

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of the Beaverton School )  
District )  
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FINDINGS OF FACT,  
CONCLUSIONS,  
AND FINAL ORDER  
Case No. 11-054-001

**I. BACKGROUND**

On January 14, 2011, the Oregon Department of Education (Department) received a letter of complaint from the parents of a student previously residing and previously enrolled in the Beaverton School District (District). The parents requested that the Department conduct a special education investigation under OAR 581-015-2030 (2010) into special education practices and procedures within the District on behalf of the parents' child. The Department confirmed receipt of this complaint and provided the District a copy of the complaint on January 14, 2011. The parents' complaint totaled 19 pages, which included narrative allegations and supporting documents.

On January 24, 2011, the Department sent a *Request for Response* ("RFR") to the District identifying the specific allegations in the complaint that the Department would investigate. The same day, the parties agreed to engage in mediation efforts while suspending the complaint order timeline. On February 7, 2011, 15 days after agreeing to suspend the complaint timeline, the parties withdrew from the mediation process. On February 7, 2011, the Department's complaint investigator informed the parties that the District's Response to the RFR would be due on February 22, 2011. In compliance with the Department's extension, the District submitted its timely *Response* to the Department and to the parents on February 22, 2011, and on February 23, 2011 submitted 350 pages of documents in support of its *Response* and pursuant to the request contained in the RFR. The parents submitted their Reply on March 2, 2011, which included approximately 214 pages of narrative discussion and supporting documents. On March 4, 2011, the parents provided an additional four pages of supporting documents. The Department's complaint investigator provided copies to the District.

The Department's complaint investigator determined that on-site interviews were required. On March 2, 2011, the Department's investigator interviewed the parents, a District special education facilitator and the District's assistant special education director. On March 3, 2011, the Department's investigator interviewed the following District staff: the student's special education teacher/case manager during the 2009-2010 school year, the student's kindergarten teacher, the principal of the school the student attended during the 2010-2011 school year, two school psychologists, a District special education facilitator, and the student's special education teacher during the 2010-2011 school year. On March 11, 2011, the Department's complaint investigator interviewed a District substitute teacher by phone. The Department's complaint investigator reviewed and considered all of these documents, exhibits, and interviews.

Under federal and state law, the Department must investigate written complaints that allege IDEA violations that occurred 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.<sup>1</sup> The relevant twelve-month period for this complaint is January 15, 2010 to January 14, 2011. The Department may extend the timeline if the District and the parents agree to an extension to participate in mediation or if exceptional circumstances require an extension.<sup>2</sup> As recited above, the Department agreed to a fifteen-day extension to the complaint timeline to allow the parties to participate in the mediation process. This order is timely.

## II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under 34 CFR 300.151-153 and OAR 581-015-2030. The parents' 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 January 15, 2010 to the filing of this complaint on January 14, 2011.<sup>3</sup>

	<b>Allegations</b>	<b>Conclusions</b>
	The written complaint alleges that the District violated the IDEA in the following ways:	
1.	<p><b><u>Review and Revision of IEPs:</u></b></p> <p>A. Not reviewing the student's IEP at least once every 365 days;</p> <p>B. Not revising the student's IEP to address any lack of expected progress during the 2009-2010 school year.</p>	<p>Not Contested.</p> <p>Not Substantiated. The District did revise the student's IEP on multiple occasions to address the student's progress or lack thereof.</p>
2.	<p><b><u>IEP Content:</u></b></p> <p>Not providing adequate IEP services, modifications, accommodations and supports for school personnel to address the student's behavioral needs.</p>	<p>Not Substantiated. The District provided adequate services and supports to address the student's behavioral needs and school attendance.</p>
3.	<p><b><u>IEP Implementation:</u></b></p> <p>A. Not implementing the accommodations contained in the</p>	<p>Not Substantiated. The Department concludes that the</p>

<sup>1</sup> 34 CFR §300.151 (2010).

<sup>2</sup> OAR 581-015-2030(12) (2010)

<sup>3</sup> See 34 CFR § 300.153(c) (2008); OAR 581-015-2030(5).

