tutoring." There is no description of how the Team arrived at the proposed percentage removals for delivery of special education services.
21. The Team selected the homebound tutoring placement option, stating that it "provides an appropriate educational program while Student is unable to attend school." In the nonparticipation justification section of the IEP, the Team noted the Student "receives 5.5 hours of homebound instruction a week . . . because the Student "is working to meet goals in order to return to school and/or increase time. School staff and Parents meet at minimum every 20 school days to review progress."
22. At the March 4, 2019 IEP Meeting, the Team also developed a "Re-Entry Plan from Abbreviated Day" to guide the Student's return to more time at school. The Team identified two target behaviors for the Student to build while on an abbreviated school day. The first behavior was for the Student to demonstrate "safety to self, others and the physical space." The second behavior was for the Student to engage in "academic tasks when prompted by an adult." The Team then identified targeted steps that would be implemented unless "there is a major incident of physical aggression/safety to self or others." Step 1 is "[d]evelop step-in-plan to assist [the Student's] return to school and increase in academic time –this step will

be with [the tutor], 4 days a week for 1 hour 15 minutes each. Time for this step is through spring break.” Step 2 is “[t]utoring sessions return to [elementary school] setting.” Step 3 is “Opportunity to participate with 5th grade class for 20 minutes per week.” Step 4 is “Opportunity to participate in lunch and breaks with 5th grade class.” Finally, Step 5 is described as “Change of placement to Abbreviated day¹² for 2 hours each day.”

23. After the March 4, 2019 meeting, the District sent the Parent two Prior Written Notices (PWN), dated March 4, 2019. The first PWN informed the Parent and the Student’s Attorney that the District proposed to change the Student’s eligibility by maintaining the Emotional Disturbance eligibility and eliminating the Communication Disorder eligibility. In the second PWN, the District informed the Parent and the Student’s Attorney that the District proposed to change the Student’s provision of a free appropriate public education by recrafting the IEP and beginning to implement a re-entry plan with the goal of gradually returning the Student to the school environment at a pace that would likely be successful. The Parent and the Student’s Attorney both objected to the plan, stating it was not aggressive enough in returning the Student to school.
24. The Parent and the Student’s Attorney requested that the District conduct an evaluation to gather more information about whether the Student demonstrated characteristics of a student with an Autism Spectrum Disorder (ASD). The District noted that such eligibility had been previously ruled out, but that the District would be agreeable to exploring it again. The Parent signed a consent for this evaluation on March 16, 2019.
25. On May 1, 2019, the District invited the Parent to a meeting to be held on May 21, 2019, to develop or review an IEP and review the Student’s placement. On May 3, 2019, the District sent a notice informing the Parent that the District proposed a meeting for June 10, 2019 in order to decide whether the Student was eligible for special education.
26. At a May 21, 2019 meeting, the Parent and District staff discussed the Student’s transition to sixth grade, which would occur in September 2019. The Team reviewed the Student’s current schedule and re-entry plan. At some point before this meeting, a middle school Principal and the District Special Education Director had observed the Student working with their tutor. At the May 21, 2019 meeting, these individuals reported that the Student had pushed past each of them—using hands and arms to push them away. Due to these recent incidents of “physical aggression,” the District concluded the Student was not ready to have any additional staff, such as an educational assistant, introduced to their program. The Team decided that the Student would begin the 2019-2020 school year in middle school, working with the same tutor in an undefined space. The Parent asked that the Student be able to participate like all other middle school students. On the same date, the District sent the Parent a PWN noting the Student would begin the 2019-2020 school year in the sixth grade, at the middle school, and that the current IEP would carry over to that setting.
27. During April and May 2019, the Student was evaluated for potential ASD eligibility. In the evaluation report, the Autism Specialist noted that the Student “presented with some behavioral characteristics that may be associated with, but not necessarily exclusive to, an Autism Spectrum Disorder.” The evaluator noted that the Student is charming, has an advanced vocabulary, excellent eye contact and mature interests in specific subject matters,

¹² The District differentiates between “Homebound Tutor” and “Abbreviated Day”. District staff reported that Homebound instruction is usually given at home, whereas an Abbreviated Day is usually 3-4 hours per day at school given in a circumstance where a student has had an injury, illness, or something else that reduces the student’s stamina.

which the Student is willing to discuss with trusted and familiar adults. The evaluator went on to note that the Student's "receptive communication skills have always been in the typical range" and that the Student's "challenges as a youngster was with expressive communication – being understood by those around [the Student]."

