

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of David Douglas)	FINDINGS OF FACT,
School District)	CONCLUSIONS,
)	AND FINAL ORDER
)	Redacted
		Case No. 08-054-016

I. BACKGROUND

On April 14, 2008, the Oregon Department of Education (Department) received a letter of complaint from the parent of a student attending school and residing in the David Douglas School District (District). The parent requested that the Department conduct a special education complaint 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. There were no exceptional circumstances warranting an extension, and this order is issued within 60 days of receipt of this complaint.

On April 25, 2008, the Department sent a *Request for Response* to the District identifying the specific allegations in the complaint the Department would investigate. The District submitted its timely *Response* to the allegations, and made a copy available to the parent. On May 16, 2008, the Department’s complaint investigator conducted an on-site investigation, and interviewed the parent and the following District staff: special education teacher A, special education teacher B, vice principal, educational assistant, and special education director.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under 34 CFR 300.151-300.153 and OAR 581-015-2030. 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).

#.	Allegations	Conclusions
(1)	<u>IEP Review and Revision:</u> The parent alleged that the District had not addressed a lack of expected progress on IEP goals and in the general curriculum.	Substantiated. The District should have initiated an IEP meeting with the parent to address a lack of expected progress on IEP goals and in the general curriculum.
(2)	<u>Physical Restraint:</u>	Not Substantiated.

#.	Allegations	Conclusions
	The parent alleged that the restraint techniques used by school personnel on February 15, 2008 violated IDEA.	The Department did not find substantial evidence that District personnel used physical restraint techniques with the student during a February 15, 2008 behavior incident.

III. FINDINGS OF FACT

1. The student resides within the District, is enrolled in the [] grade, and attends his neighborhood school within the District. The student is eligible to receive special education and related services as a child with mental retardation and as a child with a communication disorder. The parent pointed out, however, that a physician originally diagnosed her son as developmentally delayed before he was school-aged, and this continues to be his medical diagnosis, rather than mental retardation. The student's medical history also includes a seizure disorder and asthma. The student received services through the Early Childhood Special Education program as a preschool student and has continued to receive special education services through the District since becoming school-aged.

2007-08 School Year (September 17, 2007 IEP)

2. The District held a meeting on September 17, 2007 and developed a new IEP for the student. The student, the student's parent, special education teacher A, special education teacher B, the vice principal, a regular education teacher, an individual to interpret evaluations, the student's developmental disabilities caseworker, and several other individuals participated in this meeting. The team developed a statement of the student's present levels of academic achievement and functional performance, noting that the student was attending a Structured Learning Program (SLP) for academics on a half-day schedule. The statement noted that the student's half-day schedule was developed by the student's middle school IEP team due to excessive absences when on a full day schedule. The team also noted in the statement that the student had attended school only 2 days out of the last 9 school days leading up to the meeting. The team also included statements in the areas of written language, math, reading, and communication on the student's IEP. The communication statement noted that, due to student absences, the most recent data available to the IEP team of the student's progress on his communication goals was from June 2007.
3. The student's September 17, 2007 IEP provided for services in the areas of reading, written language, and mathematics, with speech/language provided as a related service. The District also provided the student with transportation services. The IEP provided for specific annual goals and measurable short-term objectives in each area of service. The IEP team also determined that the student did not exhibit

behavior that impeded his learning and that of others. The IEP did not provide for behavior services or describe any behavior needs.

February 15, 2008 Behavior Incident

4. On February 15, 2008, there was a behavior incident involving the student at school. The student was with several classmates from the SLP class, returning from an outing, and was arguing with one of his classmates. The educational assistant reported that he separated the student from his classmate, and the group returned to class. The student stayed in special education teacher A's classroom because he was still angry about the argument with his classmate. The educational assistant had the student stay in an area with small cubicles, and asked him to quiet down as the student was yelling and swearing. The educational assistant observed the student causing a mess in the area, throwing some things and destroying some property. The educational assistant observed that the student was leaning against the frame of a partially open window, and opening and shutting the window on his own arms and hands. The student was very loud, yelling and being disruptive for at least 10-15 minutes. The educational assistant closed most of the windows in the classroom because the noise was disruptive to the other classes.
5. The educational assistant told the student that he would be given the chance to calm down, and that he did not want to have to write a referral for the student. The student calmed down, cleaned up the mess he had made in the area, apologized to the educational assistant for his behavior, and was excused to go to his next class. The educational assistant reported that at no time was the student physically restrained, and that there was never any physical contact with the student. The educational assistant reported that he has had restraint training, but no physical intervention was necessary. He reported that the student's behavior never amounted to a threat to the student or to anyone else.
6. Special education teacher A operated an SLP class and had the student on "A" schedule days. The student was in her classroom during the February 15, 2008 behavior incident. She reported that the student was kicking and hitting things, throwing sensory objects and a calculator, and was opening and closing a window. Special education teacher A also reported observing the student putting his arms on the frame of the window, and shutting the window on himself and across his arms. She did not believe, however, that the student was actually hurting himself, and did not feel that physical restraint or intervention was needed. Special education teacher A reported that no staff had any physical contact with the student.
7. Special education teacher B operated an SLP class and had the student on "B" schedule days. Special education teacher B talked to special education teacher A on the day of the February 15, 2008 behavior incident, suggesting that she call for assistance from administration, but reported that the student defused his behavior

on his own and went to class before any other intervention was necessary. She described the incident as relatively short and low intensity.

