

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Lincoln County School)
District)
)
)

FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 09-054-013

I. BACKGROUND

On March 17, 2009, the Oregon Department of Education (Department) received a letter of complaint from the parent of a student attending school and residing in the Lincoln County School District (District). The parent requested that the Department conduct a special education investigation under OAR 581-015-2030. The Department confirmed receipt of this complaint on March 18, 2009 and provided the District a copy of the complaint letter. On April 10, 2009, the parent submitted a supplemental email to the Department and the District which included additional allegations.

On March 26, 2009, 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 April 9, 2009. The District submitted its timely *Response* to the Department and to the parent on April 8, 2009. The District’s Response included two pages of narrative explanation and an additional 209 pages of documents and exhibits requested in the RFR. On April 15, 2009, the Department sent an *Amended Request for Response* to the District. On April 20, 2009, the parent submitted her Reply to the RFR. On April 23, 2009, the District submitted its two-paged Response to the Amended RFR along with 4 pages of documents. The parent submitted her two page Reply on April 27, 2009 and provided an additional six pages of documents during the on-site interview process (copies of which were provided to the District).

The Department’s complaint investigator determined that on-site interviews were necessary. On April 21, 2009, the Department’s investigator interviewed a case worker with the Lincoln County Health & Human Services Developmental Disabilities Department by telephone. On April 28, 2009, the Department’s investigator interviewed the parent, the student’s special education teacher, a District principal, and the District’s Special Education Administrator. The Department’s complaint investigator reviewed and considered all of these documents, interviews, and exhibits.

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; the timeline may be extended if the District and the parent agree to extend the timeline to participate in mediation or if exceptional circumstances require an extension.¹ This order is timely.

¹ 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 March 18, 2008, to the filing of this complaint on March 17, 2009.²

	Allegations	Conclusions
	<p>Allegations to be investigated. The written complaint alleges that the District violated the IDEA in the following ways.</p>	
1.	<p><u>IEP Implementation:</u></p> <p>A) Not fully implementing the student's March 18, 2008 IEP. Specifically, the parent alleges that the specially designed instruction and modifications and accommodations were not implemented by the District beginning January 27, 2009, when her child was enrolled in the District.</p> <p>B) Beginning March 30, 2009, not implementing the student's March 6, 2009 IEP accommodation of "Communication between school and home".</p>	<p>Not Substantiated.</p> <p>The District is not required to implement the services included on a transfer student's IEP from another Oregon district. The Department does not substantiate this allegation.</p> <p>No Finding.</p> <p>The March 6, 2009 IEP was the product of an IEP team meeting that inappropriately excluded the parent. The Department believes that the deficiencies of the March 6 IEP will be addressed at when the IEP team is properly reconvened in accordance with this order.</p>
2.	<p><u>Transfer Students:</u></p> <p>Upon transfer of the student from another Oregon school district, not adopting the child's IEP from the previous school or developing, adopting, and implementing a new IEP for the child.</p>	<p>Substantiated.</p> <p>Upon the student's transfer into the District, the District did not provide services comparable to those on the student's previous IEP, adopt the previous IEP, or create and implement a new IEP.</p>

² See 34 CFR 300.153 (c); OAR 581-015-2030(5).

<p>3.</p>	<p><u>Change of Placement/ Least Restrictive Environment:</u></p> <p>A) Beginning February 3, 2009 and extending through February 10, 2009, the District changed the student's placement by shortening the student's school day from six hours per day to two hours per day;</p> <p>B) Removing the student from a general education classroom setting to a separated room away from his general education peers;</p> <p>C) Not allowing the student to participate in recess with his general education peers; and</p> <p>D) Secluding and/or restraining the student in a separated room.</p>	<p>Substantiated.</p> <p>The District changed the student's placement from February 4 through 10, 2009, shortening his school day from six to two hours for the four school days in that time period.</p> <p>Substantiated.</p> <p>The District separated the student from all peers between January 27 and March 13, 2009.</p> <p>Substantiated.</p> <p>The student was not allowed to participate with any peers during recess between January 27, 2009 and March 13, 2009.</p> <p>Substantiated, in part.</p> <p>The Department finds that the student's excessive removal from the educational setting resulted in a denial of FAPE and was inconsistent with the interventions listed on the student's behavioral intervention plan.</p>
<p>4.</p>	<p><u>Equal Rights and Privileges:</u></p> <p>Not extending to children who require special education the same rights and privileges provided to other students by denying the student full admission from February 3, 2009 to February 10, 2009.</p>	<p>Substantiated.</p> <p>The District unilaterally reduced the student's school day for four days from six hours to two hours without implementing disciplinary procedures, denying the student the same rights and privileges provided to other students.</p>
<p>5.</p>	<p><u>Parental Participation/ IEP Design:</u></p> <p>A) Not providing the parent the opportunity of participating in the</p>	<p>Substantiated (A-C).</p> <p>The District did not provide the parent the opportunity to participate in the</p>

