

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of the Lowell School District ) and the Lane Education Service District ) ) )	FINDINGS OF FACT, CONCLUSIONS, AND FINAL ORDER Case No. 12-054-001 (a) & (b)
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**I. BACKGROUND**

On January 9, 2012, the Oregon Department of Education (Department) received a faxed letter of complaint from the parent of a student (Student) residing in the Lowell School District (District) and attending the Lane School, located at Creslane Elementary School within the Creswell School District and operated by the Lane Education Service District (ESD). The parent requested that the Department conduct a special education investigation under OAR 581-015-2030. The Department confirmed receipt of this complaint and forwarded the request to the District and the ESD by email and by US mail on January 10, 2012.

On January 13, 2012, the Department sent a *Request for Response* (RFR) to the District and the ESD identifying the specific allegation in the complaint that the Department would investigate. The District and ESD submitted their timely joint *Response* to the Department and to the parent on January 26, 2012, along with approximately 75 pages of documents in support of its *Response* and pursuant to the request contained in the RFR. The parent did not submit a formal Reply.

The Department's complaint investigator determined that on-site interviews were required. On February 1, 2012, the Department's investigator viewed a December 2, 2011 video surveillance film of the area around the ESD classroom where the Student attended school. On February 2, 2012, the Department's investigator interviewed the District Superintendent, the District Director of Special Education, the District bus driver, and the parent. On February 6, 2012, the Department's complaint investigator interviewed the Student's teacher, two instructional aides, and the ESD Special Education Director. 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 Department may extend the timeline if the District and the parents agree to an extension to participate in local resolution, mediation, or an extension if requisite exceptional circumstances are present.<sup>2</sup> This order is timely.

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<sup>1</sup> 34 CFR §300.151  
<sup>2</sup> 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 January 10, 2011 to the filing of this complaint on January 9, 2012.<sup>3</sup>

	Allegations	Conclusions
	The written complaint alleges that the District violated the IDEA in the following way:	
1.	<p><b><u>IEP Implementation:</u></b></p> <p>On December 2, 2011, the District/ESD failed to escort the Student from the morning bus to the Student's classroom, contrary to the Student's IEP.</p>	<p><b>Not Substantiated.</b></p> <p>The Student's IEP did not require the District or ESD staff to escort the Student from the morning bus to the classroom.</p>
1.	<p><b><u>Requested Corrective Action:</u></b></p> <p>The parent is requesting that the District:</p> <p>Release the Student so that the parent could place the Student in another district (Inter-district transfer).</p>	<p><b>Not Ordered.</b></p>

## III. FINDINGS OF FACT

### **Background**

1. The Student is currently six years old and last attended kindergarten in December 2011. The Student is a resident of the District. The Student was first determined eligible for special education services on June 10, 2008. The Student is presently eligible for special education under the category of Autism Spectrum Disorder. The Student's three-year eligibility determination last occurred on May 31, 2011.

