

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Gladstone School District)
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FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 08-054-043

I. BACKGROUND

On December 3, 2008, the Oregon Department of Education (Department) received a letter of complaint from the parents of a child residing in and attending school in the Gladstone School District (District) alleging violations of the Individuals with Disabilities Education Act (IDEA). The parents requested that the Department conduct a special education complaint investigation under OAR 581-054-2030.

On December 5, 2008, the Department sent a *Request for Response* (RFR) to the District identifying the specific allegations in the complaint to be investigated with a Response due date of December 19, 2009. The District requested, and was granted, an extension to submit its Response.¹ The District submitted its extended timely *Response* to the Department and to the parents on January 5, 2009. The District’s Response included two pages of narrative explanation and an additional 112 pages of documents and exhibits requested in the RFR.

The Department’s complaint investigator determined that on-site interviews were necessary. On January 21 and 22, 2009, the Department’s investigator interviewed the parents and the child; a District principal; a District vice-principal; the District’s case manager for the student; the student’s special education teacher; the student’s general education teacher; an instructional assistant associated with the student; a District school psychologist and the District’s Director of Special Services/Special Education. The Department’s complaint investigator reviewed and considered all of these documents, interviews, and exhibits. Before the Department issues findings of facts or conclusions of law in this case, the District indicated that it did not contest the allegation regarding the placement of the student and proposed a course of corrective action.

Under federal and state law, the Department must investigate written complaints that allege IDEA violations within the twelve months prior to the Department’s receipt of the complaint and issue a final order within 60 days of receiving the complaint unless exceptional circumstances require an extension.² This order is timely.

¹ Due to school closures resulting from to inclement weather and staff unavailability during the regularly scheduled winter break, the Department granted the District’s request for an extension for nineteen days.

² OAR 581-015-2030(12)

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under 34 CFR §§ 300.151-153 and OAR 581-015-2030. The parent's allegations and the Department's conclusions are set out in the chart below. These conclusions are based on the Findings of Fact (Section III) and the Discussion (Section IV). This complaint covers the one year period from December 4, 2007 to the filing of this complaint on December 3, 2008.³

	Allegations	Conclusions
1.	<p><u>IEP Implementation:</u></p> <p>Not fully implementing the student's IEP Safety Plan and modifications and accommodations of access to instructional assistants. Specifically, the parents allege that on November 25, 2008, while on a bus in preparation for a field trip, the student was sent to the office to accomplish a task without adult assistance, resulting in a behavioral incident. When the student's behavior escalated, the student's Safety Plan was not followed.</p>	<p>Not Substantiated.</p> <p>The student's IEP, including the Safety Plan, was implemented as written. Specifically, the student had access to instructional assistants on November 25, 2008 and the Safety Plan was followed.</p>
2.	<p><u>Change of placement:</u> (Beginning December 2, 2008)</p> <p>After a two day disciplinary suspension (November 25 and December 1, 2008), the District did not return the student to the student's then current educational placement. Specifically, the parents allege that following a Manifestation Determination on December 2, 2008, which determined that the student's behavior resulting in the disciplinary suspension was a manifestation of the student's disability, the District did not return the student to the placement from which the student was removed.</p>	<p>Not Contested.</p>
3.	<p><u>Requested Corrective Action:</u></p> <p>The parents are requesting compensatory educational services be provided to the</p>	<p>Not Ordered, but further action required as per stipulation. See Corrective Action.</p>

³ See 34 CFR § 300.153 (c); OAR 581-015-2030(5).

	Allegations	Conclusions
	student by the District as appropriate corrective action.	

III. FINDINGS OF FACT

Background

1. The child is currently 10 years old, resides in the District and attended a District elementary school during the 2007-2008 school year while in fourth grade. The student attends a District middle school while in fifth grade during the 2008-2009 school year. The child was determined eligible for special education when the student entered kindergarten and is presently eligible for special education as a child with a communication disorder and as a child with mental retardation. The student weighs approximately 60 pounds and has a slight build.

2007-2008 School Year

2. The District, through the Educational Service District, completed and presented a psycho-educational evaluation (The "P-Ed Evaluation") at a properly noticed reeligibility meeting conducted on February 14, 2008. The student's three year reevaluation⁴ was due by March 4, 2008.
3. The P-Ed Evaluation addressed two specific questions posed by the District.
 - a) What are [the student's] current functioning levels: cognitive, language, adaptive behavior and motor?
 - b) What kinds of interventions might the school team implement to assist in [the student's] overall functioning?
4. The 18 page report (plus supporting test data) addressed the District's questions and also included a comprehensive history, evaluation results from a recently completed battery of testing instruments⁵, and planning suggestions for the IEP team to consider when crafting the student's educational program.