	<p>March 6, 2009 IEP meeting by scheduling the meeting when the parent was not available;</p> <p>B) Not scheduling the March 6, 2009 IEP meeting at a mutually agreed time and place after the parent informed the District that she was not available to attend the IEP meeting scheduled for March 6, 2009;</p> <p>C) Not providing a copy of the March 6, 2009 IEP to the parent until April 9, 2009;</p> <p>D) Changing the student's IEP without determining whether the student was demonstrating adequate progress on the annual goals; and,</p> <p>E) Not revising the IEP, as appropriate, to address the student's present levels of academic achievement and functional performance and progress, or lack thereof, toward his annual goals.</p>	<p>March 6, 2009 IEP meeting.</p> <p>Substantiated.</p> <p>The District did not schedule the March 6, 2009 IEP meeting at a mutually agreeable time.</p> <p>Substantiated.</p> <p>The Department finds that the District failed to provide the parent with a copy of the IEP for over a month after the IEP was implemented.</p> <p>No Findings.</p> <p>The Department believes that the deficiencies of the March 6 IEP addressed in allegations 5D and 5E will be addressed at when the IEP team is properly reconvened in accordance with this order.</p> <p>See Corrective Action.</p>
6.	<p><u>Prior Written Notice:</u></p> <p>Not giving the parent a Prior Written Notice of the District's proposal to initiate or change, or refusal to initiate or change, the educational placement of the child or the provision of a free appropriate public education to the child resulting from the March 6, 2009 IEP meeting.</p>	<p>Substantiated.</p> <p>The District issued no prior written notices following the changes to the student's placement and the March 6, 2009 IEP meeting, which resulted in changes to the student's educational program.</p>

7.	<p><u>Requested Corrective Action:</u></p> <p>The parent is requesting that the District provide compensatory educational services.</p>	<p>Ordered, See Corrective Action.</p>
----	--	--

III. FINDINGS OF FACT

Background

1. The child is currently 7 years old, resides in the District, and attends first grade at a District elementary school and is presently eligible for special education as a child with Autism Spectrum Disorder. The child was first determined eligible for special education services in 2005 at age two years and eleven months.
2. The student previously attended kindergarten in another Oregon school district. On March 13, 2008, the other Oregon school district completed the three year eligibility reevaluation and continued the student's eligibility as a child with Autism Spectrum Disorder. The student continued in that school district until transferring into the District in January 2009.
3. On March 13, 2008 the student's IEP team in the former district designed an IEP ("March 2008 IEP") that, had the student remained in the prior district, would not have required revision until March 12, 2009.

2008-2009 School Year

4. The student attended kindergarten and began first grade in another Oregon school district. On October 16, 2008, the parent wrote one of the District elementary schools to inform the school that the parent intended to relocate into the attendance boundary and wanted more information about the school. The letter disclosed the student's eligibility and described some of the student's services, stating that the student "would not be a successful candidate for mainstreaming." Instead, the parent described the student's then-current placement as "a very structured setting" where the student was "flourishing....[the student] behaviors have decreased and [the student] is increasingly more verbal." The parent asked to speak with staff to learn more about the District's special education curriculum in hopes that the "transition [could] be as smooth as possible." The letter included the parent's phone number and email address. The parent enclosed the student's IEP.
5. In October 2008, the District contacted the parent by phone and described the methodology, supports, and physical setting at the neighborhood school that the student was expected to attend.

6. The March 2008 IEP included specially designed instruction in:

Communication (180 minutes/month);
Classroom/Social Skills (200 minutes/month);
Academics (200 minutes/month);
Social/Emotional Skills (150 minutes/month);
Self Care and Daily Management (150 minutes/week); and
Adaptive PE (30 minutes/week). (SD 5)

7. Related Services on the March 2008 IEP included daily transportation and "Occupational Therapy (OT) services to address writing and social emotional." Modifications and Accommodations included, among other things, adult assistance for inclusion (5 hours/week) and a behavior plan "throughout the day." There is no reference to a communication plan between school and the child's home, but the parent reported that a sheet was exchanged on a daily basis to inform the recipient about important events before, during, and after school time.
8. The Nonparticipation Justification stated that the student needed to be removed from participating with non-disabled peers for up to 80% of the day because the student "needs adult support, structure and a behavior plan to maintain productive school behavior and increase [the student's] academic and communication skills." The Special Factors section indicated that the student exhibits communication needs addressed in the IEP and behaviors that impede the student's learning or the learning of others.
9. The student's Present Levels of Academic Achievement and Functional Performance described that the student was placed in a "Communication and Behavior classroom for up to 95% of [the student's] school day." Behaviors when frustrated include "hitting, kicking, throwing objects and biting, as well as....head butting....and requires a Behavior Intervention Plan to be implemented consistently."
10. The student's placement options identified the general education class with special education support. This option was rejected as not providing enough time for individual instruction and a small enough class size. The other option identified, and eventually selected, was a "special class" with small group and individualized instruction, highly trained staff, and a smaller student to teacher ratio.
11. The previous school district revised the student's Functional Behavioral Analysis and Behavior Intervention Plan in December 2008. This evaluation and plan was provided to the District before the student began attending the District school. The targeted behavior included throwing objects, knocking over objects, hitting and grabbing other's clothing, rolling, crawling, or running away from adults while laughing. A "Cool Down" routine, described as being escorted to a separated space (using Crisis Prevention Institute ("CPI") restraint if necessary) and using sign language or visual prompts to quiet the student, was the corrective consequence specified in the plan. Once calm for two minutes, positive behavior was reinforced with 5 minutes of desirable activity.