	<p>student's IEP, specifically the "quiet place for lunch" and "extended time for lunch" accommodations;</p> <p>B. Not implementing the student's behavioral interventions consistent with the student's IEP, specifically, using restraint and seclusion as a behavioral intervention without a legitimate or justifiable reason in the Spring of 2010 and the Fall of 2011.</p>	<p>accommodations listed in the student's IEP were available at the student's request but were not requested.</p> <p>Not Substantiated. The Department concludes that the District consistently applied the student's behavioral intervention plan.</p>
4.	<p><b><u>Student Records:</u></b></p> <p>Not providing the parents with all of the student's educational records, specifically copies of incident reports related to restraint incidents, following the parents' request.</p>	<p>Substantiated, in part. The Department concludes that the District failed to provide the parent access to the meeting minutes from the October 5, 2010 IEP team meeting.</p>

1.	<p><b><u>Requested Corrective Action.</u></b></p> <p>The parents are requesting that the District:</p> <p>A. Provide staff training on conducting IEP procedures, content and implementation;</p> <p>B. Compensatory education services for the failure to address lack of student progress;</p> <p>C. Provide parents with copies of the student's educational records, including incident reports, not previously provided; and,</p> <p>D. Provide staff training on seclusion and restraint procedures and documentation requirements.</p>	<p>See Corrective Action</p>
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### **III. FINDINGS OF FACT**

#### **Background**

1. The child is currently 8 years old. The child attended school within the District during a portion of the 2008-09 school year, the entire 2009-10 school year and a portion of the 2010-11 school year. The student last attended a school within the District on October 5, 2010. The student no longer resides within the District. The student is presently eligible for special education under the categories of Specific Learning Disability (eligibility determined on May 27, 2009 while enrolled in the District) and Communication Disorder (eligibility determined by another Oregon school district prior to January 7, 2009 and confirmed by the District on February 17, 2009). The student was eligible for school age special education services beginning in 2008 and previously had received ECSE services.

#### **2008-2009 School Year**

2. The student began attending school within the District on January 7, 2009. The student enrolled in a half-day District kindergarten program after attending kindergarten in another Oregon school district.
3. The District held its first meeting with the parents on January 12, 2009. The meeting was brief, and the District scheduled another meeting for January 20, 2009. At this meeting, the parent reported, among other things, that the student has refused to go to school in the past but that the student was “thriving” at the present school. On February 17, 2009, the District formally accepted the previously identified eligibility of Communication Disorder. The District reviewed past records and recently completed assessments and observations, accepted the previous school district’s IEP, and added an additional social goal to the IEP at the parents’ request. The February 2009 IEP did not indicate that the student’s behavior impeded the student’s learning or the learning of others.
4. The IEP team met on April 6, 2009. The team revised the IEP and identified as a special factor that the student’s behavior impeded the student’s learning or the learning of others. Between January 2009 and June 2009, the IEP team, including the parents, met on seven occasions to revise the student’s IEP. Other areas addressed in the revisions included: additional language goals; additional occupational therapy (OT) consultation; additional reading, math, and writing goals and specially designed instruction (SDI); additional OT direct services; additional ESY goals in math, reading and writing; additional accommodation for visual supports for learning; changed OT to push-in direct services; increased SDI in reading, math, and written language for the fall of 2009.
5. The District drafted a Behavior Intervention Plan (BIP) and discussed it with the parents at the April 30, 2009 meeting. The BIP addressed the student’s difficulties transitioning between tasks during the school day along with other disruptive behaviors.

6. The IEP team met on May 27, 2009 and determined the student was eligible under the additional category of Specific Learning Disability. The team also discussed increased specially designed instructional time in anticipation of the student attending a full day first grade.
7. On June 5, 2009, the IEP team met and discussed the student's placement for the 2009-10 school year. The team discussed a number of placement options, along with the potential benefits and potential drawbacks of each placement. Ultimately, with the consensus of the entire team, the student was retained in half-day kindergarten with the same teacher at the neighborhood school. General education report card comments for the second trimester of the 2008-09 school year indicated that District staff were concerned by the student's "lack of basic skills" and that staff were modifying the curriculum to better meet the student's needs. Comments from the third trimester report that the student "has made progress" and would benefit from Extended School Year (ESY) services.
8. The student attended ESY during the summer of 2009. The District reported progress on the ESY goals on August 6, 2009. The student attended twenty out of twenty-three ESY school days.