8. The vice principal was not contacted concerning the February 15, 2008 behavior incident. She reported that the District has a policy on physical restraint and physical intervention that requires her involvement in every case involving physical contact, and requires documentation of each incident. She described the February 15, 2008 behavior incident as amounting to a “time-out” not requiring her intervention. The vice principal reported that staff are trained on this issue, and that physical intervention, including physical restraint, does happen in other cases and the correct policy and procedure is followed by staff, with each incident documented.
9. The parent contended that she should have been contacted concerning the February 15, 2007 behavior incident at school, but wasn't. She reported that her son came home from school that day with bruises on his arm and wrist, and a red mark under his eye. The parent reported that the student told her that his teacher had grabbed his arm and gave him a bruise. The parent contacted the police concerning the bruises. The parent also stopped sending the student to school. The parent agreed that her son did not have behavior problems at school, although she reported that he was in a fight at school approximately two years before this incident, and was once suspended for a behavior incident.
10. Four days later, the police responded to the complaint made by the parent concerning the bruises on the student. A police officer went to the parent's home, and spoke with the student. The police officer reported that the student stated that his teacher had grabbed his arm and she gave him a bruise. The police officer asked the student to show him his arms, and the police officer reported that he could see no bruising at all. The police officer also reported that he told the parent if the student was restrained, it was to keep him from hurting himself or someone else., The police officer also discussed with the parent that he observed no bruising on the student's arms. The police officer also spoke with the vice principal, reporting that the vice principal described the student as causing a disturbance at school, kicking and hitting things, but that she did not think the student was restrained.
11. The District reported that the student was not physically restrained on February 15, 2008. The District also reported that the student did not have a documented need in the area of behavior. The District reports that, prior to the February 15, 2008 incident, the student did not have any behavioral issues while attending his school. The District also reported that a review of the student's records from middle school shows there were no reported behavioral referrals, detentions, or other behavioral issues.

Absenteeism and School Progress

12. The student had a history of poor school attendance. For the 2007-08 school year through April 15, 2008, he attended school 16 days, some of which were not full days. The District made multiple attempts to remove barriers that may prevent the student from attending school, including providing transportation, making telephone calls to his parent, making scheduling changes, providing school supplies, providing Physical Education (PE) clothes and a PE lock. District staff also contacted the student's Developmental Disabilities caseworker, who has also made telephone calls, home visits, and has attended the student's IEP meetings. The District reports, however, that none of these efforts have made a positive impact on the student's school attendance.
13. The September 17, 2007 IEP team kept notes of their meeting, including a discussion concerning the student's history of poor attendance. The notes indicate that the student's parent discussed wanting her son to graduate, but that if he continued his poor attendance this would not happen. The team also discussed that if the student continued on his half-day schedule he would not graduate. The parent stated that she wanted help for her son so he could graduate. The team discussed alternatives, and the student agreed to a full-day schedule. The parent also asked about school supplies, lunch, and taking PE. The notes do not indicate that any other reasons were given for the student's poor attendance.
14. Special education teacher A stated that the student "hardly comes to school." She reported that reasons given for the student not attending school include: "No lock for his locker" and "No clothes for PE" and "No school supplies." Special education teacher A was unaware of any other reasons for the student's absenteeism, and has never noticed anything else. The student attended school on ten "A" schedule school days during the 2007-08 school year up to April 15, 2008.
15. Special education teacher B also reported that the student has very poor attendance. She noted that the student attended school on only six "B" schedule school days during the 2007-08 school year up to April 15, 2008. She did not know why the student attended more "A" days than "B" days, but speculated that the student had attended more "A" days because the student's PE class is on his "A" schedule. Special education teacher B reported that the student's history of poor attendance was discussed at the September 17, 2007 IEP meeting and that the parent described a number of barriers to the student's attendance, including: no clothes for PE, no lock for his locker, and transportation. Special education teacher B reported that, although the District removed these barriers by supplying all of these needs, the student still hardly ever came to school. She reported that the student's County case manager also stated that the student did not go to school because he did not want to, or would say he was sick. Special education teacher B reported observing no reason for the student's absenteeism, and that when the student came to school he seemed happy, with no reason not to come.