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

2. On March 8, 2011, the team met to draft the Student's IEP/IFSP in effect on the date of the alleged IDEA violation. Subsequent revisions to the Student's IEP occurred on May 31, 2011 (also the triennial eligibility meeting) and August 31, 2011. Relevant portions of the IEP related to the allegation include a related service of "Transportation Service, two trips, daily, to/from school, start date 9/7/11, end date 3/8/12, provided by the LEA". As "Supplementary Aids/Services; Modifications and Accommodations", the IEP referenced an Individual Health Plan (IHP) and an Individual Emergency Care Plan (IECP). The IEP team selected a "Special Class" as the Student's placement, noting that while the location was not the Student's home/neighborhood school (the placement selected was in another school district), transportation would be provided.
3. The Student's IHP included the following reference to the Student's disability and certain reactions to stimulus and the required treatment in the event of any reaction<sup>4</sup>: "[P]arents will provide two medical devices."<sup>5</sup> One of the specific medical devices is kept by the trained school staff member who is currently supervising [the Student] and 'handed off' to other trained staff as the staffing changes (i.e. bus driver will give the device to classroom teacher on school arrival and get it back for the transport home)." The Student's IECP addresses the manner in which staff would administer the medical device based on the Student showing specific symptoms. The Student's IEP, IHP and IECP are all educational records of the Student though they are not all part of the Student's IEP.<sup>6</sup>
4. On September 6, 2011, a registered nurse trained various members of the District, various staff members from the district where the special class is located, and various ESD staff members in the proper administration of the Student's specific medical device to the Student. Among the attendees at this training was the Student's classroom teacher, the Student's classroom instructional assistants and the Student's bus drivers.
5. On September 7, 2011, the District special education director completed a "Request for Transportation" form regarding the Student's transportation. District staff use this form to document to the transportation department the Student's transportation needs and protocol. In this Student's case, the form indicates that the Student must be secured in a harness, that the Student is subject to medical monitoring (pursuant to the training referred to above), and it notes that "Driver Watch as Child Enters the Building- No- Teachers pick up @ bus". The bus driver keeps this form on the bus along with the Student's IECP. Another copy of the form is maintained by the District's transportation office.
6. The Student's ESD classroom maintains classroom behavior expectations, which, if followed, allow the Student to have increased privileges. Each student

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<sup>4</sup> The specific nature of the medical reaction is redacted in order to protect student privacy rights under FERPA, 34 CFR 99.3.

<sup>5</sup> The specific type of medical device is redacted to protect student privacy rights under FERPA, 34 CFR 99.3.

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

begins at Level 1 and earns points throughout the day. After achieving a set number of points for a set number of days, the teacher promotes the student to Level 2, with increased privileges. Relevant to this complaint at Level 1, a student must be within 15 feet of the teacher during, for example, recess. Level 2 students must be within "ear/eye shot" distance of the teacher. Level 3 students must be supervised, but may go independently to the bathroom and cafeteria. The Student involved with this complaint entered the year at Level 1, earned Level 2 status in late September, returned to Level 1 status for one week in October, and then maintained Level 2 status throughout the rest of the time the Student attended school.

7. From the start of the 2011-12 school year, the instructional aides would go on the bus to unbuckle the Student from the harness and accompany the Student to the classroom. The Student would often fall asleep on the approximately thirty minute ride to school. Often the aides would hold the Student's hand as they walked from the bus to the classroom.

### **December 2, 2011**

8. On December 2, 2011, the District driver bus picked up the Student at the Student's home shortly after 7:10 a.m. The bus driver checked the outside pocket of the Student's backpack for the medical device, where it was kept, to confirm that it was in the Student's possession. The trip to the Student's school takes about thirty minutes. As often occurred, the Student fell asleep on the bus by the time the bus arrived at the school site at approximately 7:45 a.m. The bus parked approximately sixty yards away from the classroom door, directly in front of the access to a paved area that is no longer used for parking. The parked location of the bus blocked any access in or out of the paved area. The paved area is not completely fenced, but significant portions are fenced. The instructional aides assigned to the Student's classroom parked their vehicles in the school parking lot and walked towards the bus en route to the classroom. The bus driver saw one of the instructional aides approaching in the bus mirror and woke the Student, unbuckled the harness, and put the Student's backpack on.
9. The classroom teacher, watching from a window with a direct line of sight to the bus, briefly observed the instructional aide waiting at the fence adjacent to the bus. She saw the driver help the Student down the steps of the bus, and she estimated the instructional aide was between two and five feet away from the Student. The teacher stated that she observed for about a minute, and then returned to her duties in the classroom. Later that day, the teacher reported to her supervisor that the ESD staff was two feet away from the Student. The teacher told the Student's parent this estimate during a phone call later that day. The supervisor repeated this statement in an email later that day to the District Special Education Director. The teacher wrote an incident report sometime after the incident, due to the parent's displeasure and subsequent response. The teacher incorporated not only her personal observations of the event in question,

but also the recollections of the aide. The teacher believes that systematically fading supports for students promotes their independence.