⁴ OAR 581-015-2105 (4)(b)

⁵ The instruments included the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), The Woodcock Johnson III: Tests of Achievement (WJ-III), the Vineland- II Adaptive Behavior Scales, the Child Behavior Checklist (completed in November 2006 and November 2007), the Clinical Evaluation of Language Fundamentals- 4 (CELF-4), the Peabody Picture Vocabulary Test- 4, The Photo Articulation Test (PAT-3), a hearing screening, classroom observations, and an Occupational Therapy Assessment (presented on January 17, 2008 to a group including the parents).

5. Items contained in the History section of the evaluation and relevant to the current complaint included:
 - a) The student had been suspended from school on two school days during the 2006-2007 school year (no reasons identified);
 - b) The student had a Safety Plan at school addressing “the possibility of running away or aggression”;
 - c) Past instructional strategies included “model academic and behavior expectations,” access to instructional assistants up to 3 hours per day, frequent comprehension checks, opportunities for breaks when feeling overwhelmed or frustrated, modification of regular class room work “for success,” and a “safety protocol.”

6. Items contained in the Planning Suggestions section of the P-Ed Evaluation and relevant to the current complaint included:
 - a) The student has the potential to feel stress and personal discomfort in demanding environments. The suggestions included that staff members working with the student monitor the student’s level of emotional comfort via check-ins or brief questionnaires;
 - b) The student is hypersensitive to sounds and would benefit from advance warning of the situation to allow time to prepare and cope;
 - c) The student may benefit from “sensory breaks” that do not have a stimulating effect;
 - d) Transitions between classes, including noisy situations, tended to put the student into a withdrawn or “shut down” mode with the recommendation that music through earphones may filter out some of the background noise.

7. During the fourth grade, the District authored a Safety Plan for the student with the parents’ input. It addressed situations when the student was “having a bad day or [an] episode of running, dropping, hitting [or] fighting” responses. The plan was updated on January 8, 2007. The updated plan included positive responses to change the student’s “mood” with activities including drawing time, quiet time, resource room choices, or “talk time” in the resource room or office. It also identified actions which would potentially escalate the student’s behavior, such as touching the student, showing the student a walkie-talkie, telling the student the student’s parents would be called, or telling the student that the student will stand in line or miss recess.

2008-2009 School Year

8. The middle school fifth grade general education classrooms surround a common room, or, as the District describes it, the “pod” area. The “pod” area contains a number of computer stations available for student access. The resource rooms are separated from the “pod” and the general education classrooms.
9. On September 23, 2008, about two weeks into the new school year, at a noticed IEP meeting, attended by a regular education teacher, a special education teacher/case manager, the district special education director, and both parents, the team revised the student’s IEP (The “2008 IEP”).

2008 IEP

10. The 2008 IEP described the student’s Present Levels of Academic Achievement and Functional Performance. It incorporated the evaluation results from the P-Ed Evaluation discussed at the February 2008 meeting for the student’s present level of academic achievement. It discussed the parent’s concerns relating to the student’s communication needs. It described the student as “demonstrating the ability to transition in a new school environment pretty well with less adult supervision.” It also stated that the student “has needed a safety plan in the past to address the possibility of running away and aggression towards others. Currently this school year we have not had these issues that would warrant a continuing safety plan....The student does best with following well established routines and with forewarning if a change in the student’s routine is going to occur (i.e. emergency drills, alternate school schedule, substitute teacher, etc). [The student] can demonstrate frustration when the student is over stimulated....by noisy environments..., etc. [The student] benefits from sensory breaks to calm himself down when this activity occurs during the school day....The student continues to benefit from instructional assistant help and prompts to always make transitions positively, however.”
11. Under Special Factors, the 2008 IEP stated that the student has communication needs. It also identified that the student does exhibit behavior that impedes the student’s learning or the learning of others.⁶ The team considered various strategies and interventions, including the Safety Plan and the use of daily tracking sheets⁷ that followed the student throughout the day and would be reviewed by the parents.
12. The 2008 IEP included measurable annual goals and multiple short term objectives in Communication, Reading, Mathematics, Written Language and Behavior. The Behavioral goal, “[the student] will demonstrate skills that allow the student to interact positively with peers and adults throughout the student’s

⁶ If this special factor is present, the IEP Team must consider the use of strategies, positive behavioral interventions and supports to address the behaviors. OAR 581-015-2205 (3)(a)

⁷ The daily tracking sheets was not referenced in the IEP.

school day,” was to be measured by classroom observation and office behavioral records.