16. The vice principal noted that the student attended school only 16 school days during the 2007-08 school year, up to April 15, 2008. She reported that the student also had attendance issues at middle school. The vice principal also attended the September 2007 IEP meeting, and reported that during discussion of the student's poor attendance his parent explained that there were days that he doesn't feel well, and days that he just doesn't want to go to school.
17. The District has a compulsory attendance policy and an attendance coordinator. The District initiates telephone calls to address student attendance issues but, after ten consecutive days of non-attendance, students are dropped from the District's enrollment. The student was dropped from the District's enrollment for non-attendance approximately ten school days following the February 15, 2007 incident.
18. The District agreed that the student's report cards and progress reports for the 2007-08 school year did not show growth on his IEP goals and objectives. The District asserted that the lack of growth was due to the student's excessive absenteeism. In addition, the student's transcript reflected his lack of credits earned for the year.
19. The student received a first-quarter progress report as of October 8, 2007, receiving a grade of "P" in adaptive PE, grades of "U" in all subject areas in his SLP class, and an "F" in weight training. Teacher comments on the progress report included "Poor attendance"; "Make-up work not completed"; "Participates positively in class"; and, "A pleasure to have in class." The student received a second-quarter progress report as of December 10, 2007. The student received "F" grades in adaptive PE and weight training, and grades of "U" in all subject areas in his SLP class. This progress report included the teacher comment: "Poor attendance." The student received a third-quarter progress report as of April 15, 2007, with the student receiving an "F" in adaptive PE and in Foods and Nutrition, and grades of "U" in all subject areas in his SLP class. All teacher comments included the note: "Poor attendance," with other comments including "Make-up work not completed," "major project(s) not completed," and "A pleasure to have in class."
20. The parent met informally with District staff on May 12, 2008 and May 14, 2008 to discuss these issues and reach some resolution. At this meeting, the parent also discussed with staff issues the student has with medication he takes for his seizures and asthma. The parent and District staff reached several agreements concerning these issues and they developed a plan for the student to return to school with a later morning start to his school day.
21. The parent reported that her son has taken medication for his seizures since he was [] years old, except for a period between January 2006 and August 2006 when his doctor had him stop. The parent reported that her son had another severe seizure in August 2006 and was put back on the medication, and had more seizures in October 2007 and November 2007. She stated that her son's doctor increased the

dosage of her son's medication which stopped the seizures but also makes him tired. The doctor also prescribed additional medication for anemia. The parent reported that her son takes a dose of his medication in the morning at about 7:30 am, and the medication makes him too sleepy to go to school until about 10:30 am. The parent believed that school staff were aware of her son's medication, and his difficulty concentrating because of his medication. She reported that her son had a seizure at school in the third grade.

22. District staff reported that they were unaware that issues with the student's health or medication might be related to his attendance, until discussing these issues with the parent at the May 12, 2008 and May 14, 2008 meetings. The District's special education director reported that the District is pursuing the information and will make a determination concerning whether the District has reason to suspect the student has an other health impairment, and, if so, will take appropriate steps to address his needs in this area.

IV. DISCUSSION

A. Obligation of School Districts to Review and Revise IEPs

The parent alleged that the District failed to address a lack of expected progress towards IEP goals and in the general curriculum,

An IEP must be in effect for each child with a disability at the beginning of each school year, and school districts must provide special education and related services in accordance with each student's IEP.¹ A student's IEP must provide a description of how the student's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.²

Each school district must ensure that the IEP team reviews the child's IEP periodically, but at least once every 365 days, to determine whether the annual goals for the child are being achieved.³ The school district also must revise the IEP, as appropriate, to address (1) any lack of expected progress toward the annual goals described in OAR 581-015-2200 and in the general curriculum, if appropriate; (2) the results of any reevaluation conducted under OAR 581-015-2105; (3) information about the child provided to or by the parents; (4) the child's anticipated needs; or (4) other matters written document to amend or modify the child's current IEP.⁴

In reviewing and revising the student's IEP, the IEP team must consider additional

¹ OAR 581-015-2220.

² OAR 581-015-2200(1)(c) Content of IEP (Progress reports toward annual goals)

³ OAR 581-015-2225

⁴ OAR 581-015-2225(2)

factors. For a student whose behavior impedes the student'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.⁵

The school district did develop a new IEP for the student on September 17, 2007. The IEP team discussed the student's history of poor attendance and parent's recommendations for resolving the student's attendance problems. District staff responded by providing transportation, school supplies, PE clothes, a lock for the student's locker and by seeking assistance from the student's developmental caseworker. In spite of the District's efforts, the student's attendance problem continued after the September 17, 2007, IEP meeting. The student only attended school sixteen days from the start of the school year through February 15, 2008, and did not attend at all from February 15, 2008, through April 15, 2008. Progress reports dated from October 8, 2007, and December 10, 2007, show that the student earned failing grades in all subject areas with teacher comments of "poor attendance." On May 12, 2008 and May 14, 2008, District staff agreed to meet with the parent to discuss the student's absenteeism and failing grades. At that time, the parent informed District staff that the student took medication for seizures and anemia which made him drowsy in the morning and affected his ability to get to school in the morning.

