

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Eugene SD

)
)
)
)

FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 12-054-002

I. BACKGROUND

On January 30, 2012, the Oregon Department of Education (Department) received a letter of complaint from legal counsel on behalf of the parent of a student residing in the Eugene School District (District). The complaint requested a special education investigation under OAR 581-015-2030. The Department provided a copy of the complaint to the District.

Under federal and state law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) that occurred within twelve months prior to the Department's receipt of the complaint and issue a final order within 60 days of receiving the complaint unless exceptional circumstances require an extension.¹ This order is timely. The timeline may be extended if the District and the parent agree to extend the timeline in order to participate in mediation or local resolution or if exceptional circumstances require an extension.² On February 7, 2012, the Department sent a *Request for Response* to the District identifying the specific allegations in the complaint to be investigated. On February 22, 2012, the District timely submitted its *Response* to the *Request for Response*.

The Department's contract complaint investigator determined that an on-site investigation to interview District staff would not be necessary in this case. On March 16, 2012, the complaint investigator met with and interviewed the parent, without the parent's legal counsel being present, at the request of the parent and with express permission of the parent's legal counsel. The parent provided an additional email and an assessment, which the complaint investigator provided to the District by email. On March 16, 2012, the complaint investigator also interviewed the District's legal counsel by telephone, who wished the opportunity to communicate with the complaint investigator. The Department's investigator reviewed and considered all of the documents and interviews in reaching the findings of fact and conclusions of law contained in this order.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under OAR 581-015-2030 and 34 CFR §§ 300.151-153. The parent's allegations and the Department's conclusions are set out in the chart below. The Department based its conclusions on the Findings of Fact in Section III and the Discussion in Section IV. This complaint covers the one year period from January 31, 2011, to the filing of this complaint on January 30, 2012.³

¹ OAR 581-015-2030; 34 CFR §§ 300.151-153

² OAR 581-015-2030(12)

³ OAR 581-015-2030(5)

No.	Allegations	Conclusions
(1)	<p data-bbox="293 283 789 346"><u>Failure to Implement a Due Process Decision</u></p> <p data-bbox="315 385 867 612">The complaint alleges that the District has failed to implement a due process decision involving the parent and the District issued by an Administrative Law Judge (ALJ) on October 13, 2011 in Case No. DP 10-116, in its entirety.</p>	<p data-bbox="898 283 1149 314"><u>Not Substantiated</u></p> <p data-bbox="898 385 1433 1919">The October 13, 2011 due process order required the District to meet with the parent by October 20, 2011 in order to discuss transitioning the student back to the student's prior placement, to return the student to the prior placement by October 27, 2011, to convene an IEP meeting in order to develop an IEP by November 13, 2011, and to begin providing social skills instruction, counseling and writing instruction by November 3, 2011. The Department finds that the District attempted to comply with these portions of the due process order, but the parent was unavailable to meet to discuss transitioning the student back to the student's prior placement until October 26, 2011, as such the District convened a meeting with the parent in attendance at this time. At the October 26, 2011 meeting, the parent indicated that the parent did not want to return the student to the prior placement, begin any services, or even convene an IEP meeting until the District completed a Functional Behavior Assessment (FBA). The District timely completed the FBA and provided a copy to the parent before the deadline of December 13, 2011. The parent does not believe the District completed an appropriate FBA, and has consequently taken the position that return of the student to the student's prior placement in the District, as well as an IEP meeting to determine the appropriate placement, may not occur until a parentally deemed "sufficient" FBA and Behavior Support Plan (BSP) are first in place. The Department finds that the parent has not demonstrated that the FBA conducted by the District in this case is not an adequate FBA. The District's FBA concluded that the student's behavior is not a problem in</p>