28. The Autism Specialist summarized the Student's impairments in various domains, noting that: (1) Due to unsafe behavior at school, the Student has far fewer opportunities to practice developing social skills; (2) The Student has difficulty with any group work in class, collaboration; (3) The Student does not see the cause and effect of personal actions and how others think and act in response; (4) The Student misses out on instruction during behavioral episodes or when perseverating on "fixing" something that changed; (5) The Student's intense interest in video game/battling creates difficulty in focusing on academic work; and (6) The Student dislikes entering general education classroom most of the time.¹³
29. During April and May 2019, the District conducted a Functional Communication Evaluation. The Student scored in the average range for standardized testing for expressive and receptive language. Sparse information was collected about the Student's interactions with same-aged peers, as the Student did not join or initiate social interaction with peers. The evaluator recommended more time in the classroom "for peer to peer interaction . . . if safety can be maintained." The evaluator found that the Student is capable of following directions, asking and answering questions, and interacting appropriately with preferred adults. The Student could explain preferred activities and tell personal stories, show social reciprocity, topic management in conversation, and turn-taking. The evaluator concluded that while the Student's overall pragmatic language is lower than average, the Student's deficits are not consistent with the communication characteristics of a Student with ASD.
30. The IEP Team met on June 10, 2019 to consider the results of the ASD evaluation. The Team did not find the Student eligible, but agreed the Student exhibited some characteristics of ASD. The Student's Attorney attended the meeting by telephone, as did the District's Legal Counsel. The Parent, the Student's Attorney, and the Care Coordinator all disagreed with the conclusion that the Student was not eligible for special education under an ASD eligibility.
31. On June 10, 2019, the District sent the Parent a PWN informing the Parent of the Team's decision regarding the Student's ASD eligibility.
32. The IEP Team met on August 26, 2019¹⁴ to create a "Start of Year Plan" for the Student. The Team agreed the Student would pick up a schedule before classes started, which would list periods 1-3 with a teacher's name and location. The Student would receive a tour of the school and be assigned a locker. The Parent was told this was a transition meeting to plan for the move to middle school, but in effect, it was an IEP meeting. In the PWN sent to the Parent on August 30, 2019, the District noted that, "Since there is no new data or information to consider, it was decided the placement would not change at this time, but the team would continue to implement effective supports for the Student and review data according to the re-entry plan from March 4, 2019."
33. The Student currently attends middle school for 130 minutes, four days per week. The Student receives instruction in social skills, Math and Language Arts for 100 minutes of that total time.

¹³ The Student did not display adverse effects in the domains of: (1) Nonverbal Communicative Behaviors used for Social Interaction; and (2) Stereotyped or repetitive motor movements, use of objects, or speech.

¹⁴ There is no meeting notice in the record sent to the Investigator.

The Student works¹⁵ primarily in the Resource Room at the middle school with both a tutor and with the Special Education Teacher, who is the Student's Case Manager.

34. The Investigator interviewed the Student's Care Coordinator from the county mental health organization. This individual noted that staff who have worked with the Student in this program believe that the language difficulties the Student experiences in communication with others contribute greatly to the Student's behaviors. The Care Coordinator further stated that the program staff believe that while the Student might not tolerate a full day of school immediately, it does not suggest the Student will never be able to attend a full day. This individual also noted that if the Student were supported by an assistant with the right training, who understands the impact of the Student's communication difficulties, the Student could be successful in the school environment.
35. To meet its general supervision obligations under the IDEA, the Department engages in various activities. It implements System Performance Review and Improvement reviews with each school district on a yearly basis. Also, it conducts on-site monitoring visits in school districts and consistently reviews school district improvement plans. The Department also implements a dispute resolution process that provides information and various mechanisms for school districts to conform with special education laws and regulations. The Department retains staff to vet in-District situations that are brought to its attention and determine the appropriate level and type of support to offer to a school district or other educational agency.
36. The Department does not have a record of a previous complaint filed by the Parent regarding the Student.
37. On September 11, 2019, the Student's Attorney filed this Complaint.

