

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Beaverton
School District No. 48J

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FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 08-054-024

I. BACKGROUND

On June 6, 2008, the Oregon Department of Education (Department) received a letter of complaint from the parent of a student attending school and residing in the Beaverton School District (District) concerning services to her child during the 2007-08 school year. 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.

On June 19, 2008, the Department sent a *Request for Response* to the District identifying the specific allegations in the complaint the Department would investigate. The District requested an extension of the timeline for investigation of this complaint due to the unavailability of District staff to provide a *Response* over the summer break, until after August 25. The Department determined that these exceptional circumstances warranted an extension of the timeline for investigating this complaint, and extended the timeline for investigating this complaint by 59 days.

The District submitted its *Response* to the allegations within the extended timeline, and made a copy available to the parent. On August 29, 2008, the Department’s complaint investigator, and a specialist from the Department, conducted an on-site investigation and interviewed the following District staff: special education facilitator, special education teacher, speech-language pathologist, school psychologist, principal, and special education coordinator. On September 2, 2008, the Department’s complaint investigator met with and interviewed the parent.

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).

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(1)	<u>Placement/Least Restrictive Environment:</u> (a) The parent alleged that the District did not provide a placement for the student in the least restrictive environment. Specifically, the parent alleged that the District did not provide	Substantiated in part: (a) The Department concluded that the half-day program in the cafeteria was an interim, temporary placement for the student pending his acceptance

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	<p>an appropriate placement consistent with her son's IEP until April 2008, when the District placed him in a REACH program;</p> <p>(b) The parent alleged that the District's placement of her son in a two-hour per day program from January 2008 through April 2008 did not meet her son's educational need for a full-day school program;</p> <p>(c) The parent alleged that the District did not provide opportunities for her son to participate with non-disabled children in extracurricular services and activities to the maximum extent appropriate;</p>	<p>into the REACH program, was selected due to the unavailability of an appropriate placement (such as REACH) at the time, and was not based on student-specific information related to the student's needs.</p> <p>(b) The half-day program in the cafeteria was not selected to meet the student's needs, but was an interim, temporary placement for the student pending his acceptance into the REACH program.</p> <p>(c) The Department did not find that the District should have provided additional opportunities for the student to participate with other children in extracurricular services and activities, given the evidence of his disruptive behaviors, and how these behaviors manifested when the student came into contact with other children.</p>
(2)	<p><u>Specially Designed Instruction (Qualified Staff):</u></p> <p>The parent alleged that the District did not provide her son with specially designed instruction by a qualified teacher from January 2008 through April 2008. Specifically, the parent alleged that her son only received services through an educational assistant during this period, and not a certified special education teacher.</p>	<p>Not substantiated:</p> <p>The Department did not find persuasive evidence to conclude that a qualified teacher did not provide the student's services from January 2008 through April 2008. The services were provided under a consultative model by which a certified special education teacher developed the student's program, checked in with the student and educational assistants daily, and provided direction supervision, consultation, and regular monitoring of the student's educational program and his progress, and of the educational assistants who worked with him.</p>
(3)	<p><u>Implementation of IEP:</u></p> <p>The parent alleged that the District did not fully implement her son's IEP. Specifically, the parent alleged that the District did not implement provisions of her son's IEP with respect to:</p> <p>(a) Social skills, including goals and objectives concerning appropriate peer and adult interaction, cooperating appropriately in small</p>	<p>Substantiated in part:</p> <p>The Department concluded that the student's IEP did not require academic services. The Department concluded that social skills and behavioral skills services required by the student's IEP were not fully implemented based on these factors: 1. The student was not</p>

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	<p>group settings, and sharing;</p> <p>(b) Behavioral skills, including goals and objectives concerning making appropriate behavioral choices; and</p> <p>(c) Academic services;</p>	<p>provided with services implementing the specially designed instruction in behavior and social skills while removed from the BLC program and secluded in the alternative room; 2. The student was secluded in the alternative room on numerous occasions, several times for substantially the entire school day; and 3. The student did not make progress towards the goals on his IEP.</p>
(4)	<p><u>Medication:</u></p> <p>The parent alleged that the District did not properly administer her son's medication at school, or ensure that he ingested the medicine as required.</p>	<p>Not substantiated:</p> <p>The Department did not find persuasive evidence that District staff failed to properly administer the student's medication where they kept a log showing dates and times medication was administered, watched him chew his medicine with food, and had him open his mouth to verify he swallowed it.</p>
(5)	<p><u>Disclosure of Information:</u></p> <p>The parent alleged that the District permitted staff to contact her son's physician without her knowledge or consent to discuss his medication.</p>	<p>Not substantiated:</p> <p>The disclosure of information made by District staff to the student's mental health agency was authorized by a signed, written consent provided by the parent.</p>
(6)	<p><u>Seclusion:</u></p> <p>The parent alleged that the District did not properly document the days and times her son was placed in a seclusion room.</p>	<p>Not contested:</p> <p>The District agreed that staff did not follow District policy with respect to physical restraint and seclusion of the student, and proposed corrective action to address this issue.</p>
(7)	<p><u>Discipline:</u></p> <p>The parent alleged that the District started calling the parent in mid-October 2007 and required her to remove her son from school 2-3 days per week, and suspended her son from school on Fridays, due to his behavior.</p>	<p>Substantiated:</p> <p>The District erred by not counting the days and half-days the student was secluded in the alternative room without access to the special education and related services described in the student's IEP as suspensions. This error resulted in the District suspending the student in excess of 10 cumulative school days without taking required steps to address the disciplinary removals, including the conduct of a manifestation</p>

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		determination, conduct of a functional behavior assessment and development or review of a behavior plan.
(8)	<p><u>Review and Revision of IEP:</u></p> <p>The parent alleged that her son did not make progress towards the goals and objectives on his IEP. The parent alleged that the District should have considered revising her son's IEP to address his lack of expected progress.</p>	<p>Substantiated in part:</p> <p>The Department concluded that the evidence supported the District's efforts to find an appropriate placement for the student. However, the District erred by not holding an IEP meeting following its November 27, 2007 removal of the student to determine whether the student's behavior was a manifestation of the student's disability. In this meeting, the IEP team must review all relevant information in the student's file, the child's IEP—including addressing any lack of progress toward reaching the goals and objectives, any teacher observation, and any relevant information provided by the parents. If the behavior in question is determined to be a manifestation of the student's disability, the team must conduct a Functional Behavior Assessment and develop or revise a Behavior Intervention Plan.</p>
(9)	<p><u>Behavior:</u></p> <p>The parent alleged that the District did not appropriately address the student's behavior. Specifically, the parent alleged that the District did not conduct an analysis of the student's behavior, and did not consider revising her son's behavior plan to address the behavior.</p>	<p>Substantiated:</p> <p><i>See Conclusion #8.</i></p>

III. FINDINGS OF FACT

1. The student resides within the District and attended second grade at a District school during the 2007-08 school year. The student is eligible to receive special education and related services as a child with emotional disturbance.
2. 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. Upon becoming school-aged, the District placed the student in a behavior learning class (BLC) for his

kindergarten school year, and continued this placement through the student's first grade year in school.

June 8, 2007 IEP (first Grade):

3. The District held a meeting on June 8, 2007, near the end of the student's first grade year in school, and developed a new IEP for the student. The parent, the student's special education teacher, a regular education teacher, and the school psychologist participated in this meeting. The team wrote a statement of the student's present levels of academic achievement and functional performance, noting that the student was a first grade student placed in the BLC, that academically the student was "doing very well," and that he continued to make progress in this placement.
4. The statement described the student as participating more within group settings and, while he needed adult prompts, able to answer questions. The statement described the student as having difficulties in the classroom with peers, that he often burped, made noises, laughed, or said inappropriate things in the classroom or on the bus. The statement also reported that the student received lots of reminders to not pick his nose, but usually continued to do so, and when the student got into arguments with his peers the argument at times resulted in pushing or hitting.
5. The June 8, 2007 statement of the student's present levels of academic achievement and functional performance also described the strengths of the student, noting that the student: "is a smart, creative student. He is enthusiastic about learning and enjoys challenges academically." The parent noted as a concern that her son "doesn't want to move out of the BLC classroom." The statement reported that the student started mainstreaming that year into a general educational class for math, but consistently had difficulties with positive interactions with peers, that he often burped, made noises, and didn't share the math manipulatives with his peers.
6. The student's June 8, 2007 IEP provided for 30 minutes per day of specially designed instruction in behavior in a self-contained class. The IEP also provided for 60 minutes per week of psychological services, and transportation services, as related services, and included a behavior plan and access to behavior coaching as supplementary aids and services and modifications and accommodations. The IEP provided for specific annual goals and measurable short-term objectives for the behavior services. The IEP team also determined that the student exhibited behavior that impeded his learning or the learning of others. The non-participation statement written by the team stated: "[The student] is removed from general education 90% of the school day. However, he has begun mainstreaming this year, and as his behaviors improve his mainstreaming will increase."
7. The team stated two annual goals for the behavior services on the student's June 8, 2007 IEP, each with short-term instructional objectives. The first goal was for the student to "demonstrate appropriate classroom behaviors." Examples of related short-term instructional objectives included: "[The student] will be on task 85% of the time."; "[The student] will participate in group activities by listening and contributing as appropriate without adult prompts, 9 out of 10 opportunities."; and, "Given a

situation where [the student] needs to transition from a preferred activity to a non-preferred activity, [the student] will handle the transition in a positive and timely adult defined manner, 7 out of 10 opportunities.”