		<p>the charter school and thus no BSP is required as there is currently no problem behavior to address. The District has recognized that it will be appropriate to conduct a new FBA if and when the student is returned to the student's prior placement or another environment other than the charter school which the student currently attends. Under these circumstances, the Department does not sustain the allegation that the District has failed to implement the portions of the due process order requiring a FBA and BSP.</p> <p>Finally, the Department concludes that, as set forth in the factual findings above, the District has implemented the requisite portions of the due process order requiring training of the appropriate staff person on "the development of IEPs, the development of FBAs and BSPs, and appropriate disciplinary measures for sixth grade students."</p>
--	--	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

III. FINDINGS OF FACT

Background:

1. For a full recitation of the underlying facts concerning this case, reference must be made to the 74-page due process order issued on October 13, 2011 in *In the Matter of the Education of Student and Eugene School District*, Case No. DP 10-116.
2. The Department's jurisdiction for review of this particular complaint, which alleges the failure of the District to implement a due process order, is pursuant to OAR 581-015-2030(11), which provides, in part, "A complaint alleging a school district's failure to implement a due process decision will be resolved by the Superintendent."
3. The due process order requires the District to take nine steps, including: "(1) Within one week of the date of this Order [by October 20, 2011], the District will meet with Mother to discuss transitioning Student back to the placement s/he had at Elementary School before the District changed her/his placement to home instruction in May 2010."
4. The District communicated with the parent on October 19, 2011, requesting a meeting by October 20, 2011 as directed by the due process order. The parent indicated that the earliest the parent could meet would be October 26, 2011. At the parent's request the District scheduled and held the required meeting on October 26, 2011.

5. At the meeting on October 26, 2011, the parent indicated that the parent did not want to reenroll the student in the student's prior placement in the District until completion of the Functional Behavioral Assessment (FBA) and IEP. The District understood that the parent did not want to move forward with any services, including mental health counseling until the FBA and IEP had been completed.
6. The second requirement of the due process order states: "Within two weeks of the date of this Order [by October 27, 2011], the District must return Student to the placement s/he had at Elementary School before the District changed her/his placement to home instruction in May 2010."
7. At the October 26, 2011 meeting, the District noted that the student must be returned to the student's previous placement in the District. However, as noted in finding #5, above, at the meeting on October 26, 2011, the parent indicated that the parent did not want to reenroll the student in the student's prior placement in the District until completion of the Functional Behavioral Assessment (FBA) and IEP. The District understood that the parent did not want to move forward with any services, including mental health counseling until the FBA and IEP had been completed.
8. The third requirement of the due process order states: "Within one month of the date of this Order [by November 13, 2011], the District will convene an IEP team meeting to develop an IEP for Student that complies fully with the IDEA, and in particular, contains a detailed statement of the present levels of Student's academic and functional performance as well as a summary of how Student's disability affects her/his performance. In attendance at the IEP meeting must be a District representative who is knowledgeable about District services, in addition to all other required participants under the IDEA. As part of the IEP meeting, the team will determine an appropriate placement for Student that will allow her/him to access her/his education in the least restrictive environment."
9. The District attempted to convene a meeting with the parent present before the November 13, 2011 deadline. However, the parent simply could not attend a meeting prior to November 13, 2011, so the District, mindful of the November 13, 2011 deadline, convened an IEP meeting on November 10, 2011. This meeting involved staff from a charter school at which the parent had enrolled the student the previous year, in October of 2010. This meeting also involved staff from the Bethel School District, the district in which the charter school is located, and the District. The parent was legitimately unable to attend the November 10, 2011 IEP meeting. The parent clearly communicated to the District by email, both prior to (on November 2, 2011) and after (on November 15, 2011), that the parent did not want to convene an IEP meeting until the FBA had been completed. Under the terms of the due process order, the District had to complete the FBA by December 13, 2011.
10. The fourth requirement of the due process order states: "Within two months of the date of this Order [December 13, 2011], the District will conduct a comprehensive FBA of Student."
11. The District began the FBA process by obtaining permission from the parent to exchange information with the Bethel School District because the charter school in which the student is enrolled is located within the Bethel School District's boundaries. Following observations of the student at the student's charter school (on November 8, 2011, November 16, 2011 and November 21, 2011), interviews of two of the student's charter school teachers (on November 9, 2011 and November 17, 2011) and an interview of the parent (on November 30, 2011), the District timely completed a written FBA. The District provided a copy of the

FBA to the parent on December 7, 2011 and the team, including the parent, discussed the FBA at a meeting on January 12, 2012. The parent does not dispute that the District timely completed a FBA, but indicated during the meeting with the Department's complaint investigator that the parent believes the FBA is not adequate because it did not include a file review and thus did not address the student's previous behavior while attending school in the District, but only considered the student's current behaviors in the student's charter school.