12. On January 22, 2009, the District received a faxed copy of the student's March 2008 IEP from the previous school district.
13. On January 26, 2009, the parent and the student toured the school and were shown the special education classroom. The parent was informed that the other District elementary school in the same town had a larger learning space for structured learning and the parent could possibly enroll the student at the other elementary school. The parent decided to enroll her child in the neighborhood school.
14. The student first attended the school on January 27, 2009. The room that the student was placed in was not the larger special education classroom, but was a separate room, approximately fourteen feet by fourteen feet in area that contained temporary partitions to create a "break space." (SD 68, 244-251, interview Osborne)
15. On January 28, 2009, the student threw a small toy at an adult. The student was guided to the break area by an adult. The student dropped to the floor, banged the student's head on the wall, and started to climb on the table and chair. The student was restrained by a CPI intervention for approximately 3-5 minutes. A restraint/seclusion incident report was prepared. The staff member also filed a "Report of Job Injury" describing the incident as "Student Threw Toy. Not A Serious Injury". (emphasis in original). No medical treatment was received by the staff member.
16. Staff began tracking the events during the student's day in greater detail beginning January 29, 2009. While the information was anecdotal, staff calculated the amount of time in the break room totaled two and a half hours of the six hour day. (SD 68-70).
17. On January 30, 2009, the notes do not include a calculation of the cumulative amount of time that the student spent in the break space.
18. On February 3, 2009, staff reported the student's behavior was escalating, including throwing things, grabbing and banging wall partitions, pulling teacher's hair, and not complying in the small room setting. District staff and staff notes reflect that the temporary partitions in the room could fall from the child's behavior. Staff reported that the student was in the break space for over two hours.
19. District staff met later in the afternoon of February 3, 2009 and decided to limit the student's time at school to two hours. Initially, the District intended the shortened days to end after three days.
20. On February 4, 2009, staff reported that the student was in the break area for approximately one hour of the two hour day. The parent took the student home from school at 10 a.m. The parent was initially informed that the two hour school day would continue until Friday, February 6, 2009, but the shortened day schedule was

continued through February 10, 2009. There was no school on February 9, 2009. The shortened school days were in place for a total of four school days.

21. The District and the parent communicated in an effort to set an IEP team meeting on February 10 or 12, 2009, but were unable to schedule a meeting at a mutually agreeable time. The District scheduled an IEP meeting for February 23, 2009 and provided appropriate IEP team notice.
22. Prior to February 11, 2009, the District modified the approximately fourteen-by-fourteen foot room by removing the temporary self-standing partitions and constructing a permanent separated area with permanent walls and a standard door with a window. The interior "break room" was five feet by eight feet.
23. The child began attending school for full days again on February 11, 2009. On the child's morning bus ride to school that day, an incident report reflects that the student hit another student on the head.
24. Between February 11 and 17, 2009, the District took data on the following events and consequences: violence, non-cooperation, throwing, refusing, and requiring assists and/or breaks. The student's time in the break room for the four full days of data collection ranged from the lowest of 91 minutes to a high of 234 minutes (on a day when substitute teacher was present). Notes accompanying the data included: "[The student was] entertained ... by pulling off and playing with molding" from the break room's rubber baseboards]. The District created bar graphs of the behaviors for each day, by time of the day, and each day, by type of behavior."
25. On February 13, 2009, the student was observed by a third party to be in a classroom with an educational assistant and without any other students. The placement was described as "isolated" without any other children in the classroom.
26. On February 18, 2009, the parent learned of the third party's February 13, 2009 visit and went to the school unannounced at approximately 9:15 a.m. The child was in the small room without other peers present. The parent removed her child from the school.
27. Staff reported that, up to this point in time, the student did not attend recess with other students. Staff reported that the student would go outside with two or three staff members but without other children to become familiar with the rules of the playground. Staff reported that the longest the student was with other students was approximately ten minutes. Staff reported that the student was never left in the "break room" without a staff member watching him through the window.
28. On February 23, 2009, the parent, the county's case worker, the District special education director, and other team members met for the scheduled IEP meeting. The District presented the behavioral data, charts, and notes collected up to February 18, 2009. The parent was upset at the emphasis of reporting the negative behaviors, the placement in the small classroom, and the lack of contact with other

children. The team did not address adopting or revising the out-of-district IEP. The parent signed and submitted a Student Transfer Request to attend a different District elementary school. It was discussed that there would be another IEP meeting on March 6, 2009.