8. The second annual goal for the behavior services on the student’s June 8, 2007 IEP was for the student to “have appropriate peer and adult interactions in structured and unstructured settings.” There were five short-term instructional objectives related to this goal as follows:
 - A. Given a situation where [the student] is encouraged to make inappropriate behavioral choices by peers (such as on the bus or during unstructured time), he will be able to make his own appropriate behavior choices and take care of himself 8 out of 10 opportunities.
 - B. [The student] will work quietly in class during independent work time (no burping or disruptive noise making) 9 out of 10 opportunities.
 - C. [The student] will cooperate appropriately in a small group setting with peers 9 out of 10 opportunities.
 - D. Given a situation where other students are behaving inappropriately, [the student] will ignore the disruption and will continue working on his work without joining in with the disruptive student 8 out of 10 opportunities.
 - E. Given a social situation where [the student] needs to share materials, he will share the materials in a positive manner, 7 out of 10 opportunities.
9. The District considered and rejected placing the student in the regular classroom, noting that there was not enough behavioral support. The District also considered and rejected placing the student in the regular classroom with 21-60% special education class/resource room, rejecting this placement as not offering enough behavioral support for the student. The District continued the student’s placement in the BLC program, described as a self-contained special education class with more than 60% resource room or special class, noting that the student continued to need the behavior support of the BLC classroom. Benefits of this placement included: intensive individualized instruction; work on academic skills; opportunity to take mainstream class; and, small group/individualized instruction. The District noted as a possible harmful effect of the placement that the placement required removal of the student from his neighborhood school, and the student would not be included in all general education classroom activities. Modifications and services considered to reduce the harmful effects of the placement included modified assignments, behavior accommodation, and mainstream opportunities.
10. The student’s June 8, 2007 IEP included a behavior plan. The behavior plan provided a detailed description of the BLC program, use of a daily point sheet for tracking targeted behaviors, and the classroom token economy used to reinforce positive behavior. The behavior plan also provide a detailed description of a cost response system implemented in the classroom, and a description of a variety of intervention strategies staff would use to deal with the student, including: modeling of appropriate behaviors, role-playing appropriate behaviors, praise, awards, tangible reinforcers, verbal reminders, redirection, staff support, time out from reinforcing activities, time out when staff noticed the student’s frustration level increasing, close proximity, and use of an “alternative room.”

11. The alternative room is a small, separate room located in an area adjacent to the school cafeteria, with a door that is not locked. There is a desk outside the alternative room where a student sent to the alternative room can sit and work if the student behaves on the way to the alternative room. The behavior plan included a detailed description of the use of this alternative room, stating:

The alternative room is a multi-functional space utilized to meet individual student needs. It is a short-term alternative setting to the classroom. It services as a tool to help students progress emotionally and academically when the environment of the BLC classroom temporarily proves an inappropriate setting for continued development. As such, the alternative room may be used as a safe place for a child who is being verbally and/or physically abusive; as a private space to hold discussion with a student re (sic) specific concerns; as a calming space that a student can choose to use when upset; a private space for a child who is having difficulty staying calm; as an alternative space as other individualized student needs arise.

Typically, when temporary use of the alternative room is the best intervention strategy to help a student get back on track behaviorally and/or academically, he returns to the classroom when he is able to demonstrate to staff that he is able to maintain appropriate behaviors, complete a plan for reentry into the classroom, and complete any class work he missed while being in the individual work space, he will then be able to return to the classroom setting. He may earn up to one half of [his] points while he is in the alternative space when he is demonstrating appropriate choices.

At the end of the school day the student must be able to follow staff directions and be manifesting safe behaviors in order to be allowed to get on the school bus. If the student is unable to board the bus due to safety concerns, staff will need to contact the student's parent/guardian and arrange alternative transportation.

12. The behavior plan included a section describing the targeted behaviors on the point card, as follows:

Taking Care of Me: The student will focus on his own behavior and will refrain from getting involved in other's issues/problems when it does not involve them, or inappropriately entering other's personal space.

On Task: The student will promptly begin a task when it is assigned. [He] will remain on tasks and complete the task in the time given. [He] will work without disrupting others with his voice or his body.

Following Directions: The student will follow directions when they are give (within the 2nd cue), seek help in appropriate manner, and transition from activity to activity within appropriate time.

Positive Interactions: The student will use appropriate works, voice level, and tone of voice to verbalize feelings. Attention will be sought from staff/peers in an appropriate manner. The student will acknowledge and accept responsibility for choices by decreasing incidence of manipulative and controlling behaviors. The student will respect the property of others, and not "set up" peers.

My Own Goal: This is a goal that is decided by the student with teacher guidance relating to their IEP. This goal may change throughout the year depending on the progress toward that goal.

13. The student completed the remainder of his first grade year (2006-07 school year) in the BLC classroom. Staff reports concerns regarding the student's behavior on the bus, including aggressive behavior and inappropriate sexualized language, but also reported these behaviors were not occurring in the BLC classroom.
14. The student's file includes an August 20, 2007 medical progress note from his psychiatric mental health nurse practitioner, stating the student was tolerating an increase in his afternoon prescribed medication without complaint, that his mood had been even, temper tantrums less frequent and severe and short duration. The note stated that the student no longer talked inappropriately or sexually, and was not aggressive towards others.

2007-08 School Year (Second Grade):

15. The student returned to the BLC classroom for his second grade year in school (2007-08 school year), as decided by the District's placement team. The District assigned a different special education teacher to the BLC program. The new special education teacher was experienced in providing special education services, and in working with children with behavioral needs. She developed and implemented services to meet the needs of the students in the BLC program, provided behavioral coaching to all of the students, and supervised the educational assistants assigned to the BLC program. The special education teacher was also the student's case manager.
16. The special education teacher implemented a direct instruction model, using curriculum from behavior programs to provide a minimum of 30 minutes per day of specially designed instruction in behavior to the students in the BLC in various units and subjects related to behavior. She used a variety of instructional techniques, such as role-playing and constant review, use of video, scripts, and books, and developed and implemented data charts and observation tools to measure the progress of the students. The special education teacher also developed and implemented daily data cards, and a token economy, consistent with the point cards described on the behavior plan that was part of the student's IEP. She reported, however, that the student was not interested in the point system/token economy.
17. The special education teacher described the student as having solid academic skills that were typical of a child his age. She used regular second grade curriculum with the student, and reported that he read well and could complete regular second grade class work. She also reported that that the student's behavior impeded his learning, required a highly structured behavioral program, and prevented him from participating in the regular classroom with his non-disabled peers.
18. The school psychologist provided two 30-minute sessions each week of psychological services to the students in the BLC program, working with the

students together as a small group. The school psychologist typically read a story to the students, or played a game with them, related to the behavioral goals and objectives for the students in the BLC program. She also discussed related topics with the group such as personal issues and behavior issues occurring in the BLC classroom or at recess that were of concern to the group.

19. Staff reports that the student's behavior started out OK for the first couple of weeks, but negative, aggressive behaviors, noise, inappropriate sexualized language, and defiance behavior became progressively worse. Staff reports that by October, the student's inappropriate sexualized comments and aggressive behavior in the BLC classroom were alarming, he was spending increasing amounts of time in the alternative room, and they were also receiving negative reports of the student's behavior at home and in the community.
20. By October, District staff began to suspect the student required more structure than was available in the BLC program, as the data they were collecting confirmed that his behavior was escalating. The special education teacher moved the student to his own area in the back of the BLC classroom, but he was still too aggressive and disruptive for the other students, and his behavior was increasingly unsafe. The special education teacher developed and implemented behavior programs to encourage the other children in the BLC program to ignore the student's negative behavior, and bought earmuffs to help the other children ignore him, but these efforts were unsuccessful. By October, the student's behavior was alarming to staff, and the student was regularly removed from the BLC classroom and moved to the alternative room.
21. The student was always supervised by at least one adult staff member when removed to the alternative room, typically one of the educational assistants assigned to the BLC program. Sometimes, however, it took two staff members to hold the door to the time-out room shut, as the student would try to open the door and get out. Staff reports that the student was permitted to come out of the time-out room and work at a cubicle desk in the cafeteria adjacent to the time-out room, unless his behavior continued to escalate. When removed to the alternative room, the student had materials to work on that were provided by his special education teacher.
22. The District maintains a policy on physical restraint and seclusion. The policy requires, among other things, that when physical restraint and/or seclusion are being considered as a part of a behavior support plan, an IEP meeting must be held prior to implementation, and the IEP team must develop a behavior support plan that includes physical restraint and/or seclusion, and includes a specific number of incidents within a specific time period for reviewing the plan. The policy requires staff to notify the school administrator as soon as possible whenever physical restraint and/or seclusion is used, and requires the case manager to provide verbal or written documentation by the end of the day, and written documentation of the notification in the student's file. The policy requires staff to complete a written report containing specific information following each incident of physical restraint and/or seclusion, and provide a copy to the child's parent, case manager, and school administrator.