12. The FBA concludes that "In the current context, the frequency of problem behaviors is very low and they are easily addressed using strategies that are pretty much standard best practices. It is this evaluator's conclusion that an individualized Behavior Support Plan is not needed at this time. However, that is not to say that a support plan may not be needed in the future if there are changes in the context or the relationship between the behaviors and the antecedent and consequent variables."
13. The fifth requirement of the due process order states: "(5) Within three months of the date of this Order [by January 13, 2012], the District will complete a [Behavior Support Plan] BSP for Student. Any plan of the District to physically move or restrain Student must be discussed with [parent] and documented in the BSP with a complete description of the circumstances under which such physical movement or restraint will be used by the District. The BSP must provide that within 24 hours of any physical movement or restraint of Student by the District, the District will notify [parent] in writing of all details regarding the movement or restraint."
14. The FBA timely completed by the District concludes that a BSP is not appropriate in light of the student's absence of behavioral issues in her/his present school setting at a charter school.
15. The sixth requirement of the due process order states: "Within three weeks of the date of this Order [by November 3, 2011], the District will begin providing to Student: a. One hour per week in social skills instruction including how to trust adults, conflict resolution, self-advocacy, problem-solving strategies, self-soothing strategies, dealing with authority, appropriately expressing emotions, and organizational skills (one hour per week during each non-vacation week of the 2011-2012 academic year). b. Thirty minutes per week in counseling dealing with anxiety, trauma or other related issues by a psychologist selected by the District (thirty minutes per week during each non-vacation week of the 2011-2012 academic year). c. Specialized instruction designed to help Student learn to write legibly (30 minutes per week during each non-vacation week of the 2011-2012 academic year)."
16. The District understood from the parent's comments at the October 26, 2011 meeting that the parent did not want to re-enroll the student or move forward with any services until the completion of the FBA and an IEP meeting.
17. The seventh requirement of the due process order states: "Within three weeks of the date of this Order [by November 3, 2011], the District will provide six hours of instruction on the development of IEPs to any person who will serve as Student's special education teacher during the 2011-2012 academic year."
18. The District's *Response* in this case demonstrates that on October 25, 2011, the District timely conducted training concerning the development of IEPs to the person who would be the student's special education teacher if the student leaves the charter school and returns to the District.

19. The eighth requirement of the due process order states: "Within one month of the date of this Order [by November 13, 2011], the District will provide six hours of instruction on the development of FBAs and BSPs to any person who will serve as Student's special education teacher during the 2011-2012 academic year."
20. The District's *Response* in this case demonstrates that on November 10, 2011 through November 13, 2011, the District provided an FBA and BSP training to the person who would be the student's special education teacher if the student leaves the charter school and returns to the District.
21. The ninth, and final, requirement of the due process order states: "Within one month of the date of this Order [by November 13, 2011], the District will provide six hours of instruction on appropriate disciplinary measures for sixth grade students to any person who will serve as Student's special education teacher during the 2011-2012 academic year."
22. The District's *Response* in this case demonstrates that on November 10, 2011 through November 13, 2011, the District provided training concerning appropriate disciplinary measures to the person who would be the student's special education teacher if the student leaves the charter school and returns to the District.
23. During the interview of the parent with the Department's complaint investigator, the parent advised that January 27, 2012, the parent met with Bethel School District staff, and that Bethel School District developed an IEP for the student. The placement selected by that IEP team is "Regular education with itinerant support". As of March 16, 2012, the student is still enrolled in the charter school.