### **2009-10 School Year**

9. On September 29, 2009, the IEP team met to adjust the amount of specially designed instruction (SDI). Since the student was attending a half-day kindergarten program of approximately two and a half hours, rather than a full day (approximately six hour) first grade program, the SDI needed to be reduced to address the shorter day. The SDI was adjusted so that the student could be in the classroom between 2:30 and 3:00 pm for peer group socialization and to spend more time with general education peers.
10. The IEP team met on October 15, 2009 to discuss possibly extending the student's instructional day and to review the student's IEP services. The team did not amend the IEP at this meeting.
11. The student missed more than twenty days of school beginning October 12, 2009 and continuing into November 2009 due to a health issue. The District withdrew the student on November 18, 2009, and readmitted the student on November 23, 2009. The District did not provide the student with home instruction during this time.
12. The student was absent twenty-five additional school day between November 24, 2009 and June 17, 2010 for reasons unrelated to the student's prior illness.
13. In late March 2010, the parents notified the District of their concerns about the student's lack of academic progress via emails to District staff. The District responded to the parents that it would address those concerns at the April 5, 2010 IEP team meeting. The District also suggested that additional evaluations of the student would be of assistance to address these concerns.

14. The IEP team met on April 5, 2010 for the annual review of the student's IEP. The student's present levels of academic achievement and functional performance were revised, the parents' concerns about the student's lack of academic progress were noted, and the annual goals in language, social skills, reading, math, writing, and occupational therapy were revised.<sup>4</sup> The IEP also contained new ESY goals. The IEP continued to indicate that the student's behavior impacted the student's education.
15. Accommodations in the April 2010 IEP included access to a quiet space for snack/lunch and extended time for lunch as needed. All IEP services contained in the February 2009 IEP were retained in the April 2010 IEP and were provided, consistent with the IEP, for the duration of the 2009-10 school year. The team determined that the student would attend ESY during the summer of 2010. The District also agreed to conduct an assistive technology assessment.
16. The student's general education report cards, compared at the end of each of the three trimesters, show little improvement throughout the year, especially in reading and math. The IEP does identify annual goals in those areas, with associated specially designed instruction (SDI). General education report card comments for the first trimester include "academically, there have been few gains, but certainly [student's] absence has impacted [student's] progress." Second trimester comments include "academically [student's] progress has been limited in some areas. [Student's] letter and sound recognition decreased from the previous term with having gained some new letters, but forgetting some that [student] used to know." Third trimester comments state, "although [student's] academic progress was hindered by [student's] learning disability, [student] made growth socially throughout the year."
17. Sometime in the spring of 2010, best estimated to be in late April, a District staff member met the parent and the student in the school lobby. The student was clinging to the parent and was in the parent's arms. Staff asked the parent if she could help. The parent agreed to the offer of help, and the parent handed the student to the staff member, who carried the student with both arms in a cradled fashion and set the student down inside the classroom. The parent watched the transfer and thanked the staff member at the end of the day.
18. Prior to April 28, 2010, the parents requested, and the District agreed to, an Independent Educational Evaluation (IEE) at District expense to evaluate the student's eligibility under Specific Learning Disability.
19. The IEE report, completed at the end of April 2010, included the results of a number of assessments completed by the student, including the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV). The result of the WISC-IV, excluding the subtest results, is set forth in the chart.

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<sup>4</sup> The social skills annual goal included engaging with peers, initiating interactions with peers, and following rules.