23. District staff did not complete written incident reports following each incident of physical restraint and/or seclusion of the student, as required by District policy, and the student's IEP did not include a description of the incidences or time period of use of the alternative room/time-out room for seclusion requiring review of the behavior plan. The District has initiated corrective action with respect to these issues, including providing a copy of the District's policy on physical restraint and/or seclusion to all District BLC teachers, and initiating training to all BLC teachers and educational assistants regarding the District's physical restraint and seclusion procedures, proper documentation, and incident debriefing.

24. District staff maintained records of the student's behavior, data on his progress towards the goals on his IEP, and a log of the dates and time he spent in the alternative room. Staff kept anecdotal notes of the student's behavior and activities during the time he spent in the alternative room, describing the student's inappropriate behavior and talk, sexualized language, crying, yelling, etc., and also describing circumstances when the student engaged in appropriate behavior. The alternative room log shows that the student was in the alternative room on the following dates, for the indicated length of time:

9/18/07	3 hours
10/11/07	1 hour, 30 minutes
10/15/07	4 hours (total, first for 1 hour, then 3 hours more)
10/17/07	5 hours, 10 minutes (total, two incidents)
10/18/07	6 hours, 30 minutes
10/19/07	6 hours, 30 minutes
10/22/07	6 hours, 15 minutes [left for appointment]
10/25/07	5 hours [suspended remainder of day]
10/26/07	suspended
10/29/07	4 hours, 30 minutes
11/01/07	1 hour
11/02/07	2 hours, 30 minutes
11/06/07	1 hour, 30 minutes
11/07/07	2 hours
11/08/07	2 hours, 15 minutes
11/09/07	1 hour, 15 minutes
11/13/07	1 hour
11/15/07	1 hour (two times, 30 minutes each)
11/16/07	1 hour
11/21/07	1 hour
11/26/07	4 hours
11/27/07	4 hours
11/28/07	2 hours (with notes that the parent picked him up early)
11/29/07	2 hours
11/30/07	suspended
12/04/07	6 hours
12/05/07	6 hours, 30 minutes

12/06/07	7 hours, 15 minutes (notes indicate staff could not get the student on the bus, and the parent was late picking him up)
12/07/07	suspended
12/10/07	3 hours
12/11/07	suspended

25. On October 19, 2007, District staff responded to this increase in negative behavior by initiating an October 24, 2007 meeting to review existing information about the student and decide whether additional testing was needed. The team, including the parent, met on October 24, 2007 and reviewed the student's file, reviewed previous evaluations, reviewed current data, and discussed current concerns including: lack of eye contact, getting "stuck" (inappropriate comments repeated over and over again), difficulty reading social cues, noise making, and sexual talk. The parent reported to the rest of the team that problems occurred at home, but not to the severity present at school. The team noted that the student was due for his three-year reevaluation that school year, and decided to complete the three-year evaluation early and also initiate an evaluation of the student to determine whether he was a child with autism spectrum disorder. The team determined that the additional assessments were needed to help the team to plan more effective interventions to support the student's program.
26. The District also sought and obtained from the parent written consent for its evaluation of the student. The prior written notice the District provided to the parent stated that the evaluation would include a file review, observations, standardized Asperger's diagnostic scale, standardized behavioral assessment, language sample, communication checklist, student interview, and hearing screening.
27. On October 25, 2007, the District suspended the student from school for one day (Friday, October 26, 2007) for disorderly and disruptive conduct, noting that the student was unable to follow the directions of several staff members, proceeded to use inappropriate language, and had to be physically restrained in the time-out room. The alternative room log shows that the student was in the time-out room for 5 hours, from 8:30 am to 1:30 pm, and was suspended for the remainder of that day. On November 29, 2007, the District suspended the student from school for one day (Friday, November 30, 2007) for making a number of physical and sexual threats toward staff members.
28. The parent asserts that she was not appropriately notified when her son was sent to the alternative room, and that she would have come to the school and picked him up rather than have him stay in the time-out room. The District did call the parent on Thursday, December 4, 2007 regarding concerns at school, and she picked him up early that day. The District asserts, however, that she was not required to take him from school early that day.
29. The speech-language pathologist conducted classroom observations of the student on December 4, 2007 and December 5, 2007 as part of the District's reevaluation. She made several notes concerning her observations of the student, his off-task behavior, inappropriate and nonsense talking, and uncooperative behavior. She

also made notes of the student's on-task behavior during a project making paper Santa's.

30. The school psychologist completed a psychoeducational evaluation report of the student dated December 6, 2007. Her report noted that the student was initially identified as eligible for special education services at the age of 2, due to qualifying scores in the areas of adaptive skills, and social/emotional skills. She noted that the student's Individual Family Service Plan from 10/2004 indicated the student had difficulties: following classroom routines, transitioning between activities, interacting appropriately with peers, effectively using social language with peers, and following rules in structured games. The school psychologist referenced previous evaluations of the student, medical diagnosis of the student as attention deficit hyperactive disorder, treatment with prescription medication, treatment for depression, anxiety, and a sleep disorder, diagnosis of Asperger's Disorder, and previous evaluation for autism.
31. The school psychologist's December 6, 2007 report included a description of her observation of the student in the classroom. She described observing the student working on a page of subtraction problems, having added the problems instead of subtracting them. She observed that when a staff member commented on this, the student ignored her, did not make eye contact, and began making inappropriate noises and rude comments directed at staff and other students, followed by laughter, although no one else in the classroom laughed and most of the students ignored his comments. The school psychologist reported that when the student's behavior became too disruptive for him to remain in the classroom, he was escorted to an alternative space where he would not disrupt the learning of his peers. The school psychologist reported that the student continued to make rude and sexual comments about staff in a sing-song manner, and began to spit. She reported that the student attempted to hit and grab staff while making rhyming sexual comments about them using a silly voice, and this behavior continued.
32. In her report, the school psychologist reviewed a number of factors indicative of Autism Spectrum Disorder (ASD), and her observations of the student in each area. Her December 6, 2007 report contained a summary noting that the student demonstrated behaviors characteristic of a child with ASD both in the school environment and at home, but that ASD did not seem to totally explain the student's behavioral difficulties within the school environment. The school psychologist noted that there appeared to be an emotional component to the student's behaviors, and reported that the student continued to be under the care of a Psychiatric Mental Health Nurse Practitioner who was in the process of further evaluating the student's psychiatric needs.
33. On December 6, 2007, the District suspended the student from school for one day (Friday, December 7, 2007) for grabbing a staff member inappropriately, threatening to kill the staff member, and threatening to touch other staff members.
34. On December 10, 2007, the District suspended the student from school for one and one-half days beginning on Monday, December 10, 2007, noting the student could

return on Wednesday, December 12, 2007. The student was suspended for not responding to the directions of staff members and continuing to attempt to touch staff members inappropriately and continuing to make threats of physical harm. On December 10, the District also provided the parent with notice of a December 12, 2007 meeting to review the results of the District's evaluation, and make a determination concerning the student's eligibility for services.

35. The speech-language pathologist completed her evaluation report on December 12, 2007, noting that her assessments of the student included: a conversational language sample, a teacher checklist, and two communication/behavior observations. The speech-language pathologist also noted that she attempted to observe the student on at least four other occasions, but behavioral issues made it difficult for her to observe him in the classroom setting. The speech-language pathologist wrote numerous comments concerning her observations of the student, and her assessments of him, concluding that the student demonstrated difficulty with communication and language use in a variety of areas. The speech-language pathologist also reported that the student's ongoing behavioral concerns made it difficult to sort out how much the student's behavior impacted his communication and social relationships.
36. The District held a meeting on December 12, 2007, and the team discussed the student's behavior outbursts, and reviewed a functional communication assessment by the speech-language pathologist. The team discussed their observations of the student's behavior, noting that the behavioral increase was gradual since the beginning of the school year, and that behavioral difficulties the student had on the bus the previous school year were now seen at school. Participants at the meeting included the parent, the special education facilitator, the special education teacher, the school psychologist, and the speech-language pathologist. The team reviewed the results of the District's evaluation of the student's eligibility for services as a child with autism spectrum disorder, and determined that the student was not eligible as a child with autism spectrum disorder, but remained eligible for services as a child with emotional disturbance. Notes from the meeting also indicate that, at the meeting, the parent reported that she did not think the increased behavior was the result of her son's medication.
37. Notes from the December 12, 2007 meeting state that staff discussed a reduced school day for the student, and related procedures such as revisions to the student's IEP, and the parent agreed to provide transportation home from school while transportation services were arranged. The notes also state that placement of the student at an outside agency operating an intensive service array program was discussed at the meeting and explained to the parent, and the parent signed consent for a referral to the intensive service array program at the meeting. The team completed an IEP cover sheet identifying the participants at the meeting, reduced the specially designed instruction in behavior from 30 minutes per day to 30 minutes per week, and removed the provision for 60 minutes per week of psychological services as a related service.