10. The bus driver reported that the instructional aide appeared to be late and in a hurry that morning. The bus driver told the Student that the Student would be walking to the classroom on the Student's own. The instructional aide informed the driver that she could go, but the driver sat on the second step of the bus to watch until the Student reached the classroom. When the Student left the bus, the driver reported that the instructional aide was standing waiting for the Student near a telephone pole, approximately 40 yards away, and with a clear view of the Student. The instructional aide was encouraging the Student to walk toward her. The Student almost caught up to the instructional aide at the telephone pole, and the aide continued to walk toward the classroom. The aide entered the classroom and the Student entered shortly after. The bus driver recounted these events to the Student's parent when the Student was dropped off later that day.
11. The instructional aide reported that she and another classroom instructional aide arrived at school at about the same time that morning. They walked from the school parking lot toward the classroom, while passing directly by the bus. One aide told the other that she would take care of the Student that morning, so the other aide continued to the classroom. The Student got off the bus, said goodbye to the bus driver, and asked the aide, "Aren't you going to hold my hand?" The aide made eye contact with the Student, then replied, "No", and started walking toward the classroom while watching the Student. The bus driver told the aide that she was going to stay at the parked location until the Student was in the classroom. The aide reported that she was never more than ten feet away from the Student as she and the Student made their way to the classroom. The staff reported they were trying to cultivate a sense of independence with this Student, and all of the students in the class.
12. The December 2, 2011 closed circuit video of the classroom entrance, which the complainant indicated had evidence of the allegations, does not depict the entire area from the bus to the classroom. The fixed camera shows the area outside of the classroom, but does not include the telephone pole area or the parked location of the bus. The instructional aide is wearing a yellow rain coat and comes into view from the left of the image, turns her head three times to look toward the Student's direction between the time she enters the image until she enters the classroom. The Student enters the image approximately 18 seconds after the aide enters the image. The distance between the location where the Student is first seen in the image and the classroom door is approximately 45 feet. The aide waits at the classroom door as the Student walks to the classroom door. From the Student's entry into the camera's image until the Student enters the classroom, the Student's walk takes approximately fifteen seconds.
13. The ESD represented that its unwritten policy is that aides are not to go onto the bus to get a student, but the bus driver is to prepare the student for disembarking the bus.

## IV. DISCUSSION

### 1) IEP Implementation

The parent alleges that the District/ESD failed to implement the Student's IEP on December 2, 2011 when staff did not "escort the [S]tudent from the bus to the classroom". School districts must provide special education and related services to a child with a disability in accordance with an IEP.<sup>7</sup>

The Student's IEP contains the related service of "Transportation" to document the District's obligation to transport the Student from home to the school and return on a daily basis. Transportation is a related service that may be required to assist a child with a disability so that they may benefit from special education.<sup>8</sup> Transportation as a related service may include travel to and from school, travel in and around school buildings, and any specialized equipment that is needed to provide special transportation to a child with a disability.<sup>9</sup> The IEP team must decide what transportation services are necessary in order for a child to receive a Free Appropriate Public Education.<sup>10</sup> The IEP in question only provides for transportation as a related service to and from school. The IEP team did not warrant any other specific provisions regarding transportation in order for the Student's educational needs to be met. The IEP is silent regarding precisely how a teacher or aide is to accompany the Student from the bus to the classroom and it does not list a precise pickup or drop off point. Also, the IEP does not require a one-on-one aide for the Student at any time during or after bus transit. There is no evidence that any relevant provisions of the IEP were not met here.

