

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Myrtle Point School
District No. 41

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FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 08-054-009

I. BACKGROUND

On February 25, 2008, the Oregon Department of Education (Department) received a letter of complaint from the parent of a student residing within the Myrtle Point School District (District) adding allegations to prior written complaints (07-054-051 and 08-054-006). The new allegations were consolidated with the prior cases, under the above case number. The parent requested that the Department conduct a special education investigation under OAR 581-015-2030.

Under federal and state law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue a final order within 60 days of receiving the complaint, unless exceptional circumstances require an extension.¹ On March 6, 2008, the Department sent a *Request for Response* to the District identifying the specific allegations in the consolidated complaint to be investigated. On March 13, 2008, the District timely submitted its *Response* to the allegations and sent the parent a copy.² The parent provided a reply to the District's *Response*, by e-mail, also on March 13, 2008.

The Department's complaint investigator reviewed the information submitted by the parent and the District, and determined that some on-site interviews were needed. On April 10 and 11, 2008, the investigator conducted on-site interviews with the parent and District staff (special education director, transportation supervisor, special education teacher and supervisor of the Life Skills Program). The Department's investigator reviewed and considered all of the documents and interviews.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under OAR 581-015-2030 and 34 CFR 300.151-153. The allegations and the Department's conclusions are set out in the chart below. The Department based its conclusions on the Findings of Fact (Section III) and the Discussion (Section IV).

¹ OAR 581-015-2030 (12); 34 CFR 300.151-153.

² The District earlier provided a timely response in case no. 07-054-051, before consolidation with the present case. No Request for Response issued in case no. 08-054-006 because the new allegations were received before the Request for Response could be issued.

| No. | Allegations | Conclusions |
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| (1)(a) | <p><u>Transportation Services:</u> <u>Bus Services</u> The parent alleges that the IEP specified related service of transportation provided by the District involves different bus drivers “on a daily basis, going to school and coming home”, and the changes in the busing staff is not appropriate for a student with autism.</p> | <p><u>Not Substantiated</u> (a) The District provides appropriate transportation services, and the evidence does not demonstrate that the few incidents on the bus resulted from a change in drivers or that the change in drivers is adversely affecting the student’s ability to benefit from special education.</p> |
| (1)(b) | <p><u>Transportation Services:</u> <u>Bus Aide</u> The teacher and an aide in the student’s classroom rode the bus with the student the two weeks prior to March 2, 2008. The District would not tell the parent when the regular aide would return, there were different bus drivers, and changes in the busing staff which is not appropriate for the student’s eligibility.</p> | <p><u>Not Substantiated</u> (b) The District did not know precisely when the regular aide would return from illness and other authorized absences from work. The District provided appropriate transportation services for the student.</p> |
| (2) | <p><u>IEP Implementation</u> The parent alleges that the District is not implementing the modified BSP agreed to on January 23, 2008. The parent further alleges that reports and notes coming from ESD teachers on a daily basis show that absent implementation of the supports in the new BSP the student is showing increased anxiety with aides and teachers, denying the student the opportunity to obtain educational benefit from special education.</p> | <p><u>Not Substantiated</u> The District implemented the modified BSP agreed to on January 23, 2008 no later than February 11, 2008. The implementation of the BSP was completed in a timely manner. Additionally, the evidence does not support a finding of increased anxiety in the student from January 23, 2008 to February 11, 2008.</p> |
| (3) | <p><u>Parent Participation</u> The parent alleges that the District process did not provide an opportunity for parent participation consistent with the IDEA when District staff held a private meeting without inviting the parent.</p> | <p><u>Not Substantiated</u> The Department does not find that the District held a meeting without inviting the parent.</p> |

| No. | Allegations | Conclusions |
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| | The parent further alleges that during an IEP meeting on February 22, 2008, the District would not allow her to add anything to the staffing notes but would only allow the parent to sign the staffing notes. | The evidence does not support a finding that the District would not allow the parent to add to the staffing notes. |
| (4) | <u>BSP Plan</u> The parent alleges that the BSP does not meet the individual needs of the student. | <u>Not Substantiated</u> The BSP meets the individual needs of the student. |