13. The 2008 IEP included the following specially designed instruction:

- a) 150 minutes per week, each, in reading, math, and written language with the anticipated location identified as “School Wide”⁸;
- b) 60 minutes per week of “behavior” with the location as “School Wide”;
- c) 50 minutes per week of Communication Skills in the “Provider’s Space”;
- d) 30 minutes per week of Speech provided in the “SPED Classroom.”

14. The 2008 IEP included modifications and accommodations, with the anticipated location described as “School Wide,” including:

- a) Model academic and behavioral expectations (5 minutes daily);
- b) Access to instructional assistants (2 hours weekly);
- c) Frequent comprehension checks (15 minutes daily);
- d) Modify/reduce classroom work for student success (15 minutes daily);
- e) Access to technology for writing tasks (15 minutes daily);
- f) Provide direct, concrete repetitive review to help generalize skills (15 minutes daily);
- g) Provide opportunities for sensory breaks or when feeling overwhelmed or frustrated (15 minutes daily);
- h) Conduct check-ins to assess level of stress or positive feeling (5 minutes daily);
- i) Connect new learning to past experiences or prior knowledge (15 minutes daily).

15. The 2008 IEP included Supports for School personnel included “Consultation” (unspecified) (15 minutes per week) and “care coordinated by OT” (60 minutes per year).

⁸ The minutes of the meeting specifically reflects that the student receives the student’s specially designed instruction in the resource room.

16. The Nonparticipation Justification identified that the student did need to be removed from participating with nondisabled peers in the amount of 560 minutes per week. The justification statement stated the student's removal from the general education classroom was justified so the student could "receive individualized instruction in the areas of reading, math, writing, speech/language and behavior."
17. The 2008 IEP reflected consideration of two placement options: "Regular Classroom," which was rejected because the student would not receive enough individualized instruction to make satisfactory progress on the student's IEP goals. The IEP team's selected placement was "[r]egular classroom with support provided" and justified the placement because the student "will need a significant amount of smaller group instruction provided to make satisfactory progress on the student's goals."

Behavior Incidents and Safety Plan Reimplementation/ Revisions

18. The District's central computer data system allows staff to record individual notes for each student. In addition, it allows behavioral incidents to be recorded within the system. The "Notes and Incident" data base allows a staff member to complete a hard copy of a behavioral referral form, with support staff entering the specific information from the hard copy referral. In this case, the October 2, 2008 referral, completed by another staff member, was transcribed and entered into the data base. All other entries in the data base were entered by the school's vice principal based on her personal involvement with the incident. Not all incidents involving this student were entered into the data base, and none, other than the October 2, 2008 referral, were completed on the school's referral form. The incidents were documented by staff in writing by memo or by email.
19. On October 2, 2008, approximately 10 days after the IEP meeting creating the 2008 IEP, the District recorded the first behavioral incident. The student was reported to have hit the case manager and an administrator when the student was asked to "disengage from one of the pod computers." The student's parent was contacted and picked the student up from school.
20. On October 8, 2008, the special education teacher/case manager recorded an incident during small group instruction in reading involving the student throwing a pencil at the case manager when the student wanted to read out loud for a longer period of time. The case manager reported that the student stated that the student was trying to hurt the teacher. This incident was not contained in the administrative Notes and Incident data base.
21. On the same day, the same teacher recorded that the student was in the student's writing group and was having difficulty being a positive part of the group and not following instructions appropriately. The student was removed from the

group by an instructional assistant. This incident was not contained in the administrative Notes and Incident data base.

