BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Colton School District No. 53	))))	FINDINGS OF FACT, CONCLUSIONS, AND FINAL ORDER Case No. 09-054-006

I. BACKGROUND

On February 17, 2009, the Oregon Department of Education ("Department") received a letter of complaint from the foster parents ("Parents") of a student attending school and residing in the Colton School District No. 53 who attends a public school in a neighboring school district ("District").[1] The Parents 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") 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 the circumstances of the investigation satisfy the requirements for an extension contained in OAR 581-015-2030(12). There were no circumstances warranting such an extension and this final order is issued within the applicable timeframe.

On February 23, 2009, the Department sent a *Request for Response* to the District identifying the specific allegations in the complaint the Department would investigate. The District submitted a timely *Response* to the allegations and made a copy available to the Parents. On March 16, 2009, a Department complaint investigator conducted an on-site investigation and interviewed the Parents and the following staff: case manager A, case manager B, regular education teacher, speech-language pathologist, occupational therapist, principal, and special education director.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under 34 CFR 300.151-300.153 and OAR 581-015-2030. The allegations and the Department's conclusions are set out in the chart below. The Department based its conclusions on the Findings of Fact (Section III) and the Discussion (Section IV).

#.	Allegations	Conclusions
(1)	<u>IEP Implementation</u> The Parents alleged that the District did not fully implement the student's IEP as required by OAR 581-015-2220(1). Specifically, the Parents alleged that: (a) The student's class work is negligible and not related to IEP goals; and (b) IEP provisions for communication with the Parents are not implemented.	Not substantiated. (a) The Department does not find persuasive evidence to conclude that the student's class work was negligible or not related to IEP goals where the student's special education teacher provided all of the specially designed instruction the IEP required and the student made some progress in all academic areas. (b) The Department finds that the District provided parental communication in accordance with the student's IEP.

[1] The Colton School District will be referred to as the "District." The neighboring school district which the student attended during the time in question will be referred to as the "Attending District."

#.	Allegations	Conclusions
(2)	<u>Discipline</u> The Parents alleged that the District did not follow the discipline rules contained in OAR 581-015-2400 through 581-015-2435 in secluding or suspending the student more than 10 school days.	Substantiated. The Department finds that the District miscalculated the days the student was excluded from the current educational placement. This error resulted in the District suspending the student in excess of ten cumulative school days without taking the required steps to address the disciplinary removals.
(3)	<u>Review and Revision of IEP</u>: The Parents alleged that the District did not review and/or revise the student's IEP as required by OAR 581-015-2225(1). Specifically, the Parents alleged that: (a) The District did not review or revise the student's IEP to address the student's behavior needs; and (b) The District developed a behavior plan or behavior contract for the student that did not address the student's behavior.	Substantiated. (a) The Department concluded that the District erred by failing to convene the IEP Team to consider the student's lack of expected progress until February 18, 2009. (b) The Department concluded that the January 15, 2009 behavior contract developed by the District for the student was not appropriate because it continued to provide for contacting the Parents to have them pick up the student from school, continuing the same pattern of removal and the subsequent revisions did not adequately address the student's behaviors and their impact on the student's progress.

III. FINDINGS OF FACT

1. The student resides within the Colton School District and attended third grade at a neighboring Oregon school district via an interdistrict transfer during the 2008-09 school year, in a self-contained special education classroom (the Primary Learning Center, or "PLC") for more than 60% of the student's school day. The student also attended second grade in the same PLC program at the same neighboring Oregon school district via an interdistrict transfer agreement. The student is eligible to receive special education and related services as a child with mental retardation.

2. The student received early intervention services beginning at age six months through a birth-to-three program, and the student has received special education and related services since that time. A regional program conducted a comprehensive psychoeducational evaluation of the student in October 2005,[2] with the evaluator describing the student's cognitive ability in the extremely low range, noting the student demonstrated slightly better verbal than nonverbal ability. The evaluator described the student's adaptive behavior as being comparable to the student's cognitive ability. The evaluator noted that behavior checklists indicated the student was at-risk for or currently experiencing significant problems with attention, hyperactivity, aggression, depression, and social skills/adaptability. The

[2] The Department's complaint investigator discussed with District staff the requirement that reevaluation of a child with a disability must occur at least every three years, unless the parents and school district agree that a reevaluation is unnecessary. *See* OAR 581-015-2105(4).

evaluator also noted that the student's language skills fell in the very low range while the student's articulation was average. The evaluator further noted that the student's fine and gross motor skills, as well as sensory integration, were delayed. The evaluator conducted a classroom observation of the student, noting the student was: "observed to be aware of class routines, but was distractible, fidgety, disruptive to other students, and required many verbal and physical prompts. [The student] was on task approximately 30% of the time."

February 21, 2008 IEP (Second Grade):

3. The District held a meeting on February 21, 2008 during the student's second grade year in school and developed a new IEP for the student. The Parents, the speech-language pathologist, the occupational therapist, and several other individuals 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 second grade student placed in a self-contained special education classroom and participating with non-disabled peers in music, recess, lunch, and assemblies. The statement noted that: "[The student] says [the student] loves school, and … has excellent attendance."