III. FINDINGS OF FACT

Background:

1. The student is 16 years old and in the tenth grade. The student is eligible for special education as a student with autism, mental retardation and a communication disorder.
2. The student's placement is mostly in a special education classroom. The student's current IEP states the placement as: "Life skills classroom with less time in the regular education classroom." The student attends physical education (a modified program) and lunch with regular education students.
3. The student's current IEP provides that the student is receiving the following services: specially designed instruction, community instruction/safety/social communication, communication therapy, daily living skills - hygiene, functional academics: reading, and vocational. Related services in the current IEP include transportation/bus rider, autism consultation, and nursing services. Supplementary aides and services include visual supports/schedules & routines, life skills staff assistance for behavior and functional needs, sensory diet activities per OT/autism recommendations, allergic reaction emergency protocol, nose bleed protocol, Epi-Pen procedure, personal hygiene protocol, behavior plan prior to, during and after an escalation, bus behavior plan and adaptive regular physical education. An aide is present with the student during transportation to and from school on a bus and during the entire school day.

Transportation Services and Parental Participation:

4. The District provides transportation of the student to and from the high school. The drive is approximately two miles, or ten minutes. On the morning route, the driver picks up one student before picking up the student, and two students afterwards. On the afternoon route, two other students are on the bus when leaving school, and

the student is dropped off at his home first. An aide is always present with the student on the bus.

5. There is often a different driver on the morning and afternoon bus rides. Since November of 2007, when the parent expressed concern about different drivers picking up the student, the District has assigned a particular driver to the student's bus route. However, due to staffing issues, the assigned driver could not always be the driver. Transportation logs provided by the District show that from January of 2008 through March of 2008, the assigned driver drove at least one leg of the bus trip with the student 38 of 46 times. Three other drivers also drove the student from January of 2008 through March of 2008.
6. The parent acknowledged during the on-site investigation that things have been better during the past two months. The incident reports provided by the District in its response in this case reveal only two incidents on the bus involving the student, one on February 6, 2008 and one on March 13, 2008. Both incidents involved the student hitting the bus window or seat.
7. The District's transportation supervisor has worked with the student for several years, and continues to occasionally drive the student when staffing issues require. The transportation supervisor understands the desirability of reducing changes in the student's daily schedule, including bus drivers, and is attempting to do so. The transportation supervisor stated during the on-site investigation that she provides training for the drivers, and that she emphasizes the importance of arriving as close as possible to the same time and approaching the pickup spot in the same manner. Additionally, the drivers are all instructed that if the student's aide requests, they will go directly to the school rather than completing the route.
8. On November 28, 2007, during an IEP meeting, the team discussed the parent's request that busing be provided by the Coos County Education Service District (ESD) rather than the District. The parent prefers ESD transportation because she believes that the ESD drivers have more experience working with special needs students.
9. The staffing notes from the November 28, 2007 meeting state that the parent agreed that the special education director would investigate the busing issue and get back to her. The parent agreed to continue busing by the District until that time. The special education director looked into the busing concerns and called the parent on December 11, 2007 to share what he found out. During the on-site investigation the special education director stated that the ESD did not have a present route that could cover the student's transportation to and from school, and although the ESD could provide transportation the District would need to pay for the transportation.
10. On December 11, 2007, the District issued a Notice of Special Education Action declining to change the provision of transportation from the District to the ESD. This notice was signed, at the direction of the special education director, by the student's special education teacher, a member of the student's IEP team.

11. During the two weeks prior to March 2, 2008, the student's special education teacher or an aide other than the usual bus aide, rode the bus with the student. On February 22, 2008, during an IEP meeting, the parent asked when the regular bus aide would return to ride the bus with the student (the staffing notes from the meeting do not reflect the request). District staff advised that they did not know precisely when the aide would return due to the aide's illness and other authorized absences from work.