<i>SCALE</i>	<i>Index/IQ Score</i>	<i>Percentile</i>
Verbal Comprehension	87	19
Perceptual Reasoning	121	92
Working Memory	88	21
Processing Speed	94	34

20. The District drafted an Assistive Technology Assessment dated May 10, 2010 and shared it with the parents during a meeting on the same date.
21. On June 9, 2010, the IEP team met to discuss placement for the next school year, expecting the student to enter first grade, and to revise and increase the amount of specially designed instruction anticipated to be delivered in the full-day first grade. The team listed three placement options in the IEP: “general education with resource room and communication support;” “small setting, focus on academics and life skills;” and “small setting, focus on social communication and academics.” The team selected the last option and listed the benefits as “more intensive individualized instruction” and “will receive specific behavior monitoring.” The possible harmful effects of the selected placement listed “removal from neighborhood school.” The selected placement was not available at the student’s neighborhood school but was available at a different District elementary school. The District refers to the program that the student was placed in as the Social Communication Center (SCC).<sup>5</sup>
22. District staff reported that the April 2009 BIP was helpful for the initial kindergarten year (2008-09), and while the effective BIP strategies continued during the 2009-10 year, the student’s potential problem behaviors significantly decreased during the 2009-10 school year. Staff attributed the decrease in behaviors to the student having a full school year with the same teacher as the previous year and the student’s progress toward behavioral goals. District staff reported that once the student was at school, the student enjoyed school, never tried to leave the school, and did not exhibit anxiety toward being at school.
23. District staff reported that, while the student did not make as much progress in academic areas as they would have liked, the student did make some progress on IEP annual goals.
24. The student attended ESY during the summer of 2010. The District reported the student’s progress on ESY goals on August of 2010 and noted some progress, but the student did not meet the ESY goals. The parent reported that of the five-week ESY program, the student refused to attend for one week.

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<sup>5</sup> As of February 15, 2011, the District’s Website described the SCC as “serves students in grades K-5 who are determined will benefit from a structured setting with special emphasis on social skill development for students eligible for services with Autism Spectrum Disorder (ASD).” The SCC teacher reported that not all of her students are special education eligible under the category of ASD. As of March 7, 2011, the website no longer posts this information.

## **2010-11 School Year**

25. The parent met with a District staff member in August 2010, before the beginning of the school year, and expressed that the parents' biggest concern was the student's refusals to go to school. The parent wanted a formalized Behavior Intervention Plan with the goal of consistent attendance. On August 31, 2010, District staff drafted a "Social Story" to support the student's attendance at school and provided it to the parents. Before school started, the parents also met with staff at the new school.
26. The District's first day of school was September 7, 2010. Between the beginning of school and September 28, 2010, the student was absent one day. The student was also absent on September 29 and 30, 2010 and October 1 and 4, 2010.
27. On October 5, 2010, the parent brought the student to the classroom. The regular teacher was absent and the classroom staff included a substitute teacher and instructional aides. An instructional aide called the regular teacher at home, expressing concern that the parent remained in the classroom for an extended period. District staff reported that the parent's presence was disruptive to the class. The regular teacher called the school's principal to assist with the situation. The principal went to the classroom. The rest of the class was at recess, and only the student, the parent, the principal, and the substitute teacher were present in the classroom. The principal told the parent it was time to leave the classroom. The principal walked the parent out of the classroom, and the student stayed in the class. No one closed the classroom door.
28. As the principal and the parent were in the hallway outside of the classroom, the student ran from the room toward the doorway in an attempt to reach the parent. The principal stepped between the student and the parent near the classroom door and made physical contact in a corralling manner, directing the student back into the classroom. The principal redirected the student back to the classroom and instructed the substitute teacher to offer the student a preferred activity. The student chose to have the teacher read the student a book in the quiet area. The parent left the school, and the student remained at school throughout the school day. The substitute teacher called the parent later in the day to report that the student had done fine for the rest of the day. The parent requested a meeting with the principal that afternoon to discuss a change of placement.
29. The parents, a teacher, a school psychologist, and the principal met on the afternoon of October 5, 2010. The parent requested a change of placement because the student was refusing to attend school. Between the time the parent left the school earlier that day and the afternoon meeting, the school psychologist prepared a "School Refusal Behavior Intervention Plan." When the District presented the plan to the parents, District staff asked the parents about home-based positive incentives to reward the student for successful behavior. The parents requested an addition to the plan to cover situations where the parents brought the student to school, rather than if the student rode the bus. The parents signed an authorization for release of information to allow the school

psychologist to contact the student's doctor for follow-up questions related to the BIP.