4. The statement also described the Parents' concerns for the student, including concerns with the student's academic achievement and noting that the Parents frequently work with the student at home on academic-related activities to provide needed extra practice. The statement also noted the Parents reported that, though the student had an occasional 15-minute time-out, the Parents did not observe the types of behaviors at home that the student demonstrated at school when feeling anxious and/or sad.

5. The present levels of academic achievement and functional performance statement reported that the student received specialized instruction in reading, math, and written language, described the student as making excellent progress in all areas since the beginning of the school year, and included descriptions of the student's academic achievement in all areas. For example: "In math, [the student] is learning to add and subtract…[The student] adds and subtracts without regrouping with problems comprised of two, two-digit numbers." The statement further described the student as working on written language preparatory skills, noting the student printed upper and lower case letters independently in correct sequence but had great difficulty copying a story from a model. The statement also described the student's developmental stage of spelling "is in the early phonemic to letter-name stage."

6. The statement for the student's present levels of academic achievement and functional performance in behavior described the student as "happy and motivated the majority of each school day. [The student] usually arrives to school with a smile on [the student's] face and enthusiastic demeanor. [The student] is friendly and outgoing towards staff and peers at least 90% of the time." The statement also noted that the student "has intermittent episodes of being aggressive towards peers, and leaving designated areas during unstructured times…. [The student] has extreme difficulty accepting the consequences without tantrumming (crying, yelling, screaming, running away), and wants to 'bargain' [the student's] way out of the consequence…" The statement also reported that the student appears to participate in classroom discussions and instructional times but, when called on, often shares something about home and family rather than being on-topic.

7. The student's February 21, 2008 IEP provided for specially designed instruction in a self-contained class in the areas of reading (30 minutes per day), math (30 minutes per day), written language (15 minute per day), behavior (45 minutes per day), speech/language (90 minutes per month), and occupational therapy (90 minutes per month). The IEP also

provided for transportation as a related service and included several supplementary aids and services, modifications, and accommodations for the student (use of "word cards" and "activity reinforcers" and reducing the number of words in written language activities). As a support for personnel, the IEP provided for communication with the Parents, describing the service as "daily note home with area for parent comments."

8. The student's February 21, 2008 IEP included specific goals and objectives for services in the areas of occupational therapy, speech and language, mathematics, written language, reading, and social emotional. The IEP team also determined that the student exhibited behavior that impeded the student's learning or the learning of others. The non-participation statement written by the team described the extent of removal as "at least 60% of the day" with the removal justified because, "[the student] needs a high level of support and structure to be successful in school in all academic areas, as well as behaviorally."

9. The annual goal related to behavior (social emotional) services on the February 21, 2008 IEP was for the student to apply problem solving strategies when experiencing negative feelings such as anxiety, fear, or anger. Examples of related short-term instructional objectives included: "Given a prompt, [the student] will identify 1-2 adaptive solutions to a simulated problem situation 9/10 times" and "Given negative consequences, [the student] will accept the consequences of a wrong act without tantrumming 9/10 times."

10. The annual goal related to mathematics services on the February 21, 2008 IEP was for the student to increase computation, measurement, and problem solving skills. Examples of related short-term instruction objectives included: "Given subtraction and addition problems containing 1-4 numerals, [the student] will, with 90% accuracy: a. identify place value to 1000 [and] b. solve the problem with and without regrouping" and "Given an array of coins, [the student] will, with 90% accuracy: a. order the coins from lowest to highest value [and] b. count by 5, 10 and 25 to 100 [and] c. count various combinations of coins to $1.00."

11. The annual goal related to written language services on the IEP was for the student to increase writing skills in the areas of voice (word choice), conventions (spelling and punctuation), and organization. Examples of related short-term instructional objectives included: "Given 50, then 100, high frequency words, [the student] will spell with 90% accuracy" and "[The student] will increase [the student's] ability to write/compose a sentence independently." The annual goal related to reading services on the February 21, 2008 IEP was for the student to increase decoding, fluency, and comprehension skills in reading. Examples of related short-term instructional objectives included: "Given words with a vowel followed by r, w, and l (all, saw, star, crew, etc.) [the student] will read them with 90% accuracy" and "Given fiction and non-fiction stories, [the student] will retell and or summarize in [the student's] own words what was read with 0% accuracy."

12. The District continued the student's placement, removed from regular education peers for more than 60% of the school day, in the self-contained PLC program in the Attending District. The team noted the benefit of this placement for the student included a program designed to meet the student's needs with a small student-to-teacher ratio. A possible harmful effect of this placement for the student, the team noted, was that the placement was not the student's neighborhood school, and the student would spend less time with typically developing peers. Modifications and services considered to reduce the harmful effects of the placement included mainstreaming available as appropriate and opportunities to interact with typically developing peers in non-academic activities. The District considered and rejected placing the student in the regular classroom in the neighborhood school with resource room support, noting that this placement did not meet the student's needs. The

District also considered and rejected placing the student in a self-contained classroom provided in a special school facility for the disabled, noting that this placement was too restrictive.

2008-09 School Year (Third Grade):

13. The student returned to the PLC program for the third grade year in school (2008-09 school year) as decided by the District's placement team. The District assigned a different special education teacher to the PLC program (case manager A). Case manager A was experienced in providing special education services and in working with children with special education and behavioral needs. She developed and delivered services designed to implement the IEPs and meet the needs of the students in the PLC program, provided behavioral coaching to all of the students, and supervised the educational assistants assigned to the PLC program.