IEP (BSP) Implementation and Parental Participation:

12. On January 23, 2008, the IEP team, including the parent, agreed to modify the Behavior Support Plan (BSP) to include a 'token economy', a reward-based positive behavior intervention. District staff prepared the materials for that additional component of the BSP and explained the token economy to the student's teacher and aides. The District completed the training and implemented the token economy no later than February 11, 2008.

13. Between January 23, 2008 and February 11, 2008, the parent called and requested that the modified BSP (modified only to include the token economy) be immediately implemented. On February 22, 2008, the IEP team met to discuss the modified BSP. The notes sent to the parent by District staff from January 22, 2008 to February 11, 2008 (the date of implementation of the token economy provided in the modified BSP) do not reveal increased anxiety by the student.

14. On November 28, 2007, the IEP team, with no apparent objection from the parent, added the following to the BSP: "If Mom is unable to come and get him or cannot be reached and he continues to be aggressive and he is at risk of seriously hurting himself or others staff will call the police."

15. On January 23, 2008, the IEP team, including the parent, met and agreed upon a modified BSP. The provision concerning police involvement was slightly modified to read: "If he is unable to be picked up or the emergency contact people cannot be reached and he continues to be aggressive and is at risk of seriously hurting himself or others staff will call the police for assistance."

16. On April 4, 2008, much of the IEP team (including the parent, special education director, and life skills supervisor) met with the Myrtle Point police department's Chief of Police. The District provided information concerning interaction by law enforcement with people with autism. The District has never had to call the police, as the other provisions of the safety plan in the BSP have been adequate, to date.

17. The student's January 23, 2008 BSP lists the targeted behaviors of the student, and their functions as "hitting, kicking – communicate frustration, refusal of activity, disruption of routine or unexpected transitions/events", "touching/ rubbing genitalia – symptom of agitation/anxiety", "banging on objects (desk, wall, etc.)", and "yelling, or other loud noises (grunts, squawks, etc.)" The BSP then lists a proactive plan, including communication, environment, and sensory components. The BSP lists alternative behaviors and then lists positive behavior intervention strategies depending on the behavior being addressed.

18. The BSP includes a safety plan for specific emergency behaviors including “severe aggression: hitting, kicking to the point where you are concerned about the safety of [the student], staff and students. These strategies include: 1. ask the student to remove his shoes, 2. ask the student if he would like to take a break, 3. If the student chooses a break set the timer for 5 minutes and increase as necessary until calm, 4. Dim the lights and decrease noise if possible.
19. The safety plan also provides that if the student is unable to comply with the foregoing interventions, staff may use the following intervention strategies:
 1. Staff may use the room clear procedure. Staff will continue to need to supervise the student to ensure his safety,
 2. If the student approaches staff with his hand or hands raised, staff should stand in OIS stance position and calmly and carefully move outside of his arms reach,
 3. If the student attempts to strike or kick at staff, they can utilize Oregon Intervention System (OIS) deflection techniques to move the energy of the attack away from the staff’s body and toward the student’s centerline,
 4. Staff may utilize the OIS one person, belt-shirt control to move student away from another student, staff or dangerous situation,
 5. Staff may utilize a two-person protective physical intervention with the student in situations wherein staff cannot do a room clear. Staff may also utilize a two-person seated couch protective physical intervention if this is a safer option,
 6. After calming and OIS interventions have been tried and the student continues to be aggressive to staff, staff will call home to remove him from school, and
 7. If he is unable to be picked up or the emergency contact people cannot be reached and he continues to be aggressive and is at risk of seriously hurting himself or others staff will call the police for assistance. The safety plan finally provides that there will be a meeting with the police to share the behavior plan and recommendations. This meeting occurred, as noted above, on April 4, 2008.
20. All staff working with the student have been trained on behavior and safety plans. All classroom staff have been trained in the Oregon Intervention System and have received additional training specific to student’s safety plan. Monthly updates are conducted with the Oregon Intervention System trainer.
21. The two person protective physical intervention has not been used this year. Staff have been trained that if they do not feel comfortable using a physical restraint that they do not have to use it.
22. The parent reported that during an IEP meeting on February 22, 2008, staff told her she could not add to the staffing notes that the student’s teacher did not agree with or was not comfortable with the BSP. Three District staff members consistently stated during the on-site investigation that the parent asked to add to the staffing notes that the student’s teacher was not comfortable with the BSP in general. However, it was clarified that the teacher herself does not feel that she can use the