38. The special education facilitator had the special education teacher complete a program review summary to take before a District program review team for assistance in planning for the student. She received this program review summary on December 14, 2007 (just before the winter break), and the next available date to take the summary to the District's program review team was January 15, 2008. The District also submitted a referral to the outside agency seeking to determine the student's eligibility to enroll in the intensive service array program operated by the outside agency.
39. On December 14, 2007, the District provided the parent with prior written notice that it was changing the student's placement from the BLC program to a shortened school day (he arrived on the bus at 8:15 am and then caught the bus home at 11:15 am), noting that the student was not able to be successful for the entire school day, and his disruptive behaviors had increased in intensity and frequency. The notice stated that the team discussed outside placement in a day treatment center, and initiated the process of investigating a possible placement with a community mental health provider (referencing the intensive service array program).
40. District staff reports that, given the student's escalating behaviors, demonstrated lack of progress in the BLC program, and failure to respond to the interventions they had put into place, the team concluded that the BLC program was no longer an appropriate placement for the student, and a reduced school day was the best option for the student that was immediately available. Staff reports that the team considered placing the student on home instruction with a tutor pending availability of a suitable placement, but felt it was in the student's best interest to continue to go to school on a limited basis with a reduced school day. Staff also reports that the team did not consider placing the student in a full-day, separate day treatment program for children with behavioral needs because the District does not operate such a program. Rather, the District contracts for these services and refers students to the agencies operating such programs.
41. District staff reports that by the December meeting the team did not believe the student could tolerate a longer day at school, as shown by his stress level and continual behavioral outbursts, reflected in the behavior data and the amount of time the student was spending in the alternative room. Therefore, the District developed a plan for the student to receive services by himself in the cafeteria desk/cubicle space, continuing to utilize the time-out room/alternative room as necessary.
42. The special education teacher set up the student's part-day program, gathered second grade academic material for him, and worked to provide books and materials on subjects of interest to the student in order to engage him. Every morning she had an educational assistant meet the student as he arrived on his bus, made sure he received breakfast, and provided his materials for the day. The student worked by himself (with a one-one educational assistant) at the cubicle area in the cafeteria, under the direction and supervision of the special education teacher, and in accordance with instructional materials and schedule developed by the special education teacher. The special education teacher also worked directly with the student and rotated the staff that worked with him during the school day.

43. District behavior record notes indicate that the staff called the parent again on December 19, 2007, but do not indicate that the parent picked him up from school early.
44. The outside agency operating the intensive service array program conducted a screening of the student, reviewed the student's most recent mental health assessment and other information, and sent the District a December 31, 2007 letter stating it had determined that the student was not eligible for their program. The outside agency recommended that the student continue to receive the intensive outpatient treatment services he was already receiving.
45. The educational assistants who worked with the student provided the special education teacher with a daily log concerning the student's behavior and activities. The special education teacher checked with the student and his educational assistants every day, typically around 10:00 am. The special education teacher reports that the student's behavior calmed down, but the student did not want to return to the BLC class, and did not want to be around the other students. She noted that the student came into occasional contact with other children in the cafeteria, and his behaviors would manifest again when he saw them.
46. The staff that worked with the student in his half-day program continued to keep records concerning the student's daily behavior and activities. The staff no longer used the same point system for the student that was used in the BLC classroom, but kept anecdotal behavior notes and records. For example, the January 8, 2008 behavior notes indicate that the student worked in the cubicle area until 11 am, and then was placed in the alternative room due to loud, inappropriate talk. The January 14 notes indicate that the student had a "pretty good day" but a "rough start." The notes indicate that the teacher's plan of 10 minutes of work followed by 10 minutes of reading with an educational assistant worked well, but that the student was not willing to write or do any challenging work.
47. On January 15, 2008, the special education facilitator met with the District's program review team, shared the program review summary with the review team, and the team agreed to refer the student to the REACH intensive day treatment program. The special education facilitator contacted the parent concerning referring the student to the REACH program, and on January 18, 2008, the District's special education facilitator obtained a signed release from the parent, wrote a letter to the REACH day treatment program referring the student for consideration for placement, and hand-delivered the referral and release to the REACH program.
48. The District's placement of the student on a half-day program with services provided through the BLC (in the separate location in cafeteria) continued through April 17, 2008. Beginning January 7, 2008 the District provided additional educational assistant staffing to support the student, and continued trying to find and implement interventions to support his placement. The District notes that while the student spent most of his time during this period working one-on-one with a special education teacher or educational assistant in the workspace in the cafeteria (due to

the fact that his behavior was so disruptive and unsafe towards other students) he did have access to non-disabled peers within the library and cafeteria settings.

49. The parent contends that her son was completely isolated, and had no interaction with any other students. She does agree that a positive result of the half-day program was that her son was no longer spending time in the alternative room, as his behavior at school improved. However, the parent points to the District's statement in its response that her son "was welcome to participate in all the same extracurricular activities and events at the school as his same age general education peers (ie., after school clubs, etc.)" and disagrees, reporting that such participation was never discussed and her son did not have any further interaction with other children at school until he was placed in the REACH program. The parent asserts that, even after her son's behavior improved (which she reports was due to improvement in his medication regimen) staff did not try to return the student to the BLC. The parent also contends that District staff should have sought outside assistance and consultation from her son's psychiatric mental health nurse practitioner.
50. On March 5, 2008, the District completed a functional behavioral analysis (FBA) for the student. The report noted that the FBA reflected behaviors observed in the BLC classroom prior to the student being placed on a half-day placement with adult assistance throughout the morning. The report stated that, since the student was placed on his half-day placement he was removed from the classroom, and in a separate, less distracting environment. The report stated that the student's inappropriate behaviors decreased following these changes, and that the student's silly talk and noise making were at a lower frequency. The FBA described issues with the student's medication as a possible pre-set condition for various behaviors the student exhibited, as well as possible impacts such as autism spectrum disorder and psychiatric issues. The FBA described various behaviors of concern, frequency, pre-sets and setting events, and an hypothesis for the goal of the behavior.
51. The REACH accepted the student into their day treatment program in April. Immediately upon the student's acceptance into the REACH program, the District held an April 14, 2008 meeting and changed the student's placement to the REACH program. He started his placement in the REACH program on the partial-day schedule, with his District placement team determining that the length of his school day would be increased when he was able to tolerate a longer day. On May 5, 2008, the student's school day at REACH was increased to full day
52. The District also reviewed and revised the student's IEP at the April 14, 2008 meeting. The team revised the statement of the student's present levels of academic achievement and functional performance, noting that:

"[The student] works with a one-on-one assistant to stay focused on school work and to remain calm. He continues to spend his mornings, a half day schedule, in an area away from other students. He is on a work schedule where he works for 30 minutes before getting a 15-minute break when he can draw, read or work on word puzzles.

His difficulty in remaining calm around other students and not being disruptive in the classroom makes it difficult for [the student] to be included in classroom activities.”

53. The student's revised April 14, 2008 statement of present levels of academic achievement and functional performance noted that a functional behavioral analysis of the student indicated behaviors of concern were: noise making (including making vocal noises and baby talk), silly talk (including rhyming words based on the topic of interest on which he is stuck, and making silly, nonsensical comments), and negative, nonsensical comments directed at peers and/or staff. The statement noted on-task behavior of the student ranged from 70% to 20%, with an average of 40%, that the student followed directions in an appropriate manner on average about 50% of the time, and made almost daily sexualized and/or violent comments when he was in the classroom, with this behavior decreasing in frequency since being on half-days with one-on-one support.
54. The revised April 14, 2008 statement of the student's present levels of academic achievement and functional performance also noted that, prior to being placed on a half-day schedule, the student made threats to harm himself and others (using a silly, nonsensical manner) on approximately 2 days of every week, and these threats were numerous and continued until the student calmed down. The statement also noted that the student had made no verbal threats to cause harm since January. The statement described the student's inappropriate behaviors as “so significant that he requires a small setting with a high teacher to student ratio to be safe and to demonstrate growth academically and socially.”
55. The student's April 14, 2008 IEP provided him with 30 minutes per day of specially designed instruction in behavior, the same as provided by his June 8, 2007 IEP. The new IEP replaced the 60 minutes per week of psychological services that were provided as a related service with 30 minutes per week of individual training/counseling/consultation services, 90 minutes per week of group training/counseling/consultation services, and 60 minutes per week of family training/counseling/consultation services. The new IEP also changed the supplementary aids and services and modifications and accommodations to be provided for the student, to include a behavior change program throughout the day in a self-contained class, with structure and supports throughout his school day to help him be successful, and adult assistance during difficult times such as transitions and when he becomes frustrated. The IEP also provided for the student to receive access to behavior coaching as needed when experiencing behavioral difficulties/struggles in the educational environment as well as less structured settings such as recess. The student's April 14, 2008 IEP provided for the same two behavioral goals that were stated on his June 8, 2007 IEP, with the same short-term instructional objectives.
56. The student's April 14, 2008 IEP included a new nonparticipation justification statement, reporting that the student would be removed from participating with non-disabled children 100% of his day, and would receive his specially designed instruction within a self-contained program. The statement reported that the student required removal from general education 100% of the day due to his inappropriate

and unsafe behaviors, and because he required the support and structure provided in a self-contained program with a high staff-student ratio in order to function within the educational setting in a safe and appropriate manner.