29. On February 26, 2009, the parent emailed and faxed a letter informing the District that she did not want the current attending school IEP team to meet pending the outcome of the Student Transfer Request. The letter stated that the parent believed that it was in the student's best interest "to forgo [the student's] yearly annual IEP meeting" until [the student] was transferred, tested, and evaluated for progress and present levels. The parent based this belief on the short period of attendance at the present school (14 days) in a setting separated from peers, which she asserted was inconsistent with all prior IEP placements.
30. The student attended school on February 24 and 26, 2009 and did not attend school again until March 19, 2009.
31. On February 27, 2009, District staff at the attending school sent an IEP team meeting notice for March 6, 2009. The notice included the principal of the requested transfer school as an invited member.
32. On February 27, 2009, District staff at the requested transfer school wrote the parent that the request for a transfer was denied.
33. On March 5, 2009, the parent called the attending school to confirm that the previously scheduled IEP meeting was not going forward the next day. The parent was informed by the secretary that there was nothing on the calendar. District staff explained that IEP meetings are not always put on the calendar. The county's case worker, who attended the previous IEP meeting, emailed the District inquiring whether there was to be a meeting the next day; the case worker understood that the meeting was cancelled. The District did not respond to the county case worker's email. The parent wrote the District special education director and appealed the denial of the school transfer request.
34. On March 6, 2009, the parent spoke, by phone, with the District special education director about the appealed transfer request. She also inquired about the IEP meeting scheduled to begin within the hour. The parent was informed that, as far as the special education director knew, there were not any "big things" that would occur at the IEP meeting but she could not say for sure what would transpire. The parent understood that the only thing that would occur was transferring the information from the out-of-district IEP to the District IEP form. The District did not offer to involve the parent by alternate means, such as by telephone and, instead, pursued the meeting without the parent.

35. On March 6, 2009, the District held an IEP meeting without the parent.³ No one from the requested transfer school attended. Staff reported that the meeting was held because the meeting had been noticed, the parent initially agreed, and it would have been difficult to arrange the necessary IEP team members again before March 13, 2009 – 365 days after the previous out-of-district IEP meeting.
36. The IEP resulting from the March 6, 2009 meeting was different in the following ways from the March 2008 IEP:
- a) occupational therapy of five hours per year was deleted;
 - b) parental concerns were reported in a manner which was not reflective of the parent's actual concerns;
 - c) the present level statement was changed;
 - d) all annual goals for each area of specially designed instruction were revised;
 - e) the speech and language specially designed instruction was changed from 180 minutes per month to 40 minutes each week;
 - f) the accommodation of "adult assistance for inclusion – 5 hours per week" was deleted;
 - g) the placements considered were described as percentages of time outside of the regular class rather than as descriptions of the spectrum of options appropriate to be considered as the least restrictive environments; and,
 - h) the placement chosen was described as "More than 60% special class - allows for small group, and 1:1 instruction in environment with limited noise and visual distractions" rather than the March 2008 placement of "special class - small group instruction and individualized instruction, highly trained staff, smaller teacher: student ratio."

All IEP services were listed to begin on March 7, 2009.⁴

37. On March 12, 2009 the parent appealed the denial of the school transfer request to the District Superintendent.
38. On March 13, 2009, the District completed a divider/wall in the large special education classroom at the neighborhood school. The parent was informed of the completion of the divider/wall. This divider/wall was unrelated to the "break area" and is not in the fourteen by fourteen foot room. Other special education peers are present in this large classroom.
39. On March 16, 2009, the District superintendent wrote the parent that her appeal of the transfer request was denied.
40. The student returned to school on March 19, 2009. The District reports that the student is in a classroom with other students eligible for special education. The student is allowed to go to recess with peers.

³ The parent represented that she had attended every IFSP and IEP meeting involving her child in the past. (Parent interview)

⁴ With the exception of Special Transportation, which had a start date of March 10, 2009.

41. On April 8, 2009, the District mailed the March 6, 2009 IEP to the parent, who received it on April 9, 2009. The parent filed her amended complaint by email on April 10, 2009.

IV. DISCUSSION

Because of the interconnected nature of several of the allegations that form the basis of this complaint, this order consolidates a number of the allegations. Allegations 1, 2, 3 and 6 are addressed in Section 1. Allegations 4 and 5 are addressed separately.

1. Implementation of March 2008 IEP, Transfer Students, Change of Placement and Prior Written Notice

Under the IDEA, school districts must develop and implement, for each eligible child, an IEP that is designed to ensure that the child receives a free appropriate public education (FAPE).⁵

FAPE is defined as “special education and related services” that are: provided at public expense; meet state standards; include an appropriate preschool, elementary, or secondary education; and provided in conformity with an IEP.⁶ A school district meets its obligation to provide FAPE for an eligible child by complying with the procedural requirements of the IDEA and implementing an IEP reasonably calculated to enable a child to receive educational benefits.⁷

A written IEP must be in effect for each eligible child at the beginning of each school year.⁸ School districts must implement the services, modifications, and accommodations identified on each student’s IEP.⁹

A. Implementation of the March 2008 IEP

The parent alleges that the District did not implement the March 13, 2008 IEP from the previously attended school district. Specifically, the parent alleges that the District changed the student’s placement without an IEP meeting by reducing the number of hours from a normal school day of six hours to two hours from February 3 through February 10, 2009. In addition, the parent alleges that the District did not fully implement the student’s specially designed instruction and modifications and accommodations contained in the March 13, 2008 IEP.