14. Case manager A conducted assessments of all the students placed in the PLC in September of 2008 to determine present levels of academic performance and used this data to develop curriculum for each of the students. She reports starting the school year with simpler academic assignments for the student, below the student's instructional level, in order to build confidence and structure and engage the student. Case manager A described this as particularly important for the student because harder work easily overwhelmed the student and the student's behavior negatively impacted academic performance such that the student would not engage at all.

15. Case manager A reported providing the student 30 minutes each day of specially designed instruction in reading, 30 minutes in math, and 15 minutes in writing, consistent with the requirements of the student's IEP. Case manager A provided behavioral services throughout the student's day (in excess of 45 minutes). Case manager A also reported that the student's behavior negatively impacted the student's progress towards the goals and objectives on the IEP but that the student did make progress. Case manager A reported that the student made some progress in all academic areas by the time the student later transitioned from the PLC to the SLC-A class. She reported that the student met or partially met all short-term instructional objectives related to the annual goals in math, written language, and reading.

16. Case manager A sent home a daily update rating the student's behavior in several areas on a number scale (1 for "unacceptable" through 5 for "excellent") with a space designated for comments and an area on the form the Parents could utilize in sending questions or comments back to school. Case manager A did not generally provide a written comment concerning the student's day at school, and the Parents did not generally sign and return the form as indicated or utilize the form to ask questions or direct comments to the student's case manager. Case manager A also provided a weekly update for the Parents concerning the student's behavior for the week with behavior data summaries and teacher comments and maintained a communication log for contacts concerning the student. The weekly update provided percentage scores for the student's progress in targeted behaviors, student skills, and significant behaviors, and case manager A generally provided a detailed comment concerning the student's performance. For example, the September 19, 2008 weekly update stated, "[The student's] first two weeks were rough. [The student] was unsafe, off task, and disruptive. This week was much improved. Due to being very emotional (positive and negative) regarding a female peer, [the student] needed a lot of adult support, including regular check-ins with the counselor. [The student's] work improved this week as … was more focused and less agitated."

17. The Parents agree that they received the daily rating sheet but assert they expected more detail in the daily communication than they received from case manager A. They point to the daily communication they received from the student's previous case manager (2007-08 school year) that provided detailed written comments and feedback concerning the student's day at school. The Parents also report they only received a few of the weekly updates referenced by the case manager. The Parents point to a sample feedback form they provided at the January 29, 2009 IEP meeting as the type of communication they expected.

18. The student's speech-language pathologist reported working with the student for 30 minute sessions, three times each month, and observing the student in the PLC class for 30 minutes once each month. She described the student as presenting well in a 1:1 setting such as her speech sessions with the student. The speech-language pathologist also described her observations of the student in the PLC placement, describing the student as immature, exhibiting behavior such as crawling on the floor and under desks, not following directions, and disrupting the class. She reported that the student's behavior impeded the student's learning and the learning of others, and it is her opinion that the student is not able to function in a general education third grade setting.

19. The student's occupational therapist provided direct 1:1 services for the student. She described the student as presenting well below third grade level, with significant, developmental delays in basic gross and fine motor skills and cognitive and physical delays such that the student would not be able to function in a regular third grade classroom. The occupational therapist reported that the student cannot remember how to correctly produce all the letters of the alphabet, requires a model for copying, and cannot independently produce written work. She reported that written work is a tedious process for the student and that the student's difficulties with writing likely affect the student's progress in all areas.

20. The Parents agree with the reports by District staff that they provided the various services the student's IEP required. However, the Parents assert that the class work for the student's academic areas was not challenging enough, reporting that only 23 pages of schoolwork came home during the first three months of school. The Parents point to class work the student completed and brought home from school, compare it to work the student completed at home and in a private school placement, and assert that the student should be doing more work at school. The Parents also contend that the behavior issues occurring at school are not seen at home or in the private school placement they provided. The Parents describe the student as avoiding going to school and wanting to stay at home this school year. In contrast, the Parents describe the student as happy, friendly, smiling, and motivated to go to school in second grade.

21. Case manager A conducted a behavior assessment[3] for the student on September 20, 2008 and developed a behavior support plan for the student, reviewing the plan approximately every 30 days as the school year progressed. Case manager A reported that she used the behavior support plan as a guide, revisiting the plan several times during the school year and revising it as needed in an effort to address the student's behavioral needs. The behavior support plan included a functional hypothesis with several descriptions of the relevant context for the behavior, the problem behavior to address, desired behavior, and intervention strategies designed to address the behavior. Examples of intervention strategies to prevent the problem behavior included: frequent review of visual schedule; teach take break protocol/time-out protocol; divert behavior with alternate activity (not

[3] The behavior assessment is captioned "Behavior Support Plan Developed from a Functional Behavior Assessment."

successful). Examples for prompts for alternate/desired behavior included: provide verbal/visual cues for take break and take time-out, prompt calming techniques, and distract when frustration appears (not successful). Examples of consequence strategies to reinforce behavior included: verbal praise, classroom incentives, and positive reinforcement for appropriate reaction to work or feedback.