22. On October 9, 2008, an administrator reported that the student would not leave the computer area. The student was reported to have hit two staff members earlier in the day and also hit the reporting administrator. The parents were contacted by phone but were not asked to pick up the student.
23. On October 16, 2008, the parents, along with District staff composing a properly constituted IEP team, attended a noticed IEP meeting to “review existing information and develop or review the IEP and placement of the student.” The meeting involved three areas: (a) adopting a Safety Plan for the student; (b) revision and discussion of the student’s schedule and availability of instructional assistants; and (c) consideration of a functional behavioral assessment.
24. The IEP team reviewed, revised, and put into effect the Safety Plan, which was substantially similar to the Safety Plan in place the prior year. District staff considered the Safety Plan a part of the student’s IEP although it was not specifically listed in the IEP under the student’s modifications and accommodations. The Safety Plan included a section which described actions which have caused the student’s behaviors to escalate, including: “touching the student (unless you must for safety)...” The revisions focused predominately on administrative responses after a behavioral episode. For the first time in any Safety Plan, it included a provision that if the student refused “to leave the environment in which the student is having a conflict,” that other students would be removed from the area, the student would have the student’s choices explained, then the student’s parents would be called, and finally “an OIS [Oregon Intervention System] trained individual will escort the student from the environment.” Staff reported that reference to OIS was due to the potential that staff would be required to use restraints to safely address the student’s behavior.
25. The District wrote down a daily schedule for the student identifying which of four instructional assistants the student would have access to for each period of the day. The student’s schedule reflected the location where the student would be throughout the day. The schedule documented that the student was exclusively in the resource or speech rooms except for a one 60 minute period every other day (rotation with resource room), lunchtime, an optional “read aloud” 35 minute period after lunch, and a ten minute end of day period in the general education classroom. The District did not change the IEP placement page, or issue a prior written notice regarding the student’s placement listed in the 2008 IEP as “Regular classroom with support provided.”
26. The District requested, and the parents refused, consent for a functional behavioral assessment (FBA) including school-wide observations, staff interviews, file review, and parent interviews. Previously, the District had not conducted a FBA for this student. The parents, during on-site interviews, stated

their refusal was due to not understanding the purpose of an FBA. During on-site interviews, staff uniformly agreed that an FBA and a resulting Behavior Intervention Plan would benefit them in determining what strategies and interventions would be effective to use with this student in enabling the student to make educational and behavioral progress.

27. On October 17, 2008, the administrator was called to the resource room when the student repeatedly refused to follow the teacher's instruction.
28. On October 28, 2008, the incident summary states that the administrator was called to the classroom when the student was "unable to be successful." The aide's report includes more detail and states that the student told her to "shut up," the student was kicking cones and picking up rocks acting as if the student would throw them at her, and the student kicked and hit the aide and another staff member who came to assist.
29. On October 29, 2008, the administrator was called to the general education classroom when the student was reported to have "written several threatening notes that morning." The student went with the administrator to the office but "demanded that [the administrator] go ...buy the student a game." When the administrator explained that would not occur the student kicked the administrator. The student's parents were contacted, the student was removed from school, and a parent attended a conference that afternoon. The District suspended the student for a half day. There is also a report for the same day, not contained in the incident summary, that the student bit a teacher and brought an apology note the following day.
30. On October 30, 2008, various staff members reported a number of incidents. Only the administrator's report is reflected in the incident summary. The administrator was called to the resource room writing class during the last period of the day when the student refused to participate in the writing class. The student went to the computers rather than returning to the general education class. The student refused to end the computer game. Since school was to end in 15 minutes, the administrator allowed the student to remain on the computer. Earlier in the day, based on other staff members reports, the student needed many reminders to stay on task, made many "growly, sassy noises," bumped into an aide and, instead of an apology stated, "I can do whatever I want," hit two students at lunch without provocation, refused to stop throwing paper airplanes when asked, refused to participate in writing class, and was verbally defiant yelling "shut up" to staff members.
31. On October 31, 2008, staff reported that the student left the room after returning from lunch and went to the computers. When the staff member informed the student that she would turn off the computer, the student hit her legs with the student's fist and was verbally defiant. When told the student would lose the student's reward planned for later that day, the student returned to the classroom

but stayed at a table by himself and did not participate with the class. The incident is not recorded in the incident summary.

32. On November 4, 2008, staff reported that during a game of freeze tag, the student slapped another student's forearm. When the staff members approached the student, the student began kicking and trying to hit her. Later that day, the student was reported to hit/slap another staff member while she was completing the student's tracking sheet. The incident is not recorded in the incident summary.
33. On November 5, 2008, during reading time, the student was reported to tell an aide that the aide could leave the area. On the way to PE, when the staff member told the student to stop telling her to leave, the student told her to "shut up." The incident is not recorded in the incident summary.
34. On November 6, 2008, the District revised the Safety Plan. The primary change was the inclusion of the following statement: "In the event [the student] is unsafe with himself or others, the student will be suspended for the remainder of that school day pending a parent conference to discuss a plan for the student's positive reentry to school."
35. On November 10, 2008, an aide completed an incident report stating that the student would not transition from computer to lunch. When the aide turned the computer off, the student threw two headsets. The student refused to pick them up and later left the room and went to the gym. The student held the door to the gym closed so the door could not be opened. When the staff member tried talking with the student, the student hit and kicked her. She "did a belt restraint⁹ and redirected the student away." When the student was released, the student "continued to come up and physically attack" the aide. The staff member did two more belt restraints. The staff member reported that she was slapped on the arms and legs with the student's hands and a water bottle. She reported being pinched on the arm and kicked in the shins. The student threw a timer, which broke.
36. On November 12, 2008, the District held a debriefing meeting with staff following the physical restraint incident.¹⁰ The notes reflect a District decision that the student "is not to use the computers at school" and that the instructional assistants are "to have a copy of the Safety Plan to review at the school." Staff reported that the instructional aides were given access to student's IEPs on an "as needed" basis. Staff reported that the student's Safety Plan was accessible to them, and one staff member stated that the Safety Plan was on the wall of her private office.