30. The school psychologist made personal notes of the October 5, 2010 meeting, and a District staff member took meeting minutes, but the District is unable to locate the meeting minutes.
31. After the meeting, the parents wrote the District expressing their strong belief that the School Refusal BIP presented earlier in the day was not appropriate and did not accurately reflect the behavioral concerns of the student.
32. On October 12, 2010, the parents sent an email to the assigned District facilitator inquiring into the status of scheduling an upcoming IEP meeting and requesting copies of the October 5, 2010 meeting minutes. District staff confirms receiving the email, but no minutes of the meeting were located; therefore, the District did not provide any documents in response to the request.
33. On October 15, 2010, the IEP team met to address the BIP and the parents' request for an alternative placement. The parent expressed her opinion that two things trigger the student's school refusal: 1) the student's feeling like a "bad boy" when corrected for behavioral issues; and 2) the student's frustration when the student believes that assigned work is too difficult. The parent also presented and discussed a letter from the student's physician dated October 12, 2010, which stated that the student had "a longstanding struggle with separation anxiety, sensory integration difficulties and learning challenges." The doctor opined that the placement "needs revised (sic) and modifications made to the existing IEP... [The student] would benefit from the most intensive level of support that can be provided... I endorse a self-contained program.... I do not believe the current special education program has been sufficient to meet [the student's] needs...If the school is unable to provide an alternative placement...I would support a home school tutoring program."
34. The parent informed the District at the October 15, 2010 meeting that the student would not be returning to the SCC classroom. The District stated that it remained ready to serve the student.
35. On October 19, 2011, the District sent the parents a prior written notice refusing the requested change of placement. The District stated "that FAPE can be provided and the IEP can be implemented in the Social Communication Class ... which is the least restrictive placement." The notice also stated, "The alternative setting or home instruction is a more restrictive placement and not necessary for provision of FAPE. [Student's] current placement in the Social Communication Class..., which focuses on social communication and academics with behavior supports, will provide the most appropriate support for [the student]. Other factors considered by the team: The student's difficulty transitioning from home to school can be addressed by the behavior support plan which could be developed at an IEP team meeting. A draft plan was proposed on 10/5/10 and again on 10/15/10. The district would like to meet with the parents to review and discuss the draft behavior plan."

36. On October 19, 2010, the parents wrote a letter, addressed to the school housing the SCC with a salutation to the principal, requesting the following records: 1) student attendance records for the 2010-11 school year; 2) IEP team meeting minutes for the October 5 and October 15, 2011 IEP meetings; 3) all correspondence, memoranda, and notes from September 7, 2010 to the date of the request; and 4) incident reports or other documents related to “student restraint occurring on October 5, 2010.” District staff denies receiving the letter.
37. On October 29, 2010, after ten consecutive absences by the student, the District withdrew the student.
38. The student did not reenroll in the District, does not currently reside within the District, and is reported to be doing well in the current resident district school. The placement in the current district is described as “special class with focus on life skills and academics.”

## IV. DISCUSSION

### **1) Review and Revision of IEPs:**

- A. The parents allege that the District did not review the student’s IEP at least once every 365 days.

School districts are responsible to ensure that the IEP team review the child’s IEP periodically, but at least once every 365 days, to determine whether the annual goals for the child are being achieved and to revise the IEP, as appropriate, to address a number of matters including any lack of expected progress toward annual goals and in the general education curriculum, if appropriate.<sup>6</sup>

The IEP team met, and the student’s February 20, 2009 IEP was revised and amended, on April 6, 2009, April 30, 2009, June 5, 2009 and September 29, 2010. The District acknowledges in its *Response* to the RFR that it did not hold the annual IEP (which should have occurred by February 20, 2010) until April 5, 2010. The District does not contest this allegation. The Department substantiates this allegation. See Corrective Action.

- B. The parents allege that the District did not revise the student’s IEP to address any lack of expected progress during the 2009-10 school year.