22. On September 22, 2008, the District suspended the student from school for two days out-of school suspension. Staff contacted the Parents, arranged for them to pick the student up from school that morning, and informed the Parents that the student could not return to school until after a parent meeting. District staff reported that the student arrived at school agitated that day, screaming, throwing the student's body on the floor, crying, running out of the room, not following directions, and remaining off task. Staff reported that the student spent 90 minutes in an alternative location continuing with escalating behavior before the District suspended the student. The referral record the District generated described the discipline as "Two day out-of-school suspension to be served September 23-24, 2008."

23. The District held a meeting with the Parents on September 30, 2008, and the student was permitted to return to school on October 1, 2008. The Parents report that they informed District staff they were available for the meeting on September 23 or 24. District staff report that September 30, 2008 was the earliest date the Parents were available to meet following the suspension. The District counted the suspension as two days; however, the student was removed from the current educational setting and did not receive services for seven school days – September 22-26 and September 29-30, 2008.

24. The alternative location referenced is also called the "Rainbow Room" and is a three-part empty room adjacent to the room where the SLP program is located. Students may be sent to this room for a brief period (typically less than 15 minutes) in response to behavior or may choose to go to take a break. Students are always under direct adult supervision when in the Rainbow Room and are not prevented from leaving the room. The case manager makes a record of each instance when a student is in the Rainbow Room for more than 15 minutes due to behavior. She reported that the student would have class work to complete when sent to the Rainbow Room although the student rarely worked on it. On October 1, 2008, case manager A again reviewed and revised the student's behavior support plan.

25. On October 20, 2008, District staff called the Parents and reported that the student didn't feel well. The parents went to the student's school and picked the student up, observing that the student was just fine and was skipping down the hall. The student stayed home from school on October 21 and 22, stating to the Parents that the student didn't want to go to school because: "My teacher doesn't want me to come to school. [My teacher] doesn't like me. [My teacher is] mean to me."

26. On October 30, 2008, school staff contacted an adult caretaker for the student and arranged for her to pick the student up from school early (approximately 1:00 pm). District staff describe this as a "time-out at home" and state that if the Parents or caretaker had not picked up the student early, the student could have stayed at school in the alternative space, and, if the student had calmed down, the student could have rejoined the SLP.

27. On November 4, 2008, the District suspended the student out of school for four days following a behavior incident in which the student punched a peer in the forehead without provocation. District staff also reported that the student was agitated all morning at school. Staff contacted the Parents, and an adult caretaker for the student came to the student's school at approximately 1:00 pm to take the student home. The referral record the District

generated described the discipline as "Out-of-school suspension to be served November 5, 6, 7, and 10, 2009 (sic)." The District counted the suspension as four days; however, the student did not receive services for the afternoon of November 4, 2008.

28. On November 7, 2008, case manager A again reviewed and revised the behavior support plan for the student. November 11, 2008 was a holiday and there was no school that day. District staff reported that they attempted to set up a meeting with the Parents for November 10, but the Parents were unavailable until November 12. Staff met with the Parents on November 12, 2008 and the student returned to school that morning. Case manager A met again with the PLC team on November 18, 2008 and again reviewed and revised the behavior support plan for the student.

29. Case manager A provided a November 24, 2008 progress report for the student, detailing the progress the student made towards the goals and objectives on the student's February 21, 2008 IEP.[4] The speech-language pathologist reported that the student was making unsatisfactory progress towards the speech and language goal, commenting, "Many times when I have gone to pick up [the student] for speech [the student] has either been absent or having a time out due to [the student's] disruptive behavior. It is hard for [the student] to progress [toward the] speech goals when the student has not been available to come to speech session." The occupational therapist reported that the student was making satisfactory progress, providing a description of the student's performance, and a comparison with the goals and objectives for the service. Case manager A reported that the student was making satisfactory progress towards achieving the reading, mathematics, written language, and social emotional goals and objectives, providing descriptions of the student's performance in each area. For example, in the area of mathematics she wrote: "[The student] completed a unit on fact families but struggled to retain the skill-set from day to day. [The student] earned 39% on the unit test. [The student] also completed a unit on place value 0-99 and earned a 68%." Case manager A provided this description of the student's progress towards the annual goal relating to the social emotional (behavior) services: "[The student] is struggling significantly in this area. [The student] tantrums multiple times a day and is very disruptive during these episodes. [The student's] current scores are: takes time-outs – 4%, positive interactions – 69%, raises hand – 61%, on task and participating – 69%, handles frustrations – 66%, stays in designated area – 76%."

30. On December 5, 2008, the District removed the student from the SLP classroom at approximately 12:30 pm due to the student's behavior and called the Parents to have them pick up the student and take the student home. District staff reported that the student had a rough behavior morning: the student acted in a disruptive manner, raised the student's fists at a peer, spent 90 minutes in the Rainbow Room, screamed, kicked and hit the walls, threw shoes, and made threats to "hit" and "kill" a peer before staff called the Parents. The Parents refused to pick the student up, referencing the number of days the student had already missed from school due to disciplinary suspensions. District staff kept the student in the office the rest of the afternoon, putting the student in a conference room with an adult educational assistant from the SLP program and work provided by the student's case manager. The principal reported that students on IEPs receive services from specialists, such as speech-language or occupational therapy, during in-school suspensions.