⁹ Staff described the "belt restraint" as holding the student with one hand by the back belt loop or belt from behind and with the other hand holding the back of the student's shirt near the collar.

¹⁰ OAR 581-021-0062(2) (h)

37. On November 13, 2008, an administrator was called to the resource room when the student was reported to be unwilling to participate in the writing activity. During the fifteen minute conversation with the administrator, the student “demanded... money in order for the student’s behavior to change.” When reminded that there was an assembly beginning soon, the student’s behavior de-escalated and the administrator left the student with the teacher. Another staff member’s report included an incident that the student refused to participate in the writing class and “hit at another student.”
38. On November 17, 2008, an aide reported that the student would not transition from computer to writing class. After multiple efforts and an estimated twenty minutes of efforts to redirect the student, the aide turned off the computer. The student threatened to push the monitor off the table. An administrator was called and when the computers would not work, the student tipped over chairs and threw pencils at the aide. The student picked up a yardstick and was told the student would be restrained if the student didn’t put it down. When the student refused, the aide restrained the student. The student’s parent was called. The student deescalated and stayed to the end of the day. The incident is not recorded in the incident summary. There was no separate restraint report prepared nor restraint debriefing meeting following the restraint.
39. On November 17, 2008, the student’s safety plan was updated. The only revision was to identify that the OIS trained individual will walk, rather than escort, the student from the environment.
40. On November 25, 2008, the entire fifth grade planned to go on a field trip. The student arrived at school and checked in with the student’s special education teacher as usual. Staff walked with the student from the special education classroom to the student’s general education classroom. The general education classroom teacher received the student, checked the contents of the student’s backpack, removed an assignment, and accompanied the student to the location where assignments are turned in for grading. Other students began arriving in the classroom, attendance was taken, daily announcements were made, and the class, with the expected noise, movement, and activity, began to get ready and assemble to leave on buses for the field trip. The District anticipated that the student would have an aide accompany the student on the field trip. An aide was called to the “pod” area when other aides requested assistance with the student. Before the class had left to board the buses, the aide found the student using one of the computers in the “pod” area. The aide was unable to get the student off of the computer. An administrator arrived and was also unable to obtain the student’s cooperation to leave the computer and board the buses. By this time, the rest of the class had boarded the buses. The student was asked whether staff could call home so one of the student’s parents could arrange transportation to the field trip destination. The student started slapping and hitting staff. The buses had left the school when the student finally left the “pod” area and went to the bus boarding area. An aide accompanied the student outside. Recognizing

that the field trip buses had left, the aide decided to enter an empty, small bus parked in the bus area alone with the student. When the aide and the student sat down, the bus's horn began honking and the lights began flashing. The aide then accompanied the student into the office area, where the student became very agitated, repeatedly hitting and kicking the aide. The aide used a restraint on the student to try and protect herself and deescalate the behaviors. The student went into a conference room and the student's behaviors continued to escalate. Many staff members witnessed the events in the office and the student's behaviors continued. Staff restrained the student on two additional occasions. The student reported during on site interviews, that the student was mad because the aide "tricked the student" by getting on the small bus and not going on the field trip.

