

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

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

FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 12-054-009

I. BACKGROUND

On April 9, 2012, the Oregon Department of Education (Department) received a letter of complaint from the parent of a child attending school and residing in the Lincoln County School District (District). The complaint requested a special education investigation under OAR 581-015-2030. The parent 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) and issue a final order within 60 days of receiving the complaint unless exceptional circumstances require an extension.¹ On April 13, 2012, the Department sent a *Request for Response* to the District identifying the specific allegations in the complaint to be investigated. On April 27, 2012, the District timely submitted its *Response* to the *Request for Response*. The parent submitted a written *Reply*, including approximately 83 pages of supporting documents to the Department and the District on May 3, 2012. 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. 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 This order is timely.

The Department's contract complaint investigator determined that an on-site investigation would be necessary in this case. On May 24, 2012, the complaint investigator interviewed the parent and several of the District staff, including a Speech/Language Pathologist (SLP), two Special Education Assistant's (EA), a Special Education Teacher, a School Psychologist and the District's Special Education Director. 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 April 10, 2011, to the filing of this complaint on April 9, 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><u>General Evaluation and Reevaluation Requirements</u></p> <p>The complaint alleges that the District violated the IDEA by failing to timely complete a behavioral evaluation, not completing an evaluation until April of 2012 following the parent's signed consent for the evaluation on October 26, 2011. The complaint also alleges that the behavioral evaluation completed in April of 2012 is not an adequate assessment because the evaluator did not consider content of the student's communication notebook and did not consider behaviors of the student noted by the student's teachers to the parent, and that this is resulting in additional delay in the District's completion of an adequate behavioral evaluation of the student.</p> <p>Relevant Rules and Law: OAR 581-015-2110 and 34 CFR 300.304 and 300.305- General Evaluation and Reevaluation Procedures</p>	<p><u>Substantiated, in part</u></p> <p>The Department sustains the allegation that the District failed to timely complete the Functional Behavior Assessment (FBA) in this case. The Department concludes that the appropriate remedy is training of appropriate District staff on evaluation timelines. <i>See Corrective Action.</i></p> <p>The behavior addressed in the FBA (dated March 8, 2012), clearly addresses the type of behavior revealed in the communication notebook. The Department thus does not sustain the allegation that the FBA is not an adequate assessment.</p>
(2)	<p><u>Meeting Notice and Parent Participation – General</u></p> <p>The complaint alleges that the District violated the IDEA by failing to provide proper notification of an IEP meeting held on April 5, 2012. The complaint further alleges that the District failed to notify the parent that particular staff person (a speech pathologist) would attend the IEP meeting on April 5, 2012. The complaint further alleges that this particular staff member would not allow the parent to meaningfully participate in the IEP meeting on April 5, 2012, due to this staff member's conduct during the meeting.</p> <p>Relevant Rules and Law: OAR 581-015-2210 and 34 CFR 300.321 – IEP Team; OAR 581-015-2190(2)(b); OAR 581-015-2190 and 34 CFR 300.322– Parent Participation</p>	<p><u>Substantiated, in part</u></p> <p>The Department finds that the District failed to provide proper written notice of the April 5, 2012 meeting in this case, and failed to inform the parent who would be attending the meeting, and specifically failed to inform the parent that the SLP would attend the meeting. <i>See Corrective Action.</i></p> <p>The Department does not, however, sustain the allegation that the parent was not allowed to meaningfully participate in the IEP meeting on April 5, 2012.</p>

(3)	<p><u>When IEPs Must Be In Effect</u></p> <p>The complaint alleges that the District failed to implement the student's IEP, specifically by failing to note particular behaviors of the student in the student's communication notebook.</p> <p>Relevant Rules and Law: OAR 581-015-2220 and 34 CFR 300.323 - When IEPs Must Be In Effect</p>	<p><u>Not Substantiated</u></p> <p>The Department does not find sufficient facts upon which to conclude that the student's communication notebook omits particular behavioral incidents.</p>
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III. FINDINGS OF FACT

Background:

1. The student in this case is 17 years old and attends high school in the District. The student is eligible for special education services as a student with Intellectual Disability. The parent reported that the student has been receiving special education services since the child was about ten months of age. The student is performing academically in a range of 1st through 3rd grade, and is on a modified diploma track. The student's IEP in effect at the time of the filing of the complaint is dated October 26, 2011. The IEP team subsequently selected a placement of "Special or separate class (e.g. life skills, behavioral support class). More than 60% resource room or special class". In this placement, the student receives services in a special education self-contained classroom. Instruction of the student is supervised by the special education teacher and implemented primarily by two Educational Assistants (EAs) who work in the student's classroom. The student's October 26, 2011 IEP also provided for Specially Designed Instruction (SDI) in "Speech/Language", "Math", "Reading", "Written Language" and "Adaptive PE", and the IEP includes goals related to Reading, Writing, Communication, Adaptive PE, Math and Social Emotional. Supplementary Aids/Services and Modifications and Accommodations in the October 26, 2011 IEP include a "feeding protocol to minimize choking risk", "student behavior: Reteach desired behavior" and "Augmentative communication devices."