31. On December 8, 2008, District staff sent a meeting notice home with the student concerning scheduling a meeting for December 18, 2008. The meeting notice informed the Parents that

[4] The District is on a trimester grading system. November 24, 2008 is the first date progress reports for the 2008-09 school year were issued for the student's non-disabled peers.

the purpose for the meeting was to develop or review the student's IEP and placement. The letter indicated that the special education director, case manager A, and case manager B, would participate at the meeting. The Parents report they interpreted the meeting notice to mean that the student was again suspended from school pending the December 18 meeting. They kept the student home from school and arranged private school services pending the student's return to school. The December 18, 2008 meeting never took place due to an intervening snowstorm and school closure. District staff reported making telephone calls home, talking to the student's bus driver, and leaving messages for the Parents concerning the student's absences. The Parents reported that they did not receive any telephone calls after a December 9, 2008 telephone call discussing transitioning the student to a new class. The Parents also point out that they never received any letters concerning the student being truant from school, and the student's DHS case worker was not contacted concerning these absences.

32. A PLC communication log that case manager A maintained indicated that staff contacted the Parents by telephone on December 9, 2008 and discussed the planned December 18 meeting, referring to it as a transition meeting concerning moving the student to a new classroom. The phone log also indicated that the Parents expressed their concern that the student's behavior is an attempt to get control and attention. The communication log indicates that staff left telephone messages for the Parents on December 11, 12, and 16, 2008 concerning the student's absences. District staff reported it was their understanding that the Parents planned to keep the student home from school until the new class was available for the student.

33. District staff met with the Parents on January 7, 2009 concerning transitioning the student to a new class taught by a new teacher, case manager B. Case manager B is a special education teacher who operates a special education classroom, also in the Attending District, referred to as the structured learning center for academics ("SLC-A"). The SLC-A and the PLC, the student's prior educational setting, are both self-contained special education classes with low student-to-teacher ratios; however, the SLC-A class focuses on life skills and academics, whereas the PLC class focuses more on life skills and behavior. Case manager B first became involved with services to the student at the January 7, 2009 meeting. At this meeting, the Parents requested that the student not have further interactions with the counseling department or school psychologist and that the student no longer go to the Rainbow Room.

34. The student transitioned to the SLC-A, attending for the first time with case manager B on January 12, 2009. Case manager B reported that she read through the IEP, file, and behavior plan for the student and planned ahead for the transition. Case manager B reported that the student's first day of class was very successful, but, at the time of this investigation, the student had been in her class less than three weeks. The Parents report that they no longer received any daily communication from the District after the student transitioned to case manager B and the SLC-A class.

35. The student was absent on January 13, 2009. On January 15, 2009, the student was sent to the office, where the student spent the rest of the afternoon, following behavior incidents involving not following directions, defiance, and threatening to kill himself. Case manager B developed a behavior contract for the student that same day, listing undesired behaviors (e.g. class disruption, disrespect, defiance/non-compliance, and aggression) and desired behaviors (e.g. appropriate participation in class activities, appropriate verbal and non-verbal communication, following school rules and policies, and not throwing objects at peers or staff, or attempting to hit, kick, or make physical contact with peers or staff). The behavior

contract included four levels of consequence: "1. Classroom consequence according to classroom policy and procedures. 2. If [the student's] undesired behaviors continue, [the student] will be removed from the classroom (or location where undesired behaviors are occurring) and be escorted to the office. 3. In the office, [the student] will have an opportunity to regain personal control. If [the student] is unable [to] regain personal control or adhere to school policies and appropriate behavior, [the student's] parents will be contacted. 4. If [the student's] parents are unable to be contacted or unable to pick-up [the student] from school, the district Resource Officer may be contacted."

36. The January 15, 2009 behavior contract also provided for these rewards for the student: "A. Participation in classroom events and celebration, Fantastic Friday for example. B. Recess and lunch with class. C. Participation in all school assemblies and other activities." The student signed the behavior contract, indicating that: "I[the student] agree[d] to the expectations outlined in the contract above." Case manager B, the principal, and one of the student's parents also signed the behavior contract. The Parents quickly retracted their agreement to the behavior contract, contacting District staff and asserting that the behavior contract was not appropriate for the student and the student's needs.

37. District staff reported that the student was involved in a behavior incident on January 27, 2009 involving throwing a snowball at a staff member during recess after all students in the school were warned not to do so. On January 29, 2009, District staff again met with the Parents and discussed issues concerning the student's services and behavior at school. The Parents again stated they did not want the student to receive services through the counseling department or school psychologist.

38. On February 2, 2009, the District suspended the student from school for a half-day suspension. The behavior incident involved the student pushing another student to the ground without provocation and kicking the student "while wearing sharp pointed boots." On February 3, 2009, the District suspended the student out of school for one day. On February 9, 2009, the District suspended the student out of school for additional two days.

39. On February 17, 2009, the Parents filed the complaint that forms the basis of this investigation.

40. The District held a meeting on February 18, 2009 and reviewed and revised the student's February 21, 2008 IEP. The new IEP included new statements of the student's present levels of academic achievement and functional performance as well as new annual goals and instructional objectives for speech-language, occupational therapy, reading, written language, mathematics, and social/behavioral services. The IEP provided for the student to receive 180 minutes per day of specially designed instruction in social/behavioral, 30 minutes per day of specially designed instruction in math, reading, and written language (each), and 90 minutes per month of specially designed instruction in speech/language and in occupational therapy. The IEP provided for several related services, including: transportation, counseling (30 minutes, 1 time per week), yoga, and a friendship group (30 minutes, 1 time per week).