At the end of the 2008-09 school year, the IEP team anticipated that the student would be attending a full-day first grade. Since the kindergarten program was a half-day, the IEP team increased the service times in anticipation of the grade promotion. Ultimately, the student continued in the half-day kindergarten during the 2009-10 school year. The District revised the service times in September 2009 and met again on October 15,

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<sup>6</sup> OAR 581-015-2225

2009 to discuss the possibility of extended day or a full day kindergarten. The team's main area of concern was delivering appropriate specially designed instruction (SDI) within the student's half-day program. The team decided to reduce the amount of SDI so that the student could be in the classroom for a half-hour daily for peer group socialization.

The team did not meet again until April 5, 2010 (See Section 1A, above). When the team did meet, it revised the IEP, including the student's annual goals. The amount of SDI in the April 2010 IEP remained the same as the previous February 2009 IEP (as amended in subsequent meetings). Therefore, the student continued to receive the same amount of SDI throughout the 2009-10 school year even though the IEP annual review was over a month late.

The extent of the student's progress in the general education curriculum during the 2009-10 school year was minimal. The student was absent for more than 50 days during the school year, which clearly limited the student's exposure to the classroom curriculum. However, staff reported that the student had made progress on the IEP annual goals.

A school district meets its IDEA obligations to provide FAPE if the district adequately complies with the procedural requirements in IDEA and the student's IEP is "reasonably calculated to enable the child to receive educational benefits." *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley*, 458 U.S. 176, 207 (1982)

Courts recognize that the basic floor of opportunity to which a disabled child is entitled is more than merely providing a program that produces some minimal academic advancement, no matter how trivial. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 890 (9th Cir. 2001). Nevertheless, the FAPE to which a disabled child is entitled under the IDEA is not the absolute best or "potential-maximizing" education. *Seattle Sch. Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1498 (9th Cir. 1996). And as Rowley explained, Congress did not "invit[e] ... the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley*, supra, 458 U.S. at 206.

An appropriate special education program "does not mean the absolutely best or potential maximizing" services for the child. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987) (internal quotations omitted) (reviewing special education placement of elementary school child with disabilities). The states are only obligated to provide "a basic floor of opportunity." See, *Id.*

"Actions of the school systems cannot . . . be judged exclusively in hindsight. . . . [A]n individualized education program ('IEP') is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted. (reviewing the appropriateness of educational services for a school-age child)." *Adams v. State of Oregon*, 195 F.3d 1141 (9th Cir. 1999) (quoting *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993)).

The federal courts have said little on the failure to revise programs, but the school district is required to revise the programs as appropriate. *Kings Local School District v. Zelazny*, 325 F.3d 724 (6<sup>th</sup> Cir. 2003).

In this case, the Department does not find substantial evidence that the District, at the time the IEP was reviewed and revised, was inappropriate. While the student's progress was not what the parents, teachers, and IEP team members had hoped for, the District did meet its obligations under IDEA to provide the student a FAPE and to review and revise the student's IEP. Specifically, the student's IEP team met three times during the 2009-10 school year and made several revisions to the student's IEP, including amending annual goals and adjusting the ratio of SDI to peer interaction in the student's IEP. Therefore, the Department does not substantiate this allegation.

## **2) IEP Content:**

The parents allege that the District did not provide adequate IEP services, modifications, accommodations and supports for school personnel to address the student's behavioral needs.

In developing, reviewing and revising the IEP, the IEP team must consider special factors, including whether or not a child's behavior impedes the child's learning or the learning of others. If the team finds this special factor applies, the IEP team must consider the use of positive behavioral interventions and supports and other strategies to address the behavior. When an IEP team determines that a child needs a particular service related to the special factors (including an intervention, accommodation, or other program modification) for the child to receive a free and appropriate public education, the IEP team must include a statement to that effect in the child's IEP.<sup>7</sup>

The IEP team first identified at the April 2009 IEP meeting that the student's behavior impeded the student's learning or the learning of others. Each subsequent IEP also identified this special factor. The District created and implemented a Behavior Intervention Plan (BIP) dated April 27, 2009. Although the student's targeted behaviors were significantly reduced during the 2009-10 school year, District staff reported that they carried over the strategies contained in the BIP to the 2009-10 school year.