IV. DISCUSSION

A. Free Appropriate Public Education (District)

The Parent and Attorney allege the District violated the IDEA when it failed to provide specially designed instruction, related services and supports to address the Student's behavioral needs. A school district meets its responsibility to an eligible child when it provides the instruction, services and supports which address the Student's needs which are a result of the student's disability.¹⁶ School districts must provide students with disabilities with an education that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹⁷

As detailed above, the Student exhibits significant behaviors that threaten the safety of the Student, other students, and staff. These include punching, kicking, throwing things, overturning furniture, making stabbing, or shooting gestures at others, and threatening to throw objects at others. Based on the Student's behaviors, the District has placed the Student on an abbreviated school day program with a Re-Entry plan aimed at increasing the Student's time in the school environment. The District tracks the Student's behavioral progress and regularly convenes with the Parent to discuss moving through the Re-Entry Plan steps.

¹⁵ The Student usually does a warm-up activity, practices social skills, chooses and completes one of two math and language arts assignments.

¹⁶ 34 CFR § 300.101; OAR 581-015-2040.

¹⁷ *Andrew F. v. Douglas County School District*, 137 S. Ct. 988 (2017).

The Student has demonstrated an area of need in communicating with others, and deficiencies in this skill have contributed to the Student's challenging behaviors. In March 2019—over the objection of the Student's Parent and Care Coordinator—the Student's IEP Team removed the Student's eligibility for special education under the category of Communication Disorder, focusing primarily on the Student's speech articulation. At the same meeting, the Team implemented 60 minutes per week of Social Skills to be delivered while the Student received homebound tutoring. The Team also crafted an "Executive Functioning" goal with short term objectives where the Student can work on identifying feelings to improve self regulation, and use nonverbal signals (such as red or green cards) to indicate whether the Student needs help. During the Complaint period, the Student has consistently been on an abbreviated school day program. However, the District has developed a program around the Student to gather information and provide opportunities for the Student to make behavioral progress and prepare for transitioning safely and successfully into participating in the general education environment. The Department does not substantiate this allegation.

B. IEP Team Considerations and Special Factors and Review and Revision of IEPs

The Parent and Attorney allege the District violated the IDEA when it failed to: (1) Include the use of positive behavioral interventions and supports, and other strategies which could address the Student's behavior which impeded the learning of self or others; and (2) Review and appropriately revise the Student's IEP despite the consistent lack of expected progress toward behavioral self-regulation and the Student's ability to participate in a longer school day. When developing, reviewing, and revising a student's IEP, the team must consider several special factors. For a student whose behavior impedes the student's learning or the learning of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address the student's behavior.¹⁸

Throughout the Student's March 22, 2018 and March 4, 2019 IEPs, the Team notes the Student's behavior needs. The District details the Student's history of unsafe behavior, which includes throwing objects, hitting, and talk of a violent and threatening nature. The Student is placed in the restrictive setting of an abbreviated school day program, however interventions are in place with the objective of maintaining safety, completing work, and preparing the Student for successful peer exposure and increased participation in the school setting. Such interventions include revisiting and revising the Student's Functional Behavior Assessment, developing IEP goals around self-regulation and improving the Student's executive functioning, specially designed instruction focused on Social Skills, the development of a Re-Entry Plan from Abbreviated School Day, revisiting the Student's abbreviated school day placement regularly with the Parent, and tracking the Student's safety, compliance, and work completion.

The District has implemented various positive behavioral interventions and supports with an objective of increasing the Student's time in a school environment. When the Student did not make expected progress, the District reviewed data, reconvened the IEP Team, and revised its approach. Progress has been slow, with the Student remaining on an abbreviated school day program. However, the District has paid consistent attention to developing and implementing appropriate interventions. The Department does not substantiate this allegation.

C. Placement; Supplementary Aids and Services

The Parent and Attorney allege the District violated the IDEA when it made placement decisions for the Student without: (1) Considering and providing a continuum of placements which might be

¹⁸ 34 CFR § 300.324(a)(2); OAR 581-015-2205.

expected to provide the Student with FAPE; (2) Including the Parent in the placement decision-making process; (3) Choosing placements which conformed to the Least Restrictive Environment; (4) Considering any potential harmful effects of the placements on the Student or on the quality of services which the Student needs; and, (5) Considering general curriculum modifications which might support the Student in the general education classroom.