41. The February 18, 2009 IEP also provided for the student to receive several supplementary aids, services, modifications, and accommodations, including: a visual schedule throughout the school day, small group instruction for all academics, structured setting with clear rules and expectations, a reward system for positive behaviors, daily and weekly communication with home, a behavior support plan, breaking assignments into small chunks, simplified

instructions, and checks for understanding. As support for personnel, the IEP also provided for consultation with the school psychologist twice a month or as needed.

42. The February 18, 2009 team also determined the student's placement, considering and rejecting general education placement (not meeting the student's academic and behavior needs even with resource room support) and considering and rejecting a self-contained classroom with a life-skills model. The team selected separate school placement for the student in a structured, highly specialized setting (day treatment) and five weeks of tutoring for individualized instruction pending an opening in a day treatment program. The Parents expressed opposition to the day treatment placement.

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 refuting it. If the evidence on both sides is equally persuasive, the Department will not find a violation.

A. Implementation of IEP

School districts must provide the special education and related services listed on each child's IEP and must make a good faith effort to assist the child to achieve the goals and short-term objectives listed in the IEP.[5] Additionally, school districts must timely reconvene IEP teams to review and revise a child's IEP to address any lack of expected progress towards the annual goals.[6]

The Parents made two specific allegations with respect to the District's implementation of their son's IEP, specifically alleging that the class work provided for the student was negligible and not related to the student's IEP goals and that provisions for communicating with the Parents were not fully implemented. The District disputed these allegations, asserting that all services were provided in accordance with the student's IEP.

1. Class Work

Case manager A, the student's speech pathologist and occupational therapist, each provided the student with the specially designed instruction required by the student's IEP. Case manager A provided instruction in reading, math, and written language consistent with the requirements of the IEP, and worked on behavior support plans to address the student's social and behavioral skills consistent with the student's February 2008 IEP. Case manager A reported that the student made progress towards the goals and objectives on the IEP in each area although the student's behavior impeded the student's progress. The November 24, 2008 progress report provided by case manager A also reports that the student made progress towards the annual goals with the exception of the student's speech-language goal.

The Parents' actual dispute here has to do with their assertion that the class work provided for the student was not challenging enough. They do not actually dispute the District's assertion that it delivered to the student the amount of specially designed instruction in each area required

[5] OAR 581-015-2220.
[6] OAR 581-015-2225.

by the IEP. The Department does not find persuasive evidence to support the Parent's allegation that their son's IEP was not fully implemented with respect to class work because the student was provided with services implementing the specially designed instruction in reading, math, and written language required by the IEP and the student made progress towards the reading, math, and written language goals on the IEP.

2. Daily Communication

The Department notes that the daily rating sheet that District staff provided for the Parents daily communication does provide feedback related to the behavioral goal and short-term objectives on the student's IEP but typically only through a numerical scoring on the various behavioral areas and without teacher comment. Instead, case manager A used the weekly updates for providing detailed feedback and teacher comments. The Parents point to the daily communication they received from their son's previous case manager and assert that the daily communication they received from case manager A was not adequate. Further, the Parents assert that, though they received the daily rating sheet, they did not receive the more detailed weekly updates. The parents also allege that the daily communication stopped altogether after the student transitioned to the SLC-A class with case manager B on January 7, 2009.

The Department is not persuaded by the argument that the parent/teacher communication was not implemented where the daily rating sheet went home without the detail and teacher comments that the previous teacher had provided. The Parents had the opportunity each day to use the daily rating sheet to write questions or request clarification. The Department also notes that case manager A provided weekly updates that included narrative-style teacher comments and greater detail than the daily communications.

The Department notes a lack of evidence that case manager B provided these daily communication notes home after the student transitioned to the SLC-A, but the Department also notes that the student was only in this class a brief time. Under the standard adopted by the Ninth Circuit in *Van Duyn v. Baker School District,* 481 F.3d 770 (9 Cir., April 3, 2007), it is necessary to determine whether the lack of communication from January 7, 2009 to the filing of this complaint on February 17, 2009 constituted a material failure to implement this service. 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.[7] 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.[8] Although the Department finds that, from January 12 until the filing of this complaint on February 17, the District did not provide the student with daily communications as provided for in the student's IEP, the Department does not find persuasive evidence that the District's actions with regard to parental communications had a negative impact on the student's progress. Furthermore, the Department finds that the daily and weekly reports sent prior to January 7, though not as detailed as the parents had grown accustomed to, were issued in accordance with the IEP. The Department does not substantiate this allegation.