The parents' concern, as the student completed the kindergarten year before beginning first grade, was for the student to attend school consistently. The student had demonstrated an unwillingness to separate from the home environment and difficulties transitioning to the school environment. Staff reported that the student's refusal to make the transition was not evident once the student was in the classroom. However, to address the parents' concern, in late August 2010 and before the beginning of the 2010-11 school year, the District created a scenario (referred to as a "Social Story") to illustrate and reinforce a smooth transition from home to school. Staff reported that the Social Story assisted the student in the transition. The student's attendance records support this assertion, indicating that between September 7, 2010 and September 29, the student was absent only one day and late on two other occasions. Beginning September 29, 2010, the student missed four consecutive days before the October 5,

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<sup>7</sup> OAR 581-015-2205 (3)(a) & (4).

2010 incident, in which the school principal shepherded the student back into the classroom. The District drafted its “School Refusal BIP” that same day and met with the parents to present the plan and obtain their feedback.

Based on these facts, the Department does not find persuasive evidence that the District did not provide adequate IEP services, modifications, accommodations and supports for school personnel to address the student’s behavioral needs. Before the school year, the District had a BIP in place, created a Social Story intervention before the start of first grade, and drafted a “School Refusal BIP” on the day the student exhibited the unwillingness to transition from a home environment to a school environment. The Department does not substantiate this allegation.

### **3) IEP Implementation:**

A. The parents allege that the District did not implement the accommodations contained in the student’s IEP, specifically, the “quiet place for lunch” and “extended time for lunch” accommodations. During interviews, the parents clarified this allegation as applying to the 2010-11 school year, asserting that the District should have implemented these accommodations without regard to the student’s initiative or choice.

A school district must have an IEP in effect at the beginning of each school year and must provide special education and related services to a child’s in accordance with the child’s IEP.<sup>8</sup> The student’s IEP indicated that the student would have access to a quiet space for snack and lunch and extended time for lunch as needed. Staff stated that the student could always choose to stay in the classroom to eat lunch but chose to eat lunch with peers in the cafeteria. Staff reported that not only did the student typically choose to eat lunch with classmates but that the student’s inclusion during lunch provided an effective setting for the student to make progress on the social skill annual goal of “peer engagement.” Staff also reported that the student was always allowed extra time to eat lunch, but the extended time was not frequently used, again by student choice.

The Department finds that, although the student did not frequently choose to eat lunch or snacks separate from classmates or to take additional time for lunch, those options were available to the student. Therefore, the Department is unable to substantiate this allegation.

B. The parents also allege that the District did not implement the student’s behavioral interventions consistent with the student’s IEP, specifically, using restraint and seclusion as a behavioral intervention without a legitimate or justifiable reason in the spring of 2010 and the fall of 2010.

The Department has no authority to monitor school district compliance with OAR 581-021-0062, which addresses the use of restraint and seclusion in Oregon schools. However, the Department is authorized to investigate and make findings concerning the content and implementation of IEPs. Consistent with that authority, the Department addresses this allegation only to the extent necessary to determine whether the District

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<sup>8</sup> OAR 581-015-2220(1).

violated the IDEA by physically touching the student on two occasions in 2010. In order to make that determination, the Department must consider: 1) whether the District had reasonable procedures in place to respond to the student's difficulties transitioning into the school day and 2) whether the District acted reasonably and consistent with the student's IEP in both situations.

Regarding the incident in the spring of 2010, the Department finds that the District did not violate the IDEA. At the time that the incident took place, estimated to be in late April of 2010, the District had a BIP in place for the student that addressed the student's difficulties transitioning between tasks during the school day. The BIP did not address difficulties transitioning at the beginning of the school day. However, there is no evidence to indicate that the BIP in place during the spring of 2010 should have addressed school refusal behaviors.

While the student had accrued a number of absences during the fall of the 2009-10 school year, those absences were related to external factors which were not reasonably related to the student's documented disabilities. Therefore, the Department finds that the failure to address school refusal behaviors in the student's BIP was reasonable based on the information available to the IEP team in the spring of 2010. The Department also concludes that, despite the lack of an explicit protocol for addressing school refusal behaviors, the District acted appropriately in response to the incident. This conclusion is based on the parent's consent to the District's physical intervention and the apparent success to the approach in obtaining the student's attendance and cooperation for the remainder of that school day.