A school district must ensure that “a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” The continuum must include placements such as general education classes, special education classes, special schools, home instruction, etc.¹⁹ Placement decisions that involve removal from the general education environment must occur “only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”²⁰ In other words, first consideration must be given to placement in a general education classroom with appropriate aids and services before a more restrictive placement is considered.²¹

The District did not consider a complete continuum of placements to provide the Student with a FAPE based on the Student’s individualized needs. The Student’s operative IEP for much of the Complaint period was the March 22, 2018 IEP. There, the placement team had considered three options: (1) “Homebound/Tutoring”; (2) “Regular education with 21-60% removal to receive special education services”; and (3) “Regular education with less than 20% removal to receive special education services.” The placement team ultimately selected the most restrictive placement option among the three, “Homebound/Tutoring,” because it provided “an appropriate educational program while student is unable to attend school.” Over the next year, the Student was involved in a significant behavioral incident that prompted a threat assessment referral, and a March 2019 Functional Behavior Assessment report that noted the Student had a “tendency to escalate to verbally and physically aggressive behaviors, or to run from the designated location without permission or supervision from adults” and that behaviors may “include punching, kicking, throwing things, overturning furniture, making stabbing, or shooting gestures at others, threatening to throw objects at others, etc.” At the March 4, 2019 IEP, the Team discussed these behaviors and also discussed details surrounding a Re-Entry Plan aimed at gradually and safely increasing the Student’s time at school.

With one exception, the March 4, 2019 placement team considered the same three placement options: (1) “Homebound tutoring”; (2) “Regular education with 21-60% of special education services”; and (3) Regular education with less than 20% of pull-out special education services.” The only additional placement considered was one less restrictive than any of the other three potential placements: “Full time regular education with special education service provided in a regular setting.” Ultimately, the placement selected continued to be the Student’s “Homebound tutoring” placement.

It is laudable that the District added and considered a least restrictive option. But the District failed to consider placement options that were somewhere in between 100% Homebound tutoring and “Regular education with 21-60% of special education services.” Information in the March 4, 2019 IEP indicates that it is in this range on the continuum where the Parent and the District shared an objective of successfully introducing the Student to an educational environment where the Student can participate with peers and also experience success. However, no placement considered in the March 4, 2019 IEP reflects this, i.e., a placement option that combines homebound tutoring

¹⁹ 34 CFR § 300.115; OAR 581-015-2245.

²⁰ 34 CFR § 300.114; OAR 581-015-2240.

²¹ See Letter to Cohen, 25 IDELR 516 (OSEP 1996).

with exposure to the general education environment. Since placement options that match up with the Parent and District's objectives were not discussed, it follows that the Parent was not involved in the associated placement decision-making process, and potential harmful effects of such a placement were not considered. For this reason, the Department substantiates this allegation and orders corrective action.

D. Prior Written Notice

The Parent and Attorney allege the District violated the IDEA when it failed to provide prior written notice of its proposal to change the Student's placement to an abbreviated school day. A school district must provide prior written notice to parents within a reasonable amount of time before it proposes or refuses to initiate or change the identification, evaluation, placement, or provision of a free appropriate public education to a particular student.²² The District did provide the Parent with prior written notice each time the IEP Team met and decided to continue the Student's placement on an abbreviated school day over the Parent's objection. Prior written notice was also sent to the Parent's in response to proposed evaluations. During the relevant period, prior written notices were sent to the Parent on December 18, 2018, March 4, 2019, May 21, 2019, June 10, 2019, and August 30, 2019. The Department does not substantiate this allegation.

E. Parent Participation

The Parent and the Attorney allege that the District violated the IDEA when it predetermined the Student's placement by recommending selecting an abbreviated school day placement at an IEP Team Meeting where, the Complainants allege, the District had no intent to consider the Parent's input about the Student's placement. The Parent and Attorney also contend that the Parent's participation rights were abridged when the District misstated the purpose of an IEP Team Meeting in an oral description of the meeting, failed to provide the Student's Attorney with PWNs of the meeting, and failed to provide the Parent and the Attorney with copies of meeting minutes. As a result, the Parent and the Attorney were unable to determine when the Parent needed the Attorney's assistance at IEP meetings.