41. On November 25, 2008, the District conducted a restraint debriefing meeting with involved staff members. It also completed a "Serious Incident Restraint/Seclusion Report." The report was written by a staff member who had not been present for the underlying incident on the bus, but was dictated to the staff member by the only staff member present during the incident on the bus. The report included in the description of the incident that the student "ran away and got on the bus. The bus had problems and instructional aide asked the student to go inside to the office to get help for the bus (sic)." This report was later provided to the parents. The District also confirmed in two letters to the parents that the student was suspended for two days as a result of the incident that day and that "a parent meeting to develop a plan for [the student's] education has been scheduled for December 2, 2008 at 7:00 a.m." The District did not issue any other notice to the parents regarding the type of meeting it scheduled. The parents believed that this meeting was to discuss the student's reentry to school, as referenced in the Safety Plan, and did not understand it was to be an IEP meeting.
42. On December 2, 2008, the District held a meeting attended by the parents, the District's special education director, a general education teacher, the student's special education teacher, the student's case manager, the principal, the vice principal, and the school psychologist. The attendees determined that the student's conduct on November 25, 2008 was caused by, or had a direct and substantial relationship to, the student's disability and the student's behavior was a manifestation of the student's disability. The District completed its "Manifestation Determination" form to document the group's decisions. The meeting minutes reflect that the members "reviewed change in placement and the student's new schedule" and tutoring. The minutes reflect that the parents requested an FBA by an outside psychologist. The minutes also reflect that the parents wanted a letter from the District delineating the District's position. The parents expressed their desire for the student to be returned to the middle school to the student's prior placement. When the parent asked the District representative what would happen if the student was left at the school, staff informed them that it would not be allowed, and, if necessary, staff would call the police.

43. During onsite interviews, District staff expressed serious, significant, and sincere concerns that this student's needs could not be met at the District's middle school, even with the supports incorporated in the IEP. District staff had witnessed significant behavioral episodes which they described as escalating in both intensity and frequency between October and November 2008. District staff represented that never in their educational careers (a number of staff with more than 25 years in education) had they seen a student's behavior become this aggressive over such a short amount of time.

Prior Written Notice (change of placement):

44. On December 3, 2008, when one of the student's parents brought the student to the middle school, they were told to go to the District administrative office across the parking lot from the middle school. The parent was handed a "Prior Notice of Special Education Action" which stated that the District was initiating a "[t]emporary change in placement... in tutoring" until a formal IEP meeting could be held "to determine a more long term placement." The Notice stated that the action was proposed due to the student's "recent aggressive behavior" and the inability to "ensure the student's or staff's safety." Staff reported that their concern in allowing the student to return to class at the middle school was for the safety of the staff, other students and the safety of the student himself until they were able to gather more information on the triggers, antecedents and cause of the student's behaviors and develop an appropriate behavior intervention plan to address those behaviors.

45. The District offered tutoring to the student beginning December 3, 2008 for 2 ½ hours five days per week to be delivered at the elementary school which the student attended the previous year. On December 4, 2008, the parents requested a change in location for the tutoring from the elementary school to the local library. The District notified the parents on December 5, 2008 of its refusal to change the location for tutoring.

District Policies and Procedures

46. The District had in place a Policy and Procedure for "Discipline of Disabled Students" pursuant to OAR 581-015-2400, et seq.

47. The District had in place a Policy and Procedure for "Use of Restraint and/or Seclusion for Students on Individual Education Plans" pursuant to OAR 581-21-060, et seq. In part, the policy states that any physical restraint and seclusion "is only permitted as part of a behavioral 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."

School Calendar

48. The District's middle school academic calendar includes school days on every week day in December through December 19, 2008 when the winter break begins. Inclement weather required the school to close for five school days, beginning December 15 and ending on December 19, 2008. No services were provided to any students attending school during the week the schools were closed.

IV. DISCUSSION

1. Implementation of IEP

The parents allege that the District did not implement the student's IEP, including the student's Safety Plan and the IEP modifications and accommodations of "access to instructional assistants." Specifically, the parents allege that on November 25, 2008, while on a bus in preparation for a field trip, the student was sent to the office to accomplish a task without adult assistance, resulting in a behavioral incident. The parents further allege that, when the student's behavior escalated, the District did not follow the student's Safety Plan.

Under the IDEA, school districts must develop and implement an IEP for each eligible student designed to ensure that the child receives a free appropriate public education (FAPE).¹¹ A school district meets its obligation to provide FAPE by complying with the procedural requirements of the IDEA and providing the student with an IEP that is "reasonably calculated to enable [the student] to receive educational benefit."¹²

A student's IEP must include a statement of the specific special education and related services and supplementary aids and services and of the program modifications or supports for school personnel that will be provided to the student to: (a) advance appropriately toward attaining the annual goals; (b) be involved and make progress in the general curriculum; (c) participate in the extracurricular and other non-academic activities; and, (d) to be educated and participate with other children with disabilities and non-disabled children.¹³