IV. DISCUSSION

The parent alleges that the District failed to implement the due process order issued on October 13, 2011 in *In the Matter of the Education of Student and Eugene School District*, Case No. DP 10-116 and that the District did not contact the parent regarding the IEP or the subsequent student counseling and instruction. As set forth in the factual findings, above, the due process order sets forth nine specific matters with which the District is ordered to comply.

The October 13, 2011 due process order required the District to meet with the parent by October 20, 2011 to discuss transitioning the student back to the student's prior placement, to return the student to the prior placement by October 27, 2011, to convene an IEP meeting to develop an IEP by November 13, 2011, and to begin providing social skills instruction, counseling and writing instruction by November 3, 2011. The Department finds that the District attempted to comply with these portions of the due process order and contacted the parent on numerous occasions, but the parent was unavailable to meet to discuss transitioning the student back to the student's prior placement until October 26, 2011, when the District convened a meeting with the parent in attendance. At the October 26, 2011 meeting, the parent indicated that the parent did not want to return the student to the prior placement, begin any services, or even convene an IEP meeting until the District completed an FBA, which the due process order required to be completed by December 13, 2011. Under these circumstances, the Department does not sustain the allegation that the District has failed to implement the foregoing portions of the due process order.

The due process order also required the District to complete a FBA by December 13, 2011 and to complete a BSP by January 13, 2012. The District timely completed the FBA and provided a copy to the parent before the deadline of December 13, 2011. The parent still does not believe the District has completed an appropriate FBA, and has consistently taken the position that return of the student to the student's prior placement in the District, as well as an IEP to determine the appropriate placement may not occur until a sufficient FBA and BSP are first in place. The student is still enrolled in the charter school and showing success there. The Department finds that the parent has not demonstrated that the FBA conducted by the District in this case is not an adequate FBA, and the Department further finds that it is appropriate for the FBA to focus on the student's current behavior and not upon the student's behavior issues demonstrated during the first semester of the 2010-2011 school year and previously so that the student's current behavior needs may be addressed. The student has been in the charter school since December of 2010, and a file review of the student's behavior prior to that would not necessarily be of benefit to an assessment of the student's current behavior. The District's FBA concluded that the student's behavior is not a problem in the charter school and thus no BSP is required at this time. The District has recognized that it will be appropriate to conduct a new FBA if and when the student is returned to the student's prior placement or another environment other than the charter school or if the student is in an environment where behavior impedes the ability to learn or make educational progress. FBAs and behavior intervention plans are not expressly required components of an IEP⁴ and the general purpose of an FBA is to provide the IEP team with additional information, analysis, and strategies for dealing with undesirable behavior. Under the present circumstances of this complaint, the Department does not sustain the allegation that the District has failed to implement the portions of the due process order requiring a FBA and BSP as the District offered the parent a current and timely FBA and there is no behavior in the student which poses educational issues in the current placement. The District additionally noted that an FBA and subsequent BSP would be offered to the student if the student returns to District or changes placement from the current Charter school.

Finally, the Department concludes that, as set forth in the factual findings above, the District has implemented the portions of the due process order requiring training of the appropriate staff on "the development of IEPs, the development of FBAs and BSPs, and appropriate disciplinary measures for sixth grade students" as evidenced by the record. Although, if the parent has not been notified of this completed training by the District, a better practice would be for the District to send the parent updates on completed corrective action items in order to note completion and ensure understanding by all parties. The Department does not sustain the allegation that the District has failed to implement the foregoing portions of the due process order.

⁴ 34 CFR 300.320

V. CORRECTIVE ACTION

*In the Matter of Eugene SD
Case No. 12-054-002*

Because the Department has not sustained any allegations of the complaint, no corrective action will be ordered.

Dated: March 26, 2012



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

Mailing Date: March 26, 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 a Final Order had been issued pursuant to OAR 581-015-2030(14)(b).