The Department finds that the District should have initiated an IEP meeting to review and revise the student's IEP to address a lack of progress on annual goals by October or by the latest December, 2008, in response to the student's progress reports documenting failing grades and lack of attendance. The IEP team already had identified poor attendance as a barrier to student success at the September 17, 2007, IEP meeting and therefore, should have been ready to follow-up with the parent when the student's absenteeism continued to be an issue.

The District contended that the student's lack of progress was due to extreme absenteeism rather than to any need to review or revise the services provided by the IEP. In this case, the student was not receiving any educational services. The District should have initiated this second IEP meeting with the parent in the Fall of 2007 to determine whether the IEP needed to be revised to address the students' absenteeism and to consider the use of positive behavioral interventions, supports, and other strategies. Had the District convened this second IEP meeting, the IEP team also could have considered whether the student should undergo evaluation to determine if his absenteeism was related to other disabilities or in this case, medication issues. The Department substantiates the parent's allegation.

B. Physical Restraint

The parent alleged that the restraint techniques used by school personnel on February 15, 2008, violated IDEA.

⁵ 581-015-2205(3)

The IDEA requires that the IEP team must consider additional special factors when developing, reviewing and revising a student’s IEP. For a student whose behavior impedes the student’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.⁶ If in considering these special factors, the IEP team determines that a student needs a particular device or service (including an intervention, accommodation, or other program modification) for the student to receive free appropriate education, the IEP team must include a statement to that effect in the child’s IEP.⁷ Oregon law provides for specific requirements with respect to a school district’s use of physical restraint and seclusion with students.⁸

On February 15, 2008, the parent reported that her son came home with bruises and told her that his teacher grabbed him. The student’s IEP, in effect at the time of the February incident, did not describe any behavioral needs or include a behavioral support plan. The facts, however, do not indicate that district staff used physical restraint in the February 15, 2008 incident. The police officer, who investigated the parent’s complaint four days later, reported finding no bruises on the student. Interviews with District staff, who observed the behavior incident, consistently reported that the staff did not have any physical contact with the student and noted that had there been physical contact the incident would have been documented. The description of the student’s behavior in hitting and kicking things, leaning against the window frame, and opening and closing the window on his own arms, was consistent with marks the parent observed on the student’s arms and wrist, that would be gone four days later. The Department does not substantiate the allegation.

V. CORRECTIVE ACTION⁹

In the Matter David Douglas School District
Case No. 08-054-016

<p><u>IEP Meeting:</u>¹⁰</p> <p>The District must hold an IEP and placement meeting for the student to develop an IEP to be in effect at the</p>	<p><u>For each meeting:</u></p> <p>Copy of IEP meeting notice, complete IEP</p>	<p>Submission to ODE by</p>
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⁶ OAR 581-015 2205(3)(a)

⁷ OAR 581-015-2205(4)

⁸ OAR 581-021-0062

⁹ 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 any remedies against a party who refuses to voluntarily comply with a plan of correction. OAR 581-015-2030(17&18).

¹⁰ The district is not required to hold another meeting if the IEP to be in effect at the beginning of the 2008-2009 school year addresses the listed requirements.

<p>beginning of the 2008-2009 school year. At a minimum, the team will:</p> <p>(a) Clearly describe the student's "present level" of behavior, including baseline information on the behaviors related to the student's absenteeism;</p> <p>(b) Consider "strategies, positive behavior interventions, and supports" to address the student's behavior and the need for a Behavior Intervention Plan (BIP); and</p> <p>(c) Any need for assessment related to the student's reported health issues; and;</p> <p>(d) Any need for a medical protocol in conjunction with the IEP.</p>	<p>resulting from the meeting, meeting notes or minutes, and any prior written notices (or notices and consents) resulting from the meeting.</p>	<p>September 30, 2008.</p> <p>If further evaluation needed, IEP team to meet again within 60 days of parent consent for evaluation to consider results and complete remaining corrective actions.¹¹</p> <p>Submissions to ODE within 10 days following this meeting.</p>
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Dated: June 13, 2008

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

Mailing Date: June 13, 2008

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.

¹¹ The corrective action due date intentionally refers to 60 days (meaning calendar days) and not 60 school days.