57. The District has contacted the administration of the REACH program and discussed concerns regarding the lengthy intake process. However, the District does not operate the REACH program. The District did refer another child to the REACH program shortly before it referred the student, and the intake process for that child was completed before REACH would consider placement of the student in their program.
58. The parent reports that her son's placement at REACH has been successful, and wants him to continue in that program. The parent is not interested in seeking compensatory educational services for her son, or summer services, as she feels he needs a break over the summer and is receiving the services he needs through the REACH program.

Student Progress and Medication

59. The parent agrees with staff observations of her son's behavior escalating and becoming increasingly sexual, aggressive, and defiant, reaching extreme levels by mid-October. The parent reports, however, that she did not observe these behaviors from her son at home. The parent asserts that her son made no progress towards the goals and objectives on his IEP during the 2007-08 school year.
60. The parent contends that her son's behavior was directly attributable to problems with his medication. She asserts that her son was keeping medication administered at school in his mouth, not swallowing it, and spitting it out. The parent reports that she asked her son about his medication and he admitted to her that he spit it out. The parent is not sure why her son was spitting out his medication, but asserts that this had a very negative effect on his behavior at school, and District staff should have done a better job of ensuring that her son swallowed his medication. The parent reports that she discussed this issue with her son, started administering his medication at home beginning December 13, and saw an improvement in his behavior after that time. She contends, however, that her son's placement in the BLC had failed by the time his behavior improved, and he did not want to return.
61. District staff contend that they provided the student with his medication as directed, typically with something for him to eat, and had him open his mouth to verify he had swallowed it. District staff reported their observation that the student usually chewed his medicine before swallowing it. District staff agree that the student's behavior improved after his medication routine changed in December. The District also agrees that the student was not making expected progress towards his IEP behavioral goals.
62. The District maintained a log showing administration of the student's medication. The log notes the date and time the student was administered his medications, with staff initialing the record of each dose. Staff made notes near the end of October

when one of the student's medications was discontinued, and made a note on December 10, 2007 when the student refused to swallow his medication, and spit it out.

Disclosure of Information

63. On August 23, 2006 the parent provided a signed, written consent authorizing the release of confidential information concerning the student to District staff at the student's school by the community mental health agency that provided outside services to the student. On September 24, 2007, the parent provided the District with a signed, written consent authorizing the District to use and/or disclose educational and protected health information with the community mental health agency that provided outside services to the student. The parent provided additional signed written consents authorizing the District to use and/or disclose educational and protected health information with this community mental health agency on November 2, 2007 and again on December 5, 2007.
64. On January 9, 2008, the parent provided the community mental health agency that provided outside services to the student with a signed, written consent authorizing the release of confidential information concerning the student to District staff at the student's school. On January 18, 2008, the parent provided the District with a signed, written consent authorizing the District to use and/or disclose educational and protected health information with the REACH program.
65. District staff shared information concerning the student with the staff at the community mental health agency. The parent agrees that she provided the District with written authorization to do so. During the interview, the parent clarified that she was particularly unhappy regarding a telephone contact the school psychologist made with the student's psychiatric mental health nurse practitioner at the community mental health agency concerning her observations of the effectiveness of her son's medication. The parent agrees that the contact was authorized, but felt that she should have been included in the communication.

IV. DISCUSSION

In a complaint investigation, the Department looks at all the available information to determine whether a school district or other program has complied with the requirements of the IDEA. The Department will substantiate an allegation if the evidence supporting it is more persuasive than the evidence denying it. If the evidence on both sides is equally persuasive, the Department will not find a violation.

A. Placement in Least Restrictive Environment

Under the IDEA's least restrictive environment (LRE) rules, school districts must ensure that children with disabilities are educated with children who are not disabled "to the maximum extent appropriate". Children should be placed in special classes "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.”¹

The educational placement of a child with a disability must be determined by a group of persons that includes the parents, and other persons knowledgeable about the child, the meaning of evaluation data, and the placement options. School districts 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 of alternative placement must include: instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.² School districts must ensure that these alternative placements are available to the extent necessary to implement the IEP for each child with a disability.³

The placement determination must be based on the child’s IEP, which must include a statement of the special education services, related services, accommodations and supports that a child needs. For a child whose behavior impedes the child’s learning or that of others, the IEP team must also consider the use of positive behavioral interventions and supports, and other strategies to address that behavior.⁴ If a child’s IEP team determines that the child needs a particular device or service (including an intervention, accommodation, or other program modification) for the child to receive free appropriate public education, the IEP team must include a statement to that effect in the child’s IEP.⁵

Under the standard adopted by the Ninth Circuit in Sacramento Unified School Dist. v. Holland, 4 F.3d 1398, 20 IDELR 812 (1994), four factors are considered in determining whether a child can be appropriately educated in the regular classroom: (1) the educational benefits to the child (when the regular classroom instruction is supplemented with appropriate aids and services); (2) the non-academic benefits to the child; (3) the effect of the child’s placement on the teacher and other students in the regular classroom; and (4) cost. It is also appropriate to consider the disruptive effect of the child’s behavior on other children in the classroom and the teacher.⁶ If a school district proposes to provide home instruction to a child with a disability, the home program must be appropriate to the unique educational needs of the child.⁷ In a complaint alleging that a school district has not provided an appropriate placement in the least restrictive environment, the Department must determine whether the district has followed the proper procedures and made a determination that is reasonably based on student specific information.⁸

¹ OAR 581-015-2240.

² OAR 581-015-2245.

³ OAR 581-015-2250(2).

⁴ OAR 581-015-2205(3).

⁵ OAR 581-015-2205.

⁶ See, e.g. Seattle School District No. 1 v. B.S., 24 IDELR 68 (9th Cir. 1996); Clyde K. v. Puyallup School District, 21 IDELR 664 (9th Cir. 1994).

⁷ OAR 581-015-0015(3)(b).

⁸ Memorandum 00-20 (OSEP, July 17, 2000) (A state education agency (SEA) “resolves a complaint challenging the appropriateness of a public agency’s determination regarding a child’s educational program or placement by determining not only whether the public agency has followed the required procedures to reach that determination, but also whether the public agency has reached a decision that is consistent with Part B requirements in light of the individual child’s abilities and needs. . . . The SEA may

School districts must provide the special education and related services listed on the IEP and must make a good faith effort to assist the child to achieve the goals and short-term objectives listed in the IEP.⁹ School districts must then timely reconvene IEP teams to review and revise a child's IEP to address any lack of expected progress towards the annual goals.¹⁰

1. Placement Consistent With IEP

The parent alleged that the District did not provide an appropriate placement for her son in the least restrictive environment, consistent with her son's IEP. In September 2007, the student returned to the BLC program consistent with his June 2007 IEP and related placement determination. By October, the student's behavior within that placement had escalated and he was spending increasing amounts of time in the alternative room. District staff responded in several ways: convening an October 24 meeting, reviewing data, and initiating an evaluation of the student. In December, the District convened another meeting, reviewed the results of the evaluation, and initiated action to locate a full-time day treatment program to meet the student's needs. Pending locating such a placement, the District revised the student's IEP and changed his placement, developing a half-day program for the student in the cafeteria.

The Department concludes that the half-day placement in the cafeteria was not consistent with the student's individual needs. The student-specific data reviewed by the team, including his escalating behavior and failure to respond to the interventions put into place, led the team to conclude that the BLC program was no longer an appropriate placement for the student. The team considered home instruction with a tutor, and considered a reduced school day in the cafeteria, because these were the only suitable placement options that were immediately available. The team did not change the student's placement to a separate school providing the high structure and intensive behavioral services the student needed because the District does not operate such a program. Rather, the District must refer students who require such services to an outside day treatment program, and wait for the outside program's response. The District referred the student to the outside agency operating the intensive service array program, and initiated a program review to take to the District's review team for consideration for the REACH program. Ultimately, in April, the REACH program accepted the student (and his placement was changed), and shortly thereafter the student was attending a full-day program in the REACH day treatment center.

The Department finds persuasive evidence that the decision made by the District to place the student on a reduced school day in the cafeteria with adult assistance was made due to the unavailability of a suitable placement for the student, rather than student-specific data with

likely find that the public agency has complied with Part B requirements if the agency has followed required procedures, applied required standards, and reached a determination that is reasonably supported by the student-specific data Although decisions of the IEP team cannot be overturned by the SEA, the SEA can, on a case-by-case basis, if it concludes that what has been offered does not meet the definition of FAPE, order the IEP team to meet to determine FAPE for the child. In addition, parents always have the right to challenge the IEP team's decision by filing for a due process hearing and may seek to resolve their disputes through mediation.")

⁹ OAR 581-015-2220.

¹⁰ OAR 581-015-2225.

respect to the individual needs of the student, pending his acceptance into the REACH program. *See Corrective Action.*

2. Shortened School Day

The parent alleged that the District's placement in a half-day program from January 2008 through April 2008 did not meet her son's educational need for a full-day program. As discussed above, the Department concluded that the District's half-day placement for the student from January through April 2008 was selected due to the unavailability of a suitable placement to meet his needs.