B. 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.[9] "Suspension" means any disciplinary removal other than

[7] See *Van Duyn v. Baker School District,* 481 F3d 770 (9th Cir. April 3, 2007).
[8] See *Van Duyn v. Baker School District,* 481 F3d 770 (9th Cir. April 3, 2007).
[9] OAR 581-015-2405(1).

expulsion.[10] 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.[11] "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:[12]

(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.[13] In determining whether removals of more than ten 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.[14] 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.[15]

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 ten cumulative school days in a school year and the removals constitute a pattern of removal.[16] In such cases school districts are required to immediately schedule an IEP meeting, provide the child's parents with notice of disciplinary action and notice of procedural safeguards,[17] and, within ten school days, determine whether the child's behavior is a manifestation of the child's disability in accordance with OAR 581-015-2420.[18]

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 and develop or modify, as necessary, the child's behavioral intervention plan.[19] 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,

[10] OAR 581-015-2400(5).
[11] OAR 581-015-2405(3).
[12] *Id.*
[13] OAR 581-015-2410(1). For additional requirements, see OAR 581-015-2415.
[14] OAR 581-015-2410(2).
[15] OAR 581-015-2410(3).
[16] OAR 581-015-2415(1).
[17] OAR 581-021-0065(1); OAR 581-015-2415(5)(b).
[18] OAR 581-015-2415(3).
[19] OAR 581-015-2415(5)(b).

or for infliction of serious bodily injury; or 3) the school district obtains an order from an administrative law judge.[20]

Any 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 document. Counting days the District suspended the student from school or excluded the student from school pending a meeting with the Parents, by November 6, 2008 the District had already suspended the student from the educational program for ten full school days – September 22-26, September 29-30, a half day on October 30,[21] a half day on November 4, and November 5-6.

The District violated regulations with respect to disciplinary removals of the student by continuing to suspend the student from school after November 6, 2008 and continuing to remove the student from the student's educational program without determining whether this series of removals constituted a pattern. The District suspended the student for additional full days on November 7 and 10. The District further suspended the student from the current educational placement on February 2, 2009 (1/2-day), February 3, 2009 (full day), and February 9, 2009 (two days). In all, the District suspended the student for 15.5 days between the start of the 2008-2009 school year and the filing of this complaint. Additionally, the Department finds that the December 5 disciplinary action taken by the District did not constitute a removal because the Parents did not pick up the student from school (even though requested), and the student continued to have access to the services required by the student's IEP.

The Parents contend that the District suspended the student on December 8, 2008 when the District sent the meeting notice home for the scheduled December 18, 2008 transition meeting. The Department's review of the facts does not support this contention. The notice is for an IEP meeting, and there is no evidence that the District took any action to exclude the student from school during this time period. Rather, the District provided communication logs of contacts with the Parents concerning the purpose of the meeting (transition to a new class and teacher) and telephone messages concerning the student's absences.

OAR 581-015-2415 states, "[a] disciplinary removal is considered a change in educational placement and the school district must follow special education due process procedures if … [t]he child will be removed for more than [ten] cumulative days from their current educational placement in a school year, and those removals constitute a pattern under OAR 581-015-2410(2)." Once a student has been removed from a current educational placement, "[s]chool personnel must determine, on a case-by-case basis, whether the series of removals constitutes a pattern"[22] based on the criteria listed in the Oregon Administrative Rules.

The Department finds that, after the District removed the student from the current educational placement for ten days in the 2008-2009 school year on November 6, 2008, the District was obligated to determine whether or not the series of removals constituted a pattern. Therefore, the Department finds that the District violated IDEA when it failed to determine whether the series of removals constituted a pattern. This failure may also have deprived the student of the

[20] OAR 581-015-2415(4).
[21] The October 30, 2008 1/2-day removal must be included because District staff called the student's adult caretaker and asked her to take the student for a "time-out at home" without access to the services required by his IEP. Therefore, even though the District asserts that the student could have stayed at school if the caretaker had not picked the student up, the District must still count this as a disciplinary suspension.
[22] OAR 581-015-2410(2).

procedural safeguards that are provided to students with disabilities who have been removed from their educational setting for ten or more cumulative days constituting a pattern.

The Department concludes that the District erred by not counting all of the days and half-days the student was removed from the current educational placement without access to the special education and related services described in the student's IEP as suspensions. This miscalculation of days of removal resulted in the District violating IDEA by failing to consider, within a reasonable amount of time after November 6, 2008, whether those removals constituted a pattern under OAR 581-015-2410(2). In light of these findings, the Department orders the District to engage in corrective action as detailed below.

C. Review and Revision of IEP

The Parents allege that the District should have reviewed and revised the student's IEP to address the student's behavior needs. School districts are required to ensure that the IEP Team reviews each student's IEP periodically to determine whether the student is achieving the annual goals and, if appropriate, to modify the IEP to address "any lack of expected progress toward the annual goals … and in the general education curriculum, if appropriate."[23] In addition to considering any information concerning the student's progress on IEP goals, the IEP Team must consider the "results of any reevaluation conducted under OAR 581-015-2105."[24] Under that rule, each student with a disability must be reevaluated at least every three years unless the parent and the school district agree that a reevaluation is unnecessary.[25]

The Department finds that the District erred when it did not convene the student's IEP team to consider the student's progress on the annual goals and, if necessary, revise the IEP to better address the student's behavior prior to February 18, 2009. This conclusion is based on evidence that the student's behavior resulted in 15.5 days of disciplinary removal and the information contained in the student's November 24, 2008 progress report.

As discussed above, the student was removed from the student's current educational placement for disciplinary and other reasons during the first trimester of the 2008-2009 school year. The disciplinary removals along resulted in the student being denied special education and related services as well as access to the general educational curriculum for a substantial number of school days in that grading period. Additionally, the student's progress report for the first trimester indicates that the student's progress toward the speech and language goal was negatively impacted by the student's unavailability for services due to absences and suspensions. The progress report also indicates that the student was having difficulty attaining the social emotional (behavior) goals included on the IEP. The Department finds that, based on the evidence of the student's progress available on November 24, 2008 and the negative impact that the student's behavior was having on the student's progress, it was unreasonable for the District to wait until February 18, 2009 to convene the IEP Team and review the student's IEP.