The IDEA requires that a school district must provide an opportunity to parents to participate in meetings with respect to the identification, evaluation, and educational placement of the student.²³ Predetermination is prohibited under the IDEA. "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

While the record demonstrates that the District did not make a complete continuum of placements available to the Student, it does not support a finding that the District decided the Student's placement before IEP team meetings, nor that it was unwilling to consider alternative placements besides homebound instruction. The placement team considered three alternative placements besides homebound instruction, ultimately rejecting them based on the Student's history of physical aggression and demonstrated need for small group instruction, few distractions, and a controlled environment. The Parent received adequate notice of IEP team meetings that

²² 34 CFR § 300.503; OAR 581-015-2310.

²³ 34 CFR §§ 300.323, 300.324, 300.327, 300.501(b); OARs 581-015-2190(1), 581-015-2220(1)(b), OAR 581-015-2225.

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

convened during the Complaint period, participated in each, and at no time was restricted from being accompanied by an advocate, attorney, or other individual determined to have knowledge or expertise about the Student. The Department does not substantiate this allegation.

F. Free Appropriate Public Education (Department)

The Parent and Attorney further allege that the Department violated the IDEA when it systemically and continually failed to provide the District (and other rural or small Oregon districts) with expert behavioral resources (comparable to those in larger urban school districts) that they need to provide FAPE to students with behavioral needs.

The Department is responsible for general supervision and monitoring of special education programs for children with disabilities.²⁵ The Department carries out its general supervision and monitoring responsibilities in various ways, including facilitating district self-assessment, data collection, analysis and reporting; as well as on-site visits, review of district policies and procedures, review of the development and implementation of IEPs, improvement planning and auditing use of federal funds.²⁶ The Department's obligation to directly provide FAPE to a District student with disabilities arises when a school district refuses or wrongfully neglects to serve a student, provided that school district's failure is significant, and state agency officials are given adequate notice of the school district's noncompliance, and the state agency is afforded reasonable opportunity to compel local compliance.²⁷

The Department has historically fulfilled its monitoring and supervision responsibilities through a variety of procedures. These include overseeing District self-assessment of compliance with specific IDEA requirements based on a sample of student special education files and the collection of data related to indicators of program effectiveness (e.g., graduation rates, dropout rates, statewide assessment, discipline, least restrictive environment placement, disproportionate representation in special education, etc.) The data the Department collects from the District, and every other school district in the State, does not focus on individual children. Rather, the data depict a school district's system-wide progress toward achieving defined goals. Little, if any, of the data obtained through the Department's monitoring and supervision processes yields information that could put the Department on notice of any issues related to a specific student. Procedural Safeguards, including the state complaint process, is one of the mechanisms individual student issues can be raised to the Department's attention.

The Department timely and completely fulfilled its monitoring and supervision responsibilities with respect to the District. Also, there is no indication that the Department does not distribute funding to the District in compliance with law in the same manner it does all other school districts in the State. Until this Complaint was filed, the Department was unaware of the District engaging in any refusal or wrongful neglect toward serving the Student. In light of the Department not having any adequate notice of the Student's circumstances, it follows that the Department was not afforded any reasonable opportunity to compel local compliance. The Department does not substantiate this allegation.

²⁵ ORS 343.041; OAR 581-015-2015.

²⁶ OAR 581-015-2015.

²⁷ *Doe v. Maher*, 793 F.2d 1470, 1492 (9th Cir. 1986).

V. CORRECTIVE ACTION²⁸
In the Matter of Grants Pass School District 7, et al.
Case No. 19-054-035

Action Required	Submissions ²⁹	Due Date
Convene the Student’s placement team, with all required members present, to consider a placement option that combines homebound services with exposure to the general education environment, and allows for successful participation with peers.	Completed placement page documenting that the team, including the Parent, discussed the placement option described in the “Action Required” section of this Order.	December 6, 2019

Dated: this 8th day of November, 2019

Candace Pelt Ed.D
Assistant Superintendent
Office of Enhancing Student Opportunities

Mailing Date: November 8, 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).)

²⁸ 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)).

²⁹ 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@ode.state.or.us fax number (503) 378-5156.