The facts also show, however, that District staff worked to develop a program to keep the student engaged in school pending availability of a suitable placement. There is strong evidence to support the conclusion that by December the student was only able to tolerate a half-day of school in the cafeteria, lacking availability of the highly structured behavioral program with the services and supports the student required. The Department commends District staff for making the choice to better serve the student's interests in a half-day program developed especially for him rather than the home placement with tutoring that was also considered. By doing so, the District maximized the educational and non-educational benefits to the student, taking into consideration the fact that the student could no longer remain in the BLC program due to the effect of his disruptive behavior on the other children and the special education teacher, committing the resources and absorbing the cost of the additional educational assistant needed to support the half-day program. However, as discussed above, the half-day program in the cafeteria was an interim, temporary placement for the student pending his acceptance into the REACH program. *See Corrective Action.*

3. Participation With Non-Disabled Children

The parent alleged that the District did not provide opportunities for her son to participate with non-disabled children in extracurricular services and activities to the maximum extent appropriate. The evidence here, however, shows that the District appropriately considered the behavior of the student, including the fact that he could no longer remain in the BLC program due to the effect of his disruptive behavior on the other children and the special education teacher, in restricting his opportunities to participate with either non-disabled or disabled children in extracurricular services and activities. The facts show that even after the student's placement on the half-day program in the cafeteria his disruptive behavior would manifest again when he came into contact with other students. The Department does not find persuasive evidence that the District should have provided additional opportunities for the student to participate with other children in extracurricular services and activities.

B. Specially Designed Instruction (Qualified Staff)

In Oregon, a child with disabilities may receive special education services directly from a special education teacher or under a consultative model where the special education teacher consults with the regular education teacher or other school staff, and the regular education teacher or other school staff provides the instruction to the child. When a

child participates in a regular education class and receives special education instruction from someone other than a licensed special education teacher, the special education teacher must consult with the school staff to assist with the design and implementation of the child's special education program and to ensure that the child is making progress on the goals and objectives on the child's IEP. In the absence of this, the child is not receiving special education services by qualified personnel.¹¹

The IDEA Amendments of 1997 provide that paraprofessionals and assistants "who are appropriately trained and supervised, in accordance with State law, regulations, or written policy . . . [may] be used to assist in the provision of special education and related services to children with disabilities . . ."¹²

The relevant State regulations provide:

Assignment and Direction and Supervision of Educational Assistants

- (1) The assistant shall assist a teacher only in a supportive capacity. The role of the educational assistant is adaptable to many support tasks, and nothing in these rules should be interpreted as limiting assistants only to the performance of classroom duties. Educational assistant tasks may include:
 - (a) Instructional assistant support – Tasks performed by assistants to supplement students' basic instruction by offering students opportunities to practice and apply what they have learned: . .
- (2) Any assistant assigned to instruction-related activities shall work under the direction of the teacher assigned to that instructional station.
- (3) A plan of supervision for the assistant shall provide for:
 - (a) Access to assistance and consultation; and
 - (b) Regular monitoring of the assistant's performance to determine effectiveness of the assigned tasks and the effect on students."
OAR 581-037-0015.

Thus, the IDEA permits the use of paraprofessionals to "assist" with the delivery of special education or related services, and state law clarifies that an educational assistant may provide instruction "only in a supportive capacity."

The parent alleged that her son did not receive his special education services from a qualified teacher from January 2008 through April 2008. The student was removed from the District's BLC classroom in December 2007 and placed in the cafeteria where he received a half-day program with adult assistance and supervision, typically provided by education assistants. The student's special education teacher gathered materials for the student, generally seeking out materials of interest to him, and provided regular second grade academic materials. The special

¹¹ See D.P. and South Lane School District, ODE Complaint No. 96-010-03 (May 9, 1996).

¹² 20 USC § 1412(a)(15)(B)(3).

education teacher provided regular monitoring of the student and educational assistants, developed and implemented a schedule for the student, developed a daily log for the educational assistants to use in reporting the student's daily behavior and activities, physically checked in with them every day at about 10:00 am, and worked directly with the student.

The Department finds that the model for delivering services to the student developed and implemented by the District for the half-day program he was placed in from January 2008 through April 2008 falls within the model for assignment, direction, and supervision of educational assistants. Here, the educational assistants who worked with the student did so under the direction and supervision of the special education teacher, using materials gathered and introduced by the special education teacher, under a plan of supervision developed by the special education teacher that provided for regular monitoring and consultation. The educational assistants provided feedback to the special education teacher, gathering data and reporting to the special education teacher concerning the student's behavior and progress. Therefore, the Department does not find persuasive evidence to conclude that the student was not receiving his educational services from a certified teacher.

C. Implementation of IEP

The parent made several allegations with respect to implementation of her son's IEP, specifically alleging that provisions for services in the areas of social skills, behavioral skills, and academic services were not fully implemented. The District disputed these allegations, asserting that all services required by the student's IEP were provided. The District agrees that the student's June 2007 IEP contained provisions for specially designed instruction in social skills and behavior, noting that the goals for these services were both listed as "behavior" on the IEP, but points out that the student's IEP did not provide for specially designed instruction in academics.

The special education teacher provided the student with 30 minutes per day of specially designed instruction in behavior within the BLC program, including instruction to address social and behavioral skills, using curriculum from behavior programs and a variety of instructional techniques, gathering data and measuring progress, consistent with the student's June 2007 IEP. It is apparent, however, that the student missed a significant amount of the instruction related to these services due to the numerous times he was removed from the BLC classroom and secluded in the alternative room. The missed services were more than *de minimus* as the student on several occasions spent substantially his entire school day secluded in the alternative room. Under the standard adopted by the Ninth Circuit in Van Duyn v. Baker School District, Case No. 05-35181 (9 Cir. April 3, 2007), it is necessary to determine whether there was a material failure to implement these services. A material failure occurs when there is more than a minor discrepancy between the services provided to an eligible child, and the services required by the child's IEP.¹³ In *Van Duyn*, the Court provided some guidance on this issue, stating that an eligible child's educational progress, or lack of it, may be probative of whether there has been a material failure to implement required services.¹⁴

¹³ See, *Van Duyn v. Baker School District*, Case No. 05-35181 (9 Cir. April 3, 2007)

¹⁴ See, *Van Duyn v. Baker School District*, Case No. 05-35181 (9 Cir. April 3, 2007)

The Department agrees with the District's assertion that the student's IEP did not require specially designed instruction in academics, but finds persuasive evidence to support the parent's allegation that her son's IEP was not fully implemented based on these factors: 1. The student was not provided with services implementing the specially designed instruction in behavior and social skills while in the alternative room; 2. The student was secluded in the alternative room on numerous occasions, and removed from the BLC program on several occasions for substantially his entire school day; and 3. The student did not make progress towards the goals on his IEP.

Although the student's IEP was revised December 2007 to reduce these services to 30 minutes per week, the student did not return to the BLC classroom to participate in the social and behavioral skills direct instruction the special education teacher provided in that setting. The goals for these services were related to the student exhibiting appropriate classroom behavior, and appropriate interactions with peers and adults in structured and unstructured settings. The objectives related to these goals specifically looked to the student's participation in group activities, and settings requiring interaction with peers. The special education teacher was unable to provide the 30 minutes per week of specially designed instruction in behavior and social skills, because the student would not return to the BLC program even for this amount of time. The Department finds persuasive evidence that the District continued to not fully implement the student's IEP with respect to these behavioral services. See *Corrective Action*.

D. Medication

The parent alleged that District staff did not properly administer her son's medication. The District kept a log showing the dates and times staff administered the student's medication to him. District staff described providing the student with something to eat with his medication, watching him chew his medication before swallowing it, and having him open his mouth to verify he swallowed it. Staff also made a note concerning the December 10 incident when the student spit out his medicine. The Department does not find persuasive evidence to support the allegation that the District did not properly administer the student's medication.

E. Disclosure of Information

State and federal laws require school districts to protect the confidentiality of any record maintained on a child with a disability in conformance with OAR 581-021-0220 through OAR 581-021-0430.¹⁵ The parent must provide a signed and dated written consent before a school district discloses personally identifiable information from a child's education records, except as provided in OAR 581-021-0340.¹⁶

The parent alleged that District staff contacted her son's physician to discuss his medication without her knowledge or consent. However, the parent provided signed and dated written consents between the District and her son's mental health provider to share

¹⁵ OAR 581-021-0250.

¹⁶ OAR 581-021-0330 (1) (these exceptions generally deal with disclosure to individuals and entities with a legitimate academic, governmental or judicial purpose in receiving the information, or disclosure to the student's parent or guardian).

personally identifiable and confidential information and records concerning the student, and this consent was renewed and remained in effect during the 2007-08 school year. The parent clarified in her interview that while she agrees that she provided consent for the contact between District staff and her son's psychiatric mental health nurse practitioner, she felt she should have been included in the communication. The Department concludes that the disclosure was authorized; therefore, there is not substantial evidence to support this allegation.