restraint section of the BSP. The special education teacher was then asked if she agreed with the behavior plan and she said that she agreed with the behavior plan. After this was explained, the parent did not request again to add anything to the staffing notes.

IV. DISCUSSION

1. Transportation

Transportation is a related service under the IDEA if it is necessary to assist a student with a disability to benefit from his or her education.³ Here the student's IEP requires that the District provide the following transportation services: (1) bus service for the student to and from school; (2) a bus behavior plan; and (3) a bus aide for the student for both the morning and afternoon routes.

The issue concerns the adequacy of the student's transportation services. The transportation services the District provides meet the essential function of transportation services. The District provides door to door transportation between home and school.

Bus Services

The parent alleges that the bus service provided by the District which involves different drivers "on a daily basis going to school and coming home" is inappropriate for a student with autism. The parent contends that the changes in bus drivers increases stress for the student and adversely affects the student's ability to participate in and benefit from special education. The parent emphasizes the importance of consistency for the student to have the best possible success throughout the day.

After the parent expressed concern in November, 2007 about the student's bus service, the District assigned one particular bus driver to the student's route. Transportation logs from January, 2008 through March, 2008 show that the assigned driver drove at least one leg of the students' route 38 out of 46 times. Three other drivers drove the student from January through March 2008. The student's bus ride covers about two miles one way and lasts about ten minutes. The incident reports provided by the District document two incidents, one on February 6, 2008 and one on March 3, 2008, in which the student hit the bus window or seat during the morning route. The parent acknowledges that things have been better in the last two months.

The Department finds the District is providing appropriate transportation for this student. The District provides an aide to ride on the bus with the student to monitor and control the student's behavior to ensure safe transit. The transportation supervisor for the District emphasizes the importance of consistency in her training of the bus drivers. Bus drivers are instructed to arrive as close as possible at the same time at the student's house and to approach the pick up spot in the same manner each day. There is no evidence that the two incidents on the bus resulted from a change in drivers or that the change in drivers adversely affected the student's ability to benefit from special education. The Department does not substantiate the parent's allegation.

³ OAR 581-015-2000(28)

Bus Aide

During the two weeks prior to March 2, 2008, the student's special education teacher or an aide other than the regular bus aide rode with the student on the bus route. The parent alleges that this additional change in the student's transportation services was not appropriate for a student with autism. The parent further alleges that the District would not tell the parent when the aide would return to work.

At an IEP meeting on February 22, 2008, the parent asked when the regular bus aide would return to ride the bus with the student. District staff advised that they did not know precisely when the aide would return due to the aide's illness and other authorized absences from work.

The Department does not substantiate the allegations. Records provided in the District's response in this case, support the fact that the District did not know precisely when the aide would return. Additionally, there is no evidence in the teacher's daily reports on the student that show increased behavioral problems for the student during this period.

2. IEP Implementation

School districts must provide special education and related services to a child with a disability in accordance with an IEP.⁴ To ensure IEP implementation, school districts must inform each teacher and services provider for the student of "his or her specific responsibilities for implementing the child's IEP and the specific accommodations, modifications and supports that must be provided for or on behalf of the child in accordance with the IEP."⁵

On January 23, 2008, the IEP team including the parent agreed to modify the student's BSP to include the use of a token economy as a positive behavior intervention. The parent alleges that the District's failure to implement this modified BSP in a timely manner resulted in the student showing increased anxiety and stress with teachers and aides. The parent states that notes from teachers during the time period when the behavior plan was not implemented reflect the student's increased anxiety which adversely affected the student's participation in and benefit from his special education program.