The Department also concludes that the District did not violate the IDEA with regard to the October 5, 2010 incident. The Department acknowledges that the BIP in place for the student in October 2010 was essentially identical to the BIP in place the prior spring. However, the District did provide, prior to the start of the 2010-11 school year, a "Social Story" to support the student's attendance. Based on the information available to the IEP team at that time, the Department concludes that the existing BIP and the "Social Story" were adequate means to address concerns about the student's difficulties transitioning into the school setting.

Additionally, the Department concludes that the District acted reasonably in response to the student's behavior on the morning of October 5, 2010. The District's response to the student's attempt to join the parent outside of the classroom involved minimal physical contact intended to redirect the child to the classroom, and the use of a preferred activity with the student was consistent with the strategies listed in the student's BIP for addressing transition difficulties within the school day. The Department also notes that the District proposed amending the student's BIP to address school refusal behaviors at a meeting with the parent later that same afternoon. Therefore, the Department concludes that the District acted appropriately and consistent with the student's current BIPs when the District made physical contact with the student on the two occasions discussed above; the Department does not substantiate this allegation.

#### **4) Student Records:**

The parents allege that the District did not provide them with all of the student's educational records, specifically copies of incident reports related to restraint incidents, following the parents' request.

School districts must give parents of children with disabilities an opportunity to examine all student educational records. School districts must comply with a request for access to records within a reasonable time and without unnecessary delay, before any meeting regarding an IEP, due process hearing or resolution session and in no case more than forty-five days after receipt of the request.<sup>9</sup>

"Educational records" are records directly related to a student and maintained by an educational agency, institution or by a party acting for the agency or institution.<sup>10</sup> If the student is the subject of a physical restraint or seclusion, there are documentation requirements imposed on a District.<sup>11</sup> However, the District was not obligated to complete any documentation relating to these incidents because the incidents in question did not constitute restraints under Oregon law.

OAR 581-021-0062 (2011) provides, in part:

- (a) "Physical restraint" means the restriction of a student's movement by one or more persons holding the student or applying physical pressure upon the student. "Physical restraint" does not include touching or holding a student without the use of force for the purpose of directing the student or assisting the student in completing a task or activity.

Both of the incidents in which school staff made physical contact with the student lacked the requisite element of force to be considered restraints and are more properly classified as attempts to redirect the student. Therefore, the District was not required to – and did not – document either of the incidents. In the absence of any such documents, the Department is unable to substantiate the parents' allegation that the District violated the IDEA by failing to provide copies of the requested incident reports.

The Department reaches the opposite conclusion with regard to the parents' request for meeting notes from the October 5, 2010 IEP team meeting. On October 12, 2010, the parents requested, by email, any meeting notes from the October 5 meeting. District staff recall minutes being taken by an IEP team member, and all other IEP meetings concerning the student were recorded in minutes, copies of which are maintained in the student's educational file. The Department requested the District to provide copies of all IEP meeting minutes in the RFR sent to the District on January 24, 2011. The District maintains that it has made a diligent search for the records, including inquiry with all IEP team members present at that meeting, and is unable to locate those meeting minutes.

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<sup>9</sup> OAR 581-015-2300; OAR 581-021-0270.

<sup>10</sup> OAR 581-021-0220(6).

<sup>11</sup> OAR 581-021-0062(2).



<p>records in accordance with OAR 581-021-0220 through 581-021-0440.</p> <p>Train District staff who regularly attend IEP team meetings on the appropriate District policies and procedures for retaining educational records, including IEP team meeting minutes, and making such records available to parents.</p>	<p>educational records.</p> <p>B) Submit to the Department evidence of the completed training, including but not limited to:</p> <ul style="list-style-type: none"> <li>• Agenda, including names of presenters;</li> <li>• Verification of participation, including signature, position and date; and,</li> <li>• Copies of any materials and presentations used in presentations or distributed to staff in conjunction with training.</li> </ul>	<p><b>September 30, 2011</b></p>
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Dated: March 25, 2011

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

Mailing Date: March 25, 2011

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.