F. Physical Restraint and Seclusion

The IDEA requires that an IEP team must consider additional special factors when developing, reviewing and revising an IEP for a child whose behavior impedes the student's learning or that of others. Specifically, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior.¹⁷ If in considering these special factors the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) for the child to receive free appropriate education, the IEP team must include a statement to that effect in the child's IEP.¹⁸ Oregon law provides for specific requirements with respect to a school district's use of physical restraint and seclusion with children.¹⁹ "Seclusion" means the involuntary confinement of a child alone in a room from which the child is prevented from leaving.²⁰ Effective September 1, 2007, all school districts in Oregon must have written policies and procedures on the use of physical restraint and seclusion. These policies and procedures must include, at a minimum, provisions requiring that:²¹

- (a) Physical restraint or seclusion be used with a student only: (A) As part of a behavior support plan when other less restrictive interventions would not be effective and the student's behavior poses a threat of imminent, serious, physical harm to the student or others; or (B) In an emergency by a school administrator, teacher, school employee, or volunteer as necessary to maintain order or to prevent a student from harming him/herself, other students, and school staff or property in accordance with OAR 581-021-0061(2).
- (b) The use of physical restraint and/or seclusion only for as long as the student's behavior poses a threat of imminent, serious physical harm to the student or others;
- (c) Any room used for seclusion of a student must allow staff full view of the student in all areas of the room, and be free of potentially hazardous conditions such as unprotected light fixtures and electrical outlets;
- (d) A provision that staff will continuously monitor a student's status during physical restraint and/or seclusion;

¹⁷ OAR 581-015-2205(3)(a)

¹⁸ OAR 581-015-2205(4).

¹⁹ OAR 581-021-0062(2).

²⁰ OAR 581-021-0062(1)(b). "Seclusion" does not include "time out" as defined by OAR 581-021-0062(1)(c) to mean: "removing a student for a short time to provide the student with an opportunity to regain self-control, in a setting from which the student is not physically prevented from leaving."

²¹ OAR 581-021-0062(2).

- (e) Identification of the training program(s) or system(s) of physical restraints and seclusion selected for use in the district, which must include behavior support, prevention, de-escalation, and crisis response techniques;
- (f) A provision that only staff who are current in the required training in accordance with the training program selected under (e) will implement physical restraint or seclusion with a student except as described in OAR 581-021-0061(2);
- (g) Verbal or written notification of parents or guardians following the use of physical restraint or seclusion by the end of the day the incident occurred;
- (h) Within two school days of use of physical restraint or seclusion, a documented debriefing by appropriate staff, including staff involved in the restraint or seclusion;
- (i) Documentation requirements for the use of any physical restraint and seclusion that meets the definitions in subsection (1), including: (A) Name of the student; (B) Name of staff member(s) administering the physical restraint or seclusion; (C) Date of the restraint or seclusion, and the time the restraint or seclusion began and ended; (D) Location of the restraint or seclusion; (E) A description of the restraint or seclusion; (F) A description of the student's activity immediately preceding the behavior that prompted the use of restraint or seclusion; (G) A description of the behavior that prompted the use of restraint or seclusion; (H) Efforts to deescalate the situation and alternatives to restraint or seclusion that were attempted; (I) Information documenting parent contact and notification; and (J) A summary of the debriefing in section (h).
- (j) A documented process for annual review of the use of physical restraint and seclusion in the district to ensure that restraint and seclusion are used in accordance with the district's policies and procedure; and
- (k) A procedure for receiving and investigating complaints regarding restraint and seclusion practices which may be the same as in OAR 581-022-1940. This does not preclude complaints under other applicable provisions.

The District has a policy consistent with the regulations concerning the use of restraint and seclusion. District staff kept records concerning the dates and times that the student was placed in the alternative room (seclusion room), but did not follow the District's guidelines for documentation of the use of the seclusion room. The District agreed that staff did not follow District policy with respect to physical restraint and seclusion of the student, and proposed corrective action to address this issue. The Department notes that the parent asserted she was not informed concerning the extent that her son was secluded in the alternative room, contending that she would have picked him up from school had she known. The Department also notes that these removals contributed to a material failure to implement services the student required, and contributed to violations of regulations concerning discipline. See *Corrective Action*.

G. Discipline

School districts may suspend children with disabilities from their current educational placement for up to ten school days in a school year to the same extent, and with the same notice, as for children without disabilities.²² "Suspension" means any disciplinary

²² OAR 581-015-2405(1).

removal other than expulsion.²³ The Department counts suspensions of a half day or less as a half-day, and suspensions of more than a half-day as a whole day.²⁴

"Disciplinary removal" means suspension, expulsion, or other removal from school for disciplinary reasons, including removals for mental health examinations for students who threaten violence or harm in public schools under ORS 339.250(4)(b)(C). It does not include:²⁵

- (a) Removals by other agencies;
- (b) Removals for public health reasons (e.g. head lice, immunizations, communicable diseases, etc.);
- (c) In-school suspensions if the child continues to have access to the general curriculum and to special education and related services as described in the child's IEP, and continues to participate with nondisabled children to the extent they would in their current placement; or
- (d) Bus suspensions, unless the student's IEP includes transportation as a related service, the district makes no alternative transportation arrangements for the student, and the student does not attend school as a result of the bus suspension.

School districts may suspend children from their current educational placement for additional periods of up to ten school days in a school year to the same extent, and with the same notice, as for children without disabilities, if the removals do not constitute a pattern of removals.²⁶ In determining whether removals of more than 10 school days constitute a pattern of removals, the following factors must be considered: (a) whether the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; (b) the length of each removal; (c) the total time of removals; and (d) the proximity of the removals to one another.²⁷ Further, for children suspended for additional periods, school districts must provide services necessary to enable the child to appropriately progress in the general curriculum and to appropriately advance toward achieving the goals in the child's IEP.²⁸

A school district's disciplinary action in suspending a child from school is considered a change in educational placement if a child is suspended from his or her educational placement for more than 10 cumulative school days in a school year, and the removals constitute a "pattern" of removal.²⁹ In such cases school districts are required to immediately schedule an IEP meeting, provide the child's parents with notice of disciplinary action, together with notice of procedural safeguards,³⁰ and, within 10 school days, determine whether the child's behavior is a manifestation of the child's

²³ OAR 581-015-2400(5).

²⁴ OAR 581-015-2405(3).

²⁵ OAR 581-015-2400(3).

²⁶ OAR 581-015-2410(1). For additional requirements, see OAR 581-015-2415.

²⁷ OAR 581-015-2410(2).

²⁸ OAR 581-015-2410(3).

²⁹ OAR 581-015-2415(1).

³⁰ OAR 581-021-0065(1); OAR 581-015-2415(5)(b)

disability in accordance with OAR 581-015-2420.³¹ Further, if the child's behavior is determined to be a manifestation of his or her disability, the school district must conduct a functional behavior assessment, develop, review and modify (as necessary) a child's behavioral intervention plan, and review (and revise as appropriate) the child's IEP and placement.³² If the team determines that the child's behavior is a manifestation of the student's disability, then the school district cannot proceed with the disciplinary action unless: 1) The parent and school district agree to a change in placement; 2) the removal is to an interim alternative placement for a weapons or drug violation, or for infliction of serious bodily injury; or 3) the school district obtains an order from an administrative law judge.³³

As discussed above, the student did not receive the special education and related services described by his IEP when he was secluded in the alternative room. Thus, these removals must be considered suspensions within the meaning of these regulations. The Department recognizes that use of the alternative room for seclusion was described in the student's behavior plan. However, removal of a child from his or her educational program must be counted as a disciplinary suspension unless the child continues to have access to the general curriculum and to special education and related services as described in the child's IEP, and continues to participate with non-disabled children to the extent described by the child's current placement. Counting days the student was suspended from school or secluded in the alternative room for 4 or more hours (more than half his school day, and thus counted as a day of suspension), by November 27 the student was suspended from his educational program for 10 school days. The District violated regulations with respect to disciplinary removals of the student by continuing to suspend him from school, and continuing to remove him from his educational program and seclude him in the alternative room, without determining whether these further removals constituted a pattern of removals, or taking any of the other action required with respect to further disciplinary removals.

A review of the facts concerning the student's behavior (substantially similar behavior of the student resulted in his being secluded in the alternative room); length of each removal (10 separate days of removal exceeding 4 hours by November 27, 9 separate days of removal 3 hours or less by November 27, subsequent removals of substantially the entire school day); the total time of removals (approximately 80 hours by November 27); the proximity of the removals to one another (the referenced removals occurred substantially within a 6 week period), leads the Department to conclude that these removals constituted a "pattern" of removal. Therefore, the Department concludes that the District should have followed required procedures regarding disciplinary removal of the student from his educational placement that constituted a pattern of removals.

The District did hold a December 12 IEP meeting to review the results of its evaluation, reviewed and revised the student's IEP, and changed his placement to half-days pending availability of a program to meet the student's needs. However, the team did not make a determination whether the student's behavior was a manifestation of his

³¹ OAR 581-015-2415(3).

³² OAR 581-015-2415(5)(b).

³³ OAR 581-015-2415(4)

disability, or conduct a functional behavioral assessment, and did not review or revise a behavioral intervention plan for the student.