At the beginning of each school year, school districts must have in effect an IEP for each student within its jurisdiction. A school district must provide the special education and related services in accordance with an IEP.¹⁴ School districts must ensure that: (a) the IEP is accessible to each regular education teacher, special education teacher, related service provider and other service provider who is responsible for its implementation, and (b) inform each teacher and provider of the student's or her

¹¹ OAR 581-015-2040

¹² *Board of Educ. v. Rowley*, 458 U.S. 176, 192 S.Ct. 3034, 72 L.Ed. (1982)

¹³ OAR 581-015-2200

¹⁴ OAR 581-015-2220 (1)

specific responsibilities for implementing the child's IEP and the specific accommodations, modifications and supports that must be provided for or on behalf of the child in accordance with the IEP.¹⁵

Under IDEA 2004, the District and the parent may agree to make changes to the IEP between the annual meetings, without a meeting of the full team. In this circumstance, the District must make sure that all team members are informed of the amendment, and that the parent gets a copy of the revised copy of the IEP if the parent requests one.

In this case, the first issue is whether the 2008 IEP incorporated the student's Safety Plan.¹⁶ The previous year, while in fourth grade, the District has in place a Safety Plan for the student, but in the first two weeks of the 2008-2009 school year, following the student's enrollment in fifth grade at middle school, the IEP team determined that the student's behaviors did not "warrant a continuing safety plan." Therefore, as of September 23, 2008, the date the team met to revise the student's 2008 IEP; no Safety Plan was incorporated in the IEP.

However, two weeks after the IEP meeting, the student began to exhibit aggressive behaviors. The behaviors continued until a Safety Plan was adopted and revised at the October 16, 2008 IEP meeting. While the IEP was not revised to explicitly incorporate, by reference, the Safety Plan, the plan was designed at a noticed IEP team meeting and staff considered it to be a part of the student's IEP. The IEP identifies as a special factor that the student exhibits behaviors that impede the student's learning or that of others. The Safety Plan is reasonably connected with the obligation, when this special factor is present, to consider the use of positive behavioral interventions and supports and other strategies to address that behavior.¹⁷ The Safety Plan includes strategies for de-escalating the problem behaviors as well as identifying actions that may escalate the student's negative behaviors. It also includes the specific reference to OIS trained staff accompanying the student from the environment because of the District's concern for the potential for the need to restrain the student by OIS trained staff. The Safety Plan was sufficiently important to the District to revise it again on November 6 and November 17, 2008. Based on these facts, the Department concludes that the Safety Plan drafted on October 16, 2008, and the subsequent revisions of November 6, 2008 and November 17, 2008, were part of the student's IEP and that the District was obligated to implement the provisions of the Safety Plan.

As part of the IEP team meeting of October 16, 2008 re-implementing a safety plan, the District requested the parents' consent to an evaluation including a Functional Behavior Assessment (FBA), observations, staff and parent interviews, and a file review. The parents did not consent to the District completing an FBA. This refusal put the District in a situation that required action.

¹⁵ OAR 581-015-2220 (3)

¹⁶ Safety Plan is not a defined term under IDEA.

¹⁷ OAR 581-015-2205 (3)

The Safety Plan included and staff understood that the student might require physical restraint as part of the Safety Plan. The District policy requires that the use of physical restraint or seclusion “is only permitted as part of a behavioral 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.” The District had not completed an FBA or a document identified as a Behavior Support Plan (BSP) or Behavior Intervention Plan (BIP).¹⁸ In order to comply with its own policy regarding restraints, the District needed to create a Behavior Support Plan with less restrictive interventions than restraints. However, the parents refused to consent to the first step in creating a behavior intervention or behavior support plan - the completion of a functional behavioral assessment.

OSEP has addressed whether parental consent for an FBA is required as a reevaluation.¹⁹ Parental consent is required if “the public agency believes it is necessary to conduct a functional behavioral assessment for the purpose of determining whether the positive behavioral interventions and supports set out in the current IEP... would be effective in enabling the child to make progress toward the child’s IEP goals/objectives or to determine whether the behavioral component of the child’s IEP would need to be revised.”²⁰ If the parents refused consent, as in this case, the District would need to find an exception to consent, including the option of a determination by an administrative law judge.²¹ In this case the District neither obtained consent nor sought an order from an administrative law judge as an exception to parental consent.

The 2008 IEP included the modification and accommodation of “access to instructional assistants, two hours weekly, School Wide.” District staff interviews confirmed that one major use of instructional assistants with this student was during transitions between classes or activities. The IEP present level statement also identified that the student “continues to benefit from instructional assist help and prompts to always make transition positively.”