The Student's IEP refers to the Student's IHP and IECF as a "Supplementary Aids/Service; Modification and Accommodation". These documents are educational records since they directly relate to the Student and the educational agency maintains these records in the Student's file.<sup>11</sup> Supplementary aids and services are supports that are provided in regular education classes, other education related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent possible.<sup>12</sup> Neither of these documents detail a precise protocol for the manner in which the Student must walk from the bus to the classroom. The IHP's reference to the medical device's "handoff" between the bus driver and staff is the closest reference to anything related to proximity of staff to the Student during the Student's daily transitions. A textual reading of the IHP document does not require the staff to hold the Student's hand or be within arm's reach of the Student when the Student walks from the bus to the classroom. Additionally, the IHP does not prescribe precisely how the medical device must be "handed off" between individuals. The bus driver confirmed that the medical device was in the Student's

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<sup>7</sup> OAR 581-015-2220

<sup>8</sup> OAR 581-015-2000(28)

<sup>9</sup> 34 CFR 300.34(16)

<sup>10</sup> Letter to Anonymous, 23 IDELR 832 (OSEP 1995)

<sup>11</sup> OAR 581-021-0220(6)

<sup>12</sup> 34 CFR 300.42

backpack that morning, where it was always kept when the Student left the bus and walked toward the aide, so the IHP's responsibilities were substantially fulfilled.

The *Request for Transportation* document contains the notation "Teachers pick up at bus". Again, there is no specific description of precisely how close the teacher/aide is required to be in relation to the Student during these exchanges. More importantly, the *Request for Transportation* is not an educational record, since it is an internal District document, maintained in the transportation office, with a copy on the bus, and it is used specifically for administrative personnel's purposes.<sup>13</sup> This document is not maintained in the Student's cumulative or special education files.

Relevant to the events of December 2, 2011 is the bus blocking ingress and egress to the paved area. The Student was not at risk of being hit by traffic. The area is substantially fenced, although there are openings in the fence. The bus driver and the aide watched as the Student walked from the bus to the classroom. Fostering the Student's sense of independence was the purported reason for not being within arm's reach of the Student and this is consistent with the philosophy of the classroom teacher.

Finally, the class's "Level" system progressed the Student from "Level 1" when school started, to "Level 2" in October, which suggests that the Student had earned a level of independence. This independence had privileges associated with earning such a promotion. While the Student must still be supervised after achieving a "Level 2" status, the proximity requirements are "within 'ear/eye shot' distance of the teacher." On December 2, 2011, the Student was within "eye shot" of the aide while the Student walked from the bus to the classroom. Additionally, the Student's current IEP lists an adaptive long term goal of "will be independent in school based routines" which includes the Student's "arrival routine". As such, the IEP team encouraged the Student's independent behavior during school routines such as arrival, which would further demonstrate the staff's justification in not holding the Student's hand or walking directly with the Student upon arrival at school on the day in question.

Of concern to the Department is the different stories reported to the parent by various District personnel. The estimated distance from aide to Student was described as little as two feet, but the incident report estimated ten to fifteen feet, while the video surveillance demonstrated a greater distance. While these accounts varied they do not substantiate an IDEA violation; however, the lack of clear information does not lend itself to a positive relationship or for meaningful communication between the parent and the Student's providers.

Finally, even if the Department had substantiated the parent's allegation, the Department does not have the authority to order a resident student of a school district to be "released" for an inter-district transfer. Issues relating to inter-district transfers are left to school districts.<sup>14</sup> However, with the changes in transfer options contained in HB

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<sup>13</sup> OAR 581-021-0220(6)

<sup>14</sup> See, OAR 581-015-2030 (13)

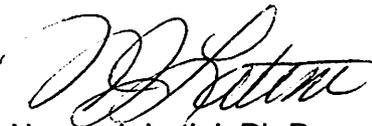
3681, there may be more options for students and their parents to change enrollment to a different district in the 2012-13 school year.<sup>15</sup>

### **CORRECTIVE ACTION**

*In the Matter of Lowell School District & Lane ESD  
Case No. 12-054-001 (a) & (b)*

The Department does not order any Corrective Action resulting from this investigation.

Dated: March 5, 2012



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

Mailing Date: March 5, 2012

**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.

Additionally, the Department of Education will not reconsider complaints after the Final Order has been issued pursuant to OAR 581-015-2030 (14) (b).

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<sup>15</sup> See, <http://www.ode.state.or.us/news/announcements/announcement.aspx?=7750>