If a child with an IEP transfers between school districts within Oregon, the new school district must provide FAPE, including services comparable to those described in the child’s IEP from the previous district, until the new district adopts the previous IEP or

⁵OAR 581-015-2040, 34 CFR 300.341

⁶ See 20 USC § 1402(8).

⁷ See *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 US 176, EHLR 553:656 (1982).

⁸ OAR 581-015-0064(1).

⁹ OAR 581-015-0064(2).

develops, adopts, and implements a new IEP for the child.¹⁰ Nothing in IDEA or Oregon's special education laws requires a district to fully implement an IEP from a school district that a student previously attended. Instead, the applicable laws require the district to provide comparable services to those included on the previous IEP until such time as the new district adopts the previous IEP or creates and implements a new IEP.

Because the District was not obligated to provide the services and placement listed on the previous IEP, the Department issues no finding with regard to this allegation.

B. Transfer Students

As discussed above, when a student changes residence from one Oregon school district to another, the receiving school district must provide the student with FAPE including services comparable to those included in the previous IEP until the student's IEP team either adopts the previous IEP or creates and implements a new IEP.¹¹ When the student began attending school in the District on January 27, 2009, the District had a copy of the previous IEP. At that point, the District was obligated to implement an educational program that provided the student with specially designed instruction, modifications and accommodations, and a placement comparable to those contained in the March 2008 IEP.

The Department finds that, from January 27 until March 13, 2009, the District failed to provide FAPE to the student by not offering an educational program comparable to the previous IEP. Specifically, the Department finds that the District did not provide the student with five hours per week of adult assistance for inclusion. The evidence indicates that the student had limited access to peers, disabled or non-disabled, during the time that the student was placed in the small classroom. Additionally, the limited access that the student was granted to peers involved bringing peers into the student's setting rather than including the student in the peers' regular setting. This practice was not comparable to the five hours a week of inclusion services included on the student's previous IEP.

The Department also finds that the District did not provide the student with a placement comparable to the placement described on the previous IEP. The March 2008 IEP indicated that the student was placed in a "special class" with small group and individualized instruction. Upon the student's arrival at the school, from January 27 until March 13, 2009, the District placed the student in a separated classroom without any peers. Additionally, from February 4 through February 10, 2009, for a total of four school days, the District reduced the student's time at school from six hours to two hours while modifications were made to the student's room.

The District placed the student alone in a class, without significant exposure to any other children, and subsequently reduced the amount of time that the student was

¹⁰ OAR 581-015-2230(1)

¹¹ OAR 581-015-2230.

allowed to attend school. The District represented that the student's isolated setting was the result of the student's violent and disruptive behavior; however, district records indicate that the student exhibited behaviors of hitting, kicking, and throwing in the previous district. The Department substantiates the allegation that the District did not provide services comparable to those contained in the March 2008 IEP.

Additionally, the Department finds that the District did not adopt the student's previous IEP or create and implement a new IEP within a reasonable amount of time after the student transferred into the District. Though the District made a number of attempts to hold an IEP team meeting in February, eventually holding an IEP team meeting on February 23, 2009, the team did not adopt the previous IEP or develop a new one. When the team finally met to discuss adoption of the previous IEP or the creation of a new IEP, the meeting did not conform to the parent participation requirements of IDEA. Therefore, the Department substantiates the parent's allegation that the District violated IDEA by failing to provide the student comparable services to those contained on the previous IEP and by failing to adopt the previous IEP or develop a new IEP within a reasonable timeframe after the student arrived in the District.

C. Prior Written Notice

If a district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation or educational placement of a child, it must give PWN to the parent after the decision is made and a reasonable time before that decision is implemented. The PWN must contain specific information.¹²

When the District changed the student's placement from the special classroom, with small group and individualized instruction, highly trained staff, and a smaller student to teacher ratio, it did not issue a PWN. Additionally, when the District changed the student's IEP at the March 6, 2009 meeting, it did not issue the parent a PWN of the changes that were scheduled to be implemented the day after the meeting. Therefore, the Department substantiates the allegation that the District did not issue a PWN informing the parent of the student's placement in a more restrictive setting or the changes made to the March 6, 2009 IEP.

D. Recess

The parent alleges that the student was not allowed to participate in recess with the student's peers. A school district must ensure that a child with disabilities participates with children who do not have disabilities, to the maximum extent possible, in extracurricular activities, including recess.¹³ In this situation, the student wasn't allowed to participate with any peers at recess. From the student's initial enrollment in the District on January 27 until the District offered the student a special classroom placement on March 13, 2009, the student's recess was alone with two or three supervising adults. However, the student's March 2008 IEP did not indicate that the

¹² OAR 581-015-2310

¹³ OAR 581-015-2255 (1)

student was to be removed from all peers during recess, and, barring the adoption of a new IEP or the implementation of disciplinary proceedings, the student was entitled to participate in recess with peers. The Department substantiates the allegation that the District did not allow the child the opportunity to participate in recess with other peers.