The District implemented the BSP by February 11, 2008. The District prepared materials and trained staff on the modification of the BSP and the use of the token economy from January 23, 2008 until February 11, 2008. The Department finds that the District implemented the modified BSP by February 11, 2008 and further finds that the District did not take an unreasonable amount of time to train staff and prepare instructional materials. A review of the daily reporting forms on the student does not show that the student exhibited an increase in anxiety or stress during the time period from January 23 through February 11, 2008. The Department does not substantiate the allegation.

⁴ OAR 581-015-2220(1)(b)

⁵ OAR 581-015-2220(3)

3. Parent Participation

Parent participation is a requirement of the IDEA and an important part of the IEP process. School Districts are required to provide parents with an opportunity to participate in meetings with respect to the identification, evaluation, IEP and educational placement of the student, and the provision of a free appropriate public education for the student.⁶ The parent alleges that the District process did not provide an opportunity for parent participation consistent with the IDEA when District staff held a private meeting without inviting the parent. The parent further alleges that District staff violated IDEA when they did not allow the parent to add written comments to staffing notes during the February 22, 2008 meeting.

As to the first allegation, the parent and District staff discussed parent's request for a change in transportation services during the IEP meeting on November 28, 2007. At that meeting the parent requested that the ESD provide bus service for the student instead of the school District. The IEP team including the parent agreed that the special education director would investigate the possibility of ESD bus service and get back to the parent. When the director investigated, he discovered that the ESD would have to create a new route to provide this transportation because it could not modify an existing route. The District did not convene a meeting on the matter. Following up on the staff notes, the special education director contacted the parent by phone and then requested that the special education teacher provide the prior written notice, which the teacher did. The staff notes do not indicate that the team intended to reconvene.

The Department does not find that the District held a meeting without inviting the parent. The special education director's request for the special education teacher to send out a prior written notice was a follow-up on an administrative directive.

As to the second allegation, the parent contends that the District allowed the parent to sign the staffing notes at the February 22, 2008 IEP but would not allow her to add written comments to the notes. Based on interviews of District staff present at the February IEP meeting, the parent requested to add a written comment stating the special education teacher was not comfortable with the BSP plan. Staff members reported that the special education teacher clarified her position on the behavior plan during the IEP meeting. The special education teacher stated that she agreed with the plan but did not feel she could utilize the restraint portion of the plan. The weight of the evidence shows that the parent did not persist in the request to add to the staffing notes once the special education teacher had clarified her position on the behavior plan. The Department does not support the allegation.

4. IEP (Behavior Support Plan)

The parent alleges that the behavior support plan does not meet the individual needs of the student. The parent also expresses concern that the behavior plan contains a safety provision which would include calling the police as a last resort if the student were to become aggressive to the point where the student was at risk of serious injury

⁶ OAR 581-015-2190(1)

or seriously injuring others and the parent could not be reached or was unable to pick up the student up.

On November 28, 2007, the IEP team, which included the parent, added the 'last resort' provision to the BSP safety plan. This 'last resort' provision was slightly modified in the January 23, 2008 BSP. During the on-site investigation, the parent stated that the parent's only concern now about the BSP was the 'last resort' provision. The parent wants the District to give the parent adequate time to come to school before the police are called.

The student has a behavior plan for both the life skills classroom and the bus. Staff introduced a token economy system on February 11, 2008 Classroom staff manage student's behavior using positive behavior intervention strategies, alternative behaviors and a proactive plan including communication, environment and sensory components. Classroom staff are trained in the Oregon Intervention System. However, the student's behavior has not escalated to the extent that required staff to use the two person protective physical intervention. Staff have utilized de-escalating and refocusing strategies with the student which have allowed the student to participate and benefit from his special education program

The Department does not substantiate the allegation that the behavior support plan does not address the needs of the student. In accordance with OAR 581-015-2205(3)(a), the IEP team has developed a BSP for the student which uses positive behavioral intervention supports and strategies to address the student's behavioral needs.

Dated: April 25, 2008

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

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