The November 25, 2008 bus incident was, no doubt traumatic for all involved. The student left the general education classroom as the other students arrived for an extraordinary day including a field trip and went to a familiar setting – a computer. For the student, however, the field trip was not the student’s usual routine, which the student’s IEP specifically identifies as a potential antecedent of inappropriate behavior. The IEP identifies that the student can become frustrated when the student is over stimulated, including “noisy environments,” and benefits from sensory breaks to calm down. The field trip preparation was noisy, with multiple classes readying to board the bus. By the time the student was able to leave the computer area, the other students had left school for the field trip. When the aide went with the student outside, she chose to get on the smaller, empty bus, which wasn’t going on the field trip. The bus’s warning

¹⁸ An FBA and BIP are defined terms under IDEA and are incorporated under the Discipline section beginning at OAR 581-105-2400, et seq. They will be discussed at greater length in the Section 2 of the Discussion of this Order under “Change of Placement.”

¹⁹ 34 CFR Sec 300.300(c); OAR 581-015-2090 (3)

²⁰ Letter to Sarzynski, OSEP, May 6, 2008, 108 LRP 65841

²¹ OAR 581-015-2095

system of lights and horns were actuated, creating more negative stimulation. The student felt “tricked” and had a major behavioral incident, including hitting, kicking, and attempted biting. The incident resulted in District staff restraining the student three times, and the student received the two day suspension.

The IEP includes access to instructional assistants. The Department does not find substantial evidence that the District failed to provide instructional assistants during the morning of the field trip, during the transition outside to the bus, or while coming back into the office area where the bulk of the serious behaviors occurred. Likewise, the Department does not find substantial evidence that the Safety Plan was not followed, since the Plan specifically provided for touching the student if necessary for the student’s safety as well as the use of OIS restraints for the student’s behaviors.

2. Change of Placement

The parents allege that after a two day disciplinary suspension (November 25 and December 1, 2008), the District did not return the student to the student’s then current educational placement after determining that the student’s behavior causing the suspension was a direct result of the student’s disability.

While the District believes there were other relevant factors contributing to this situation, the District does not contest this allegation and has agreed to a Stipulated Corrective Action Order. The District’s agreement to implement a Stipulated Corrective Action Order does not constitute an admission of all of the parent’s allegations with regards to the student’s placement; however, the District is willing to implement the corrective actions agreed to by the Department and the District.

STIPULATED CORRECTIVE ACTION²²

In the Matter of Gladstone School District
Case No. 08-054-043

#	Action Required	Submissions ²³	Due Date
2a.	<p>Review and Revise IEP</p> <p>The district will convene, with appropriate notice and documentation, an IEP team meeting, including the parent.</p>	<p>Submit for approval to ODE and copied to the parent:</p>	<p>February 23, 2009</p>

²² 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).

²³ Corrective action plans 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 ²³	Due Date
	<p>In preparation for this meeting district team and the parent will review existing relevant information in the student's file, including, but not limited to -</p> <ul style="list-style-type: none"> (i) Evaluations and information provided by the parents; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers. <p>This review does not need to occur in a meeting.</p> <p>Based upon this review, the IEP team will review, and revise as needed, the IEP to address</p> <ul style="list-style-type: none"> (i) The strengths of the child; (ii) The concerns of the parents for enhancing the education of their child; (iii) The results of the initial or most recent evaluation of the child; (iv) The academic, developmental, and functional needs of the child; and, (v) All special factors, including, in the case of a child whose behavior impedes the child's learning or that of others, the use of positive behavioral interventions and supports and other strategies to address that behavior. 	<ul style="list-style-type: none"> a. IEP team notice and documentation of any parent responses to notice; b. List of items/information reviewed by the parent and the district staff in preparation for the IEP team meeting and a description of the review process used; c. Complete copy of the new IEP with revisions clearly indicated; d. Copies of any prior written notices resulting from the meeting; and, e. Any notes, minutes, or other documentation of the meeting discussion, if made. 	
2b.	<p>Placement Determination</p> <p>Following review and any revision of the IEP, the IEP team, including the parent, will review and revise, if needed, the student's placement in the least restrictive environment (LRE).</p>	<ul style="list-style-type: none"> a. Notice of placement determination meeting; b. Copy of placement determination page completed according to ODE directions; and, 	February 23, 2009

#	Action Required	Submissions ²³	Due Date
		c. Copies of any prior written notices resulting from this meeting.	

Dated: February 6, 2009

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

Mailing Date: February 6, 2009

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.