E. Seclusion

The parent alleges that the student was secluded in a separate room. Although IDEA requires the consideration of positive behavioral supports and interventions, it does not preclude the use of seclusion. Regardless of the behavioral strategies used, including seclusion, a district must ensure that FAPE is provided. Seclusion is defined as:

(b) "Seclusion" means the involuntary confinement of a student alone in a room from which the student is prevented from leaving. Seclusion does not include "time out" as defined in subsection (c);

(c) "Time out" means a [sic] removing a student for a short time to provide the student with an opportunity to regain self-control, in a setting from which the student is not physically prevented from leaving.¹⁴

The parent's allegation addresses two practices implemented by the District while the student was placed in the small classroom: 1) the use of temporary partitions to isolate the student and 2) placing the student in the permanent break room for extended periods of time.

With regard to the District's use of temporary partitions to isolate the student within the small classroom, the Department substantiates the parent's allegation. Specifically, the Department finds that, on February 3, 2009, the District confined the student within the temporary partitions. District personnel stated that, in order to keep the student from toppling the partitions, school staff had to physically brace the temporary walls. Based on these facts, the Department finds that the District secluded the student by confining the student in the partitioned area and preventing the student from leaving.

Under OAR 581-021-0062, a student should be secluded only "as part of a behavior support plan when other, less restrictive interventions would be ineffective and the student's behavior poses a threat of imminent, serious, physical harm to the student or others." Based on the student's aggressive and self-injurious behavior reported by the previous district and witnessed by school staff in the days prior to February 3, 2009, the Department finds that, on that occasion, the teacher could have reasonably believed that the student posed an immediate threat of harm to the student or others. However, the Department also finds that the behavioral consequences implemented by the District were not comparable to those described in the student's Behavioral Intervention Plan ("BIP") from the previous district. Specifically, the student's BIP does not prescribe the use of seclusion, preventing the student from leaving an enclosed area, in response to the student exhibiting target behaviors. Therefore, the Department substantiates the claim that the District violated IDEA by failing to implement behavioral interventions

¹⁴ OAR 581-021-0062 (1)

comparable to those on the previous IEP. Additionally, the Department finds that the District erred when it did not document the February 3 seclusion of the student in accordance with OAR 581-021-0062(h). See Corrective Action.

With regard to the District's use of the permanent "break room" in response to the student's classroom behaviors, the Department does not find persuasive evidence that the District secluded the student. The District records confirm that the student was placed in the "break room" on several occasions from January 27 to March 17, 2009 for extended periods of the school day, up to 234 minutes in a six hour day. The District staff reported that the student was never left alone and always had a teacher or instructional assistant present. No evidence was presented indicating that school staff prevented the student from leaving the "break room" on any of the occasions.

Though the student's confinement to the "break room" did not fit the statutory definition of seclusion, the District's excessive confinement of the student cannot be classified as a "time out." Additionally, the use of repeated and extended confinement in response to the student's negative behaviors was not consistent with the BIP in place for the student upon transfer into the District.

The student's behavioral intervention plan prescribes the use of "cool downs" or "breaks" as corrective consequences for the student when the student exhibits aggressive or control-seeking behaviors. In instances where the student resists a teacher-initiated transition to a new activity, the BIP requires the staff to direct the student to take a break and read the student a social story. Once the student is calm, no timeframe is indicated, the staff member must direct the student, using hand symbols, to clean up any items that the student disturbed while being defiant. In instances where the student is seeking attention or asserting control, the BIP requires the staff to direct the student into a "cool down" space and place a temporary partition in front of the opening. According to the BIP, the student is to remain in the room for two minutes once calm, and the student can engage in highly desired activity for five minutes after the two minutes has expired. Under both behavioral circumstances, the BIP authorizes school staff to use CPI restraints on the student if the student hit or kicked others while being redirected.

The Department finds that the District's confinement of this student exceeded both the statutory definition for a time out and the corrective consequences described in the student's BIP. Although the evidence presented does not indicate that the student was routinely isolated in the break area for extended periods of time, the Department concludes that the cumulative amount of time that the student spent in confinement due to repeated short stays in the break room was inconsistent with student's BIP and denied the student's access to FAPE by denying the student educational services for significant portions of the school day.

Based on these findings, the Department substantiates the allegation that the District violated IDEA by removing the student from the student's educational setting for an excessive amount of time from January 27 to March 17, 2009.

2. Parental Participation/IEP Design:

The parent alleged that she was denied an opportunity to participate in the March 6, 2009 IEP meeting. She bases this allegation on her letter dated February 26, 2009 stating that, pending the transfer request, there would be no reason to hold an IEP meeting, her call to the school's office on February 5, 2009 to confirm that no meeting was scheduled, and the representation made that the District was meeting only to transfer the information from the previous district's IEP form to the District's form.