The Department also finds that the District's attempts to address the student's behavior and the revision of the student's IEP on February 18, 2009 did not satisfy the requirements of the IDEA and Oregon law. The Parents allege that the January 15, 2009 behavior contract developed for the student was inappropriate and did not adequately address the student's behavior. The four levels of consequences detailed in the behavior contract continued to include contacting the Parents to have them pick up the student from school and were unlikely to halt the series of removals that had already resulted in the student missing a substantial number of school days.

[23] OAR 581-015-2225(1).
[24] OAR 581-015-2225(1)(b)(B).
[25] OAR 581-015-2105(4)(b)(B).

On the basis of these facts, the Department is persuaded that the behavior contract did not adequately address the student's behavior. Further, the Department finds that the review and revision of the student's IEP that took place on February 18, 2009 did not comply with the requirements of IDEA. Specifically, the Department finds that the IEP Team failed to consider the required reevaluation data concerning the student. In the absence of an agreement between the District and the Parents that a reevaluation is unnecessary, the District was required to reevaluate the student in October 2008.[26] The Department finds no evidence that the District and the parent so agreed or that the student was reevaluated since October 2005; therefore, the Department substantiates the Parents allegation that the District violated the IDEA by failing to review and, if necessary, revise the student's IEP to address the lack of expected progress towards the student's speech, language, and social emotional goals. In light of these findings, the Department requires the District to engage in corrective action as detailed below.

D. Corrective Action/Compensatory Services

When 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."[27] 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."[28] 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.[29] Here, the District changed the student's placement in February 2009 to a separate school, providing the student with home tutoring services pending the availability of a suitable program.

The Department finds that the student was denied appropriate services on some occasions following the District's failure to properly consider the student's disciplinary removals; however, the Department believes that denial does not require compensatory services. From November 7, 2008[30] until the filing of this complaint on February 17, 2009, the student was removed from the current educational placement for disciplinary reasons for 5.5 days. Additionally, the student's November 24, 2008 progress report indicated that the student was making progress on the general educational goals. Based on the short timeframe in question and the student's progress on the general educational goals the Department does not believe that compensatory education is appropriate.

The Department also finds that the District's procedural errors denied the student of an IEP that was reasonably calculated to provide educational benefit. The District's failure to consider whether the student's series of disciplinary removals constituted a pattern and to consider the appropriate information in reviewing and revising the student's IEP are closely related. Because of the corrective action for these findings overlaps to some extent, the Department addresses the corrective action collectively.

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[26] *Id*.
[27] OAR 581-015-2030(13).
[28] *Id*.
[29] *See, e.g. Student W. v. Puyallup Sch. Dist*, 31 F.3d 1489 (9 Cir. 1994).
[30] November 7, 2008 is the eleventh day that the student was removed from the current educational placement for disciplinary reasons.

Additionally, the Department understands that the District has taken steps to remedy some of the findings contained in this order. Specifically, the District has obtained parental consent[31] to evaluate the student for disabilities and to place the student in a temporary setting while awaiting an opening in the preferred placement. The District has also arranged to have the student reevaluated for special education eligibility and to develop a new IEP based on the evaluation data. The following Corrective Action reflects the efforts that the District has already made to address the findings contained in this order.

V. CORRECTIVE ACTION[32]

In the Matter of Colton School District No. 53
Case No. 09-054-006

#	Action Required	Submissions[33]	Due Date
1.	Review and Revision of District Procedures Consistent with this Final Order, the District shall review, and revise as appropriate, its polices and procedures, and FAQ, concerning when removal of a student is considered a disciplinary removal/suspension, consistent with the discussion in this order.	Submit to the Department a copy of the FAQ showing the revisions, including applicable forms and documents referenced within the FAQ.	**May 31, 2009**
2.	Training and Information Distribute by email or other means a redacted copy of the Final Order in Case No. 09-054-006 to all administrators overseeing discipline of children with disabilities, and all special education teachers, and a memo explaining the Final Order, and the removal and suspension requirements for students with disabilities.	Submit to the Department evidence of completion, such as a copy of the distribution list to the Department.	**May 31, 2009**
3.	Review and Revision of IEP: (a) The District shall, pursuant to the applicable Oregon Administrative Rules, reevaluate the student. (b) Following the reevaluation of the student, the District shall reconvene the IEP Team to review and, if necessary, revise the student's	Copies of any parental consent forms, evaluation planning documents, meeting minutes, and evaluation reports.	**May 31, 2009**

[31] Prior to the issuance of this order, the Clackamas County Circuit Court assigned a surrogate educational decision-maker for the student. The student's foster parents are no longer the educational decision-makers for the student.
[32] 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).
[33] 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.

	IEP and determine the least restrictive environment in which the IEP can be implemented. (c) The District shall implement the IEP in the least restrictive environment and, in consultation with the Parents, develop a plan for reporting the student's progress towards the IEP goals.	A copy of the student's new IEP, placement document, and the plan for reporting progress.	**June 5, 2009**

Dated: April 20, 2009

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

Mailing date: April 20, 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.