The parent's specific complaint concerned staff calling her 2-3 days per week beginning in mid-October and requiring her to remove her son from school, and suspending him from school on Fridays. The District disputed the allegation, pointing to records that the parent was called in December 4, 2007 and December 19, 2007, and came and picked him up on December 4, but was not required to do so. The District agrees that it suspended the student from school on three Fridays: October 26, November 30, and December 7, and again on Monday, December 10 for one and one-half days. The Department's investigation, however, found that although the District was not requiring the parent to pick her son up at school 2-3 days per week, the District was suspending the student by removing him from his educational placement and secluding him in the alternative room.

The Department concludes that the District erred by not counting the days and half-days the student was secluded in the alternative room without access to the special education and related services described in the student's IEP as suspensions, and taking appropriate action. *See Correction Action.*

H. Review and Revision of IEP

The parent alleged that the District should have considered revising her son's IEP to address his lack of expected progress. The District agrees with the parent's assertion that the student was not making expected progress. Staff noted that the student's behavior was escalating, and the student's behavior in the BLC program was so disruptive that he was removed to the alternative room for increasing amounts of time. By October 2007, staff began to suspect that the student required more intensive structure than was available for the student in the BLC program, as his behavior continued to escalate, he failed to respond to behavioral interventions, and his behavior was disrupting the educational services to the other student's in the BLC program.

The District responded by holding an IEP meeting, initiating an early reevaluation of the student, and initiating an evaluation of the student in the area of autism spectrum disorder. All of these actions were necessary and appropriate steps to take in responding to the student's behavior. The District completed its evaluation in December, held the December 12, 2007 IEP meeting and, among other things, reviewed and revised the student's IEP. Here, the Department notes that the revisions to the student's IEP and program reduced his school day, reduced the amount of services he received, and changed his placement, without revising the student's social or behavior goals, or his behavioral plan. Clearly, the team continued to believe the social and behavioral goals remained appropriate for the student's needs, and it was the issue of the student's placement that needed to be addressed. Ultimately, these same goals remained with the student's IEP when it was again revised in April 2008 at the time he was placed in the REACH program.

However, as discussed above, the District erred by not correctly counting the removals and scheduling an IEP meeting immediately following the 10th day of removal

(November 27), and making a determination concerning whether the student's behavior was a manifestation of his disability. The District also should have conducted a functional behavioral assessment, and reviewed and modified (as necessary) the student's behavioral intervention plan, and reviewed (and revised as appropriate) the student's IEP and placement. Here, the Department notes that the student's IEP included a behavior plan descriptive of the behavioral interventions in place within the BLC classroom. However, the behavior plan did not include specific interventions to address this student's identified behavior, and the evidence suggests that the student was not interested in the positive behavioral interventions it described (point system/token economy). The District should have considered revisions to the student's behavior plan, based on a functional behavioral assessment, to address the behavior resulting in the disciplinary removals, and to address the student's lack of progress.

I. Behavior

The parent alleged that the District did not conduct a functional behavior assessment or consider revising her son's behavior plan to address her son's behavior. The District did in fact conduct a functional behavioral assessment in March 2008. However, as discussed above, the Department found that the District should have scheduled an IEP meeting following its November 27, 2007 seclusion of the student in the alternative room, to determine whether the child's behavior is a manifestation of the child's disability and, among other things, either conducted a functional behavioral assessment or reviewed the student's behavior plan and modified it, as necessary, to address the student's current behavioral concerns.

J. Corrective Action/Compensatory Services

Under OAR 581-015-0054, if the Department finds a violation of the IDEA, the written decision must include "any necessary corrective action to be undertaken as well as any documentation to be supplied by any party to ensure that the corrective action has occurred." If the Department finds persuasive evidence that a violation resulted in the lack of appropriate services to the student, the final order must address "how to remediate the failure to provide those services, including, as appropriate, compensatory education, monetary reimbursement or other corrective action appropriate to the needs of the child"; and "appropriate future provision of services for all children with disabilities."³⁴ Compensatory education is an equitable remedy, and the Department may consider other factors in determining the amount of compensatory education services necessary in a particular situation. The IDEA does not require an hour for hour approach in determining the amount of compensatory education services to be provided.³⁵ Here, the District provided what amounted to a half-day tutoring program that his IEP team determined was the maximum amount of services he was able to tolerate pending availability of an appropriate placement for him (ultimately the REACH program). These services were provided in lieu of an appropriate placement, were essentially compensatory education services provided for lack of an appropriate placement, and were selected over the only other alternative the IEP team had

³⁴ OAR 581-015-2030.

³⁵ See, e.g. *Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489 (9 Cir. 1994).

available: home instruction. The parent reports that her son is making satisfactory progress in his REACH placement, and is not interested in compensatory education services. Under these circumstances, the Department accepts the half-day tutoring program the District already provided for the student as appropriate compensatory education services, and focuses corrective action on ensuring appropriate future provision of services for children with disabilities.

The District proposed the following corrective action to address the issues in this complaint:

1. By October 31, 2008, provide a copy of the District’s Physical Restraint and Seclusion Frequently Asked Questions (FAQ), along with a copy of the “Seclusion Incident Report” and “Seclusion Incident Debriefing Notes” forms to all District Behavior Learning Center teachers.
2. By October 31, 2008, provide training to all Behavior Learning Center teachers and Instructional Assistants working in programs which implement the use of a seclusion room, regarding:
 - a. The District’s Physical Restraint and Seclusion procedures,
 - b. Proper documentation, and
 - c. Incident reporting

V. CORRECTIVE ACTION³⁶

In the Matter of Beaverton School District No. 48J
Case No. 08-054-024

#	Action Required	Submissions ³⁷	Due Date
1.	<p><u>Review and Revision of District Procedures</u></p> <p>Consistent with its proposed corrective action, the District shall review, and revise as appropriate, its Physical Restraint and Seclusion Frequently Asked Questions (FAQ). This review and revision includes, but is not limited to, a Q and A concerning when seclusion of a student is considered a disciplinary removal, consistent with the discussion in this order.</p> <p><i>The Department will approve/disapprove the</i></p>	<p>Submit to the Department a copy of the FAQ showing the revisions, including applicable forms and documents referenced within the FAQ.</p>	<p>October 31, 2008</p>

³⁶ The Department’s order shall include corrective action. Any documentation or response will be verified to ensure that corrective action has occurred.. OAR 581-015-2030 (13). The Department requires timely completion. 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).

³⁷ Corrective action and related documentation as well as any questions about this corrective action should be directed to Rae Ann Ray, Oregon Department of Education, 255 Capitol St. NE, Salem, Oregon 97310-0203; telephone – (503) 947-5722; e-mail: raeann.ray@state.or.us; fax number (503) 378-5156.

#	Action Required	Submissions ³⁷	Due Date
	<i>revisions and notify the District by November 10, 2008.</i>		
2.	<p><u>Training and Information</u></p> <p>a. Distribute by email or other means a redacted copy of the Final Order in Case No. 08-054-024 to all administrators of schools where there is a seclusion room, such as the alternative room used by the Behavior Learning Center (BLC) program, and to administrators overseeing discipline of children with disabilities and a memo explaining the Final Order.</p> <p>b. Consistent with its proposed correction action, the District shall provide training to all Behavior Learning Center teachers and Instructional Assistants working in programs which implement the use of a seclusion room, regarding:</p> <ol style="list-style-type: none"> 1. The District's Physical Restraint and Seclusion procedures, 2. Proper documentation, and 3. Incident reporting and 4. Removal and suspension requirements for students with disabilities <p>c. Following the approval of the District's FAQ by the Department and consistent with its proposed corrective action, the District shall provide a copy of the District's updated Physical Restraint and Seclusion Frequently Asked Questions (FAQ), along with a copy of the "Seclusion Incident Report" and "Seclusion Incident Debriefing Notes" forms to all District Behavior Learning Center teachers. The Department also requires that this information be provided to all administrators of schools where there is a seclusion room, such as the alternative room used by the BLC program, and to administrators overseeing discipline of children with disabilities.</p>	<p>a. Submit to the Department evidence of completion, such as a copy of the distribution list to the Department³⁸.</p> <p>b. Submit to the Department evidence of completion, including agenda, copy of training materials and sign-in sheet.</p> <p>c. Submit to the Department evidence of completion, such as a copy of the distribution list to the Department.</p>	<p>November 1, 2008</p> <p>November 27, 2008</p> <p>December 15, 2008</p>
3.	<p><u>Location Options - Day Treatment Center:</u></p> <p>The District shall:</p>	The District shall notify	December 15,

³⁸ See Corrective Action #1

#	Action Required	Submissions ³⁷	Due Date
	<p>a. Identify at least one other potential location for intensive day treatment services as an alternative to the REACH program OR b. Identify a process for dealing with situations such as the one described in this order when local day treatment services are unavailable.</p>	<p>the Department in writing that it has completed this action by submitting either:</p> <p>a. the name/address of a potential alternative to the REACH program OR b. the process the District will use in similar situations to identify day treatment placements when local services are unavailable.</p>	<p>2008</p>

Dated: October 1, 2008

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

Mailing date: October 1, 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.