Parental participation includes, but is not limited to, scheduling meetings at a mutually agreeable time and location sufficiently in advance to ensure that the parent may attend.¹⁵ There is evidence that the parent initially agreed to the March 6, 2009 meeting at the February 23, 2009 IEP meeting. The major outcome of the February 2009 meeting was to present the negative behavior data and obtain her signed request for a school transfer. Within days, the parent informed the District that, pending the transfer request, there would be no purpose in reconvening the IEP team, which would be substantially different if the transfer request were granted. She also had a reasonable expectation that the transfer request would be granted, when, during her initial contact with the neighborhood school, staff explained that she could attend the other elementary school in the same town. District staff also represented that the physical setting in the other school's special needs classroom may be more suitable for the child. Ultimately, the District denied the transfer request.

The parent emailed the District requesting that the IEP meeting be postponed pending the outcome of her transfer request. The next day, the District sent out a meeting notice. When the parent called the school office on the day before the noticed meeting, she was told that a meeting was not on the calendar. A school official represented that IEP meetings are not always placed on the office calendar. Additionally, the county case worker inquired about the meeting and the District did not reply. The next day, during a conversation with District staff, the parent was informed that if the meeting were held, there would be no big changes. The District represented that the meeting would be primarily to transfer the IEP information from the out-of-district form to the District's form. However, there are differences between the IEPs. The parent takes issue with a number of areas of the IEP including the accuracy of the parental concerns portion of Present Level statement. The March 2008 IEP included Occupational Services as a related service for five hours per year while the District's IEP does not contain any occupational therapy services. The March 2008 IEP included communication services totaling 180 minutes per month, and the District's IEP lists 40 minutes per week of speech-language services. Also, in the District's IEP all of the annual goals have been revised and the Present Level statement is updated.

IDEA's parent participation requirements for IEP meetings require scheduling at a time and place mutually agreed upon by the parent and the District. IDEA also permits parent participation in IEP meetings by alternate means, such as telephone

¹⁵ OAR 581-015-2190

conferences. An IEP meeting can be held without a parent only if the District is unable to convince the parent to attend. A district that would proceed without a parent must meet the greater parent participation requirements for IEP and placement decisions.¹⁶ The parent was not at the meeting, communicated that she wanted the transfer request acted upon before having the IEP meeting, and called the day before the scheduled meeting date to inquire about the meeting. She was told it was not on the calendar. On the day of the meeting, during a call with District staff, she was informed that the District would have the meeting but would change nothing substantial in the IEP and would only perform the ministerial duty of transferring information to its forms.

The Department finds substantial evidence that the parent would have attended the IEP meeting if she had been informed that there were substantial changes to be made and if it was scheduled at a mutually agreeable time to allow the parent to participate. The Department notes that the District did not satisfy the requirements of conducting an IEP meeting without a parent.¹⁷ The Department also notes that options were available to the District to extend the annual date of the IEP or to make changes to the child's IEP without the parent's presence.¹⁸ Therefore, the Department substantiates the allegation that the parent was not provided the opportunity to participate in the meeting. See Corrective Action.

The parent also alleges that the District changed the student's IEP without determining whether the student was demonstrating adequate progress toward the annual goals. The parent alleges that the District did not appropriately revise the IEP to address the student's present levels of academic achievement and functional performance and progress toward the annual goals. The District's basis of knowledge with respect to the child's progress toward annual goals and revision of the child's present level of academic achievement and functional performance was severely limited due to the limited amount of time the child attended the District school, the amount of time the child had been in "break" when in school, and the absence of the parent at the meeting. In light of the Department's determination that the District erred by holding the March 6, 2009 meeting without the parent and the District's obligation to reconvene the IEP team meeting as part of the corrective action required by under this order, the Department issues no finding on these allegations.

Similarly, the parent alleges that the District did not implement the communication protocol contained in the March 6, 2009 IEP. The protocol specified weekly written and/or oral communications, and District staff represented, and parent confirmed, that the parent has been called on approximately a weekly basis.¹⁹ The Department finds that the District did implement the communication protocol from the March 6, 2009 IEP. However, because the meeting in which that IEP was created violated the parent participation requirements of the IDEA, the Department does not issue findings on this

¹⁶ OAR 581-015-2195(1)-(3)

¹⁷ OAR 581-015-2195(3)

¹⁸ Amendments to an IEP, without a formal meeting, may occur by agreement of the school district and the parent. OAR 581-015-2225(2)

¹⁹ The March 2008 IEP did not include a communication protocol, although the parent represented that a daily school/home/school communication sheet was sent.

allegation. The Department notes that the parent will be able to address concerns about the student's progress on yearly goals, present levels of academic achievement and functional performance, and school to home communications at the IEP meeting ordered in the Corrective Action section below.

The parent alleges, and the District acknowledges, that the District did not provide the parent a copy of the IEP until April 9, 2009, over a month after the March 6 meeting. A district must give a copy of the IEP at no cost to the parent, and if the parent does not attend, the District must ensure the parent receives a copy.²⁰ While the period between the meeting and sending the IEP to the parent included the spring break, waiting a month to send the new IEP, when the services listed in the IEP were to begin on March 7, 2009, violates the parent participation requirements of IDEA. The Department substantiates this allegation.

3. Equal Rights and Privileges:

The parent alleges that the District did not extend to children who require special education the same rights and privileges provided to other students by denying the student full admission from February 3, 2009 to February 10, 2009.

School districts operating or initiating special education programs must have their programs approved by the State Superintendent of Public Instruction in order to qualify such programs for state reimbursement. As part of this process, districts must subscribe to the following:

- (a) Special education instructional programs in the district must include a continuum of services to meet the individual special education needs of all resident children with disabilities, including resident children with disabilities enrolled in public charter schools.
- (b) Special education must be established and conducted as an integral part of the district's regular school program.
- (c) Children who require special education have the same rights and privileges provided to other students.²¹

To the extent that the District unilaterally reduced the student's time in the classroom between February 3 and February 10, 2009, the District did not provide the student the same rights as other students attending the school. The District takes the position that due to the student's violent behavior that resulted in staff injury, the student's time at school was reduced to two hours.

There is no evidence that the student was suspended for the staff injury. The student's behaviors in throwing things, hitting, and kicking is consistent with incidents contained in the records received from the previous district, and was specifically of the type of behavior addressed in the behavior plan. Consistent with Section 1 of this Discussion, the Department finds that the District did not provide the same rights and privileges to

²⁰ OAR 581-015-2195(5)

²¹ OAR 581-015-2005(1)

this student as offered to other students by reducing the length of the student's school day without implementing disciplinary procedures.

V. CORRECTIVE ACTION²²

In the Matter of Lincoln Co School District
Case No. 09-054-013

Action Required	Submissions ²³	Due Date
<p>Compensatory Education Services.</p> <p>The District and the parent will develop and submit a signed implementation plan for providing student with not less than 60 hours of direct, structured instruction for the student, with projected completion date of October 30, 2009.</p> <p>To address the student's isolation from peers during nonacademic activities, structured instruction may include nonacademic and extracurricular activities such as structured community recreational activities involving social communication and interaction peers.</p> <p>The District shall provide 45 hours of behavior specialist support to personnel, including the IEP team, and 15 hours of autism specialist support to personnel, including the IEP team. The parent and the District shall consult with the</p>	<p>Submit a copy, for Department approval, of the implementation plan, signed by parent and authorized District representative.</p> <p>Submit report of hours of completed compensatory education services</p> <p>Submit evidence of completed compensatory education services.</p>	<p>June 7, 2009</p> <p>August 28, 2009</p> <p>October 30, 2009</p>

²² The Department's order shall include any necessary corrective action as well as documentation to ensure that the corrective action has been completed. OAR 581-015-2030 (13). The Department expects and requires the timely completion of corrective action and will verify that the corrective action has been completed as specified in any final order. OAR 581-015-2030 (15). The Department may initiate 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.

<p>regional autism consultant and the ESD behavior specialist in designing, implementing, and evaluating the compensatory education service. These support services are in addition to any provided the student within the school day or designated on the new IEP, including extended school year services.</p> <p>The remaining hours of support services may be scheduled as determined by the district and the parent in the implementation plan, from the date of the order to October 30, 2009.</p>	<p>Submit evidence of completion of support services (behavior specialist; autism consultant)</p>	<p>March 1, 2010.</p>
<p>IEP Team Meeting.</p> <p>Prior to the end of the school year, convene an IEP meeting at a mutually agreeable time that parent, and any individual with knowledge of the child who is invited by the parent or the district may attend. Meeting purpose is to review and revise, as necessary the child's IEP.</p>	<p>Submit to the parent and the Department, copies of any meeting notices, completed IEP documents, any notes or minutes related to the IEP meeting, and any prior written notices resulting from this meeting.</p>	<p>June 30, 2009.</p>
<p>ODE Review of Restraint and Seclusion Policies.²⁴</p> <p>Submit, for review, a copy of the District's current Policies and Procedures implementing OAR 581-021-0062.</p> <p>Following ODE review of the District's Restraint and Seclusion Policies and Procedures required by OAR 581-021-0062:</p>	<p>Submit a copy of the District's current Policies and Procedures implementing OAR 581-021-0062, including the date of adoption; may be submitted electronically</p>	<p>June 7, 2009</p>

²⁴ District adoption required by OAR 581-021-0062(2).

<p>Revise or clarify as needed to comply with OAR 581-021-0062 (Use of Restraint and Seclusion); and,</p>	<p>If required, submit electronically revised copy of the District Policies and Procedures implementing OAR 581-021-0062.</p>	<p>August 21, 2009</p>
<p>Provide training and information to district staff and administrators regarding the District's Restraint and Seclusion Policies, Procedures, and Practices. Training must include differentiation of the requirements related to the use of seclusion under OAR 581-021-0062 and those related to the use of disciplinary removals under OAR 581-015-2400. Training may be provided in conjunction with other regularly scheduled District trainings or meetings.</p>	<p>Submit evidence of completed training, including agenda, names of presenter(s), meeting materials, and sign-in sheet.</p>	<p>October 15, 2009</p>

Dated: May 12, 2009

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

Mailing Date: May 12, 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.