Evaluation: Functional Behavior Assessment (FBA)

2. On October 26, 2011, the student's IEP team met for an annual review. The Present Levels of Academic Achievement and Functional Performance section of the IEP includes a statement that the parent is "concerned with [the student's] safety with other student, as [the student] is becoming aware of [the student's] sexuality and [the parent] wants to make sure [the student] understands appropriateness of her actions and the actions of others." The IEP also states that the parent "agrees that a functional behavioral assessment and plan is needed to address [the student's] behaviors of concern for [the student's] safety and others' safety."
3. On October 26, 2011, consistent with the decision of the IEP team (including the parent), the parent signed a "Consent for Evaluation", for a "Functional Behavior Assessment" of the student. The District staff person (evaluator) assigned to complete the FBA understood that the FBA must be completed within 60 school days from the date the consent form was signed. Review of the District's published calendar reveals that the 60th school day following

October 26, 2011 was approximately February 23, 2012. The evaluator conceded during the on-site investigation that the evaluator did not complete the FBA within 60 school days from the written consent of the parent because "time simply got away" from the evaluator.

4. Portions of the student's communication notebook (a notebook in which entries are made by District staff and the student's parent) provided during the on-site investigation reveal a note dated October 31, 2011 from the parent, concerning the fact that the evaluator "will be evaluating [the student] for a behavior plan", but will "not be addressing why [the student is] acting out because there may be a conflict of interest if [the evaluator] does." [emphasis in parent's original entry] By way of explanation of that entry, during the on-site, the parent clarified that the student alleged improper sexual touching of the student by another District student, in April of 2011. The District is aware of this allegation of inappropriate sexual contact at the school. The student's communication notebook also contains an entry by District staff dated November 2, 2011 noting that the student "had to have a warning to have hands to self." Another entry by District staff dated November 3, 2012 notes that "we had to tell [the student] no more high fives finally because [the student] wouldn't stop", and that "[the student] also started being very silly & bouncy with one of the boys in class." Another entry by District staff dated November 8, 2011, the student "was a bit hands on." Another entry by District staff dated November 9, 2011, notes "[the student] had to be told to stop bouncing up & down again today."
5. The evaluator's contact log reveals that on November 15, 2011 the evaluator met with the parent to discuss the student. On November 15, 2011, as part of the FBA, the evaluator observed the student in the student's physical education class. On December 1, 2011, the evaluator observed the student in the student's classroom. The evaluator did not observe any significant behaviors of the student during the observations. On January 10, 2012, the evaluator attempted another classroom observation of the student, who was absent that day. The evaluator provided blank forms ("Functional Assessment ABC Observation Form") to one of the two EAs who work with the student and asked the EA to advise the evaluator if and when the student demonstrates inappropriate behavior. The EA commented that the EA had not observed any inappropriate behaviors lately. On February 9, 2012, the evaluator spoke with the other EA who told the evaluator of a couple of incidents, which were documented on an FBA form. The evaluator received three observation forms from the EAs, dated February 6, 2012 (student approached another student who had not been to school for a while and "got right in his face" and "asked for a hug" and was "twirling [the student's] hair and staring" at the other student, and then "did a high pitched bark, stuck out [the student's] chest and started jumping up and down"), February 8, 2012 (student kept calling out the name of a former student who came into the building and kept trying to run after the other student and "kept trying to get a hug and hold his hand"), and February 9, 2012 (student kept hissing at another student who was afraid of spiders). On March 20, 2012, one of the TAs told the evaluator of an incident that occurred during a bowling class at the bowling alley (student called out to two men who were with another student's father at the bowling alley and the men came over to the student and the student shook hands with them). The evaluator received a copy of pages from the student's communication notebook which contains an entry concerning the bowling alley incident dated March 8, 2012. The student's communication notebook noted another incident, on March 12, 2012 (student had "issue of [the student] getting right up in someone's face").
6. The FBA concerning the student is dated March 8, 2012. District staff called the parent on March 8, 2012 to set up a meeting concerning the FBA. The District and the parent had to reschedule the first meeting due to a conflict of the parent, for April 4, 2012, and the parties agreed to reschedule this meeting to April 5, 2012. The FBA includes the following

"Description of Behavior" occurring "once or twice a month": "When a new person, or a student that has not been around for a while (particularly male), comes into the classroom, [the student] will usually try to gain that student's attention by getting in his face, asking for a hug, trying to hold his hand, and staring at him. [The student] may stick out her chest and start jumping up and down if those behaviors don't work to gain attention." The FBA identifies the "need" identified as that "[the student] is communicating [the student's] need for individual attention." The evaluator completed a "Behavior Intervention Plan" (BIP) for the student (dated March 8, 2012 and April 5, 2012), identifying strategies and interventions to get the student to return to task within one minute of a new person entering the classroom, including "social story – every day," "Role play and practice – twice a month," "Staff alert to when a new person enters the room," "Verbal praise when [the student] gets back to [the student's] task. Review it with [the student] afterward ('Great job [student], you chose to get up and greet the new person and then quickly got back to work!)," "Data tracking sheet for each step (include whether it was verbal/physical prompt, verbal prompt or independent) – initiating contact – exchanging greetings – returning to work within minute", and "social skills checklist."

7. The meeting notes from the April 5, 2012 meeting to discuss the FBA indicate, in part, that the parent believed the evaluator should have read the student's entire communication notebook, although the evaluator noted that the student's special education teacher and two EAs "were supposed to inform [the evaluator] if there was a significant behavioral incident." The evaluator "agreed to read it that afternoon and call [the parent] the following afternoon to discuss whether any other behaviors were noted. If there were additional behaviors, everyone agreed to meet again." The evaluator reviewed portions of the student's communication notebook from October 26, 2011, but did not believe any of the behaviors noted were not addressed in the FBA. The evaluator communicated this in a telephone message left with the parent on April 6, 2012.
8. On May 14, 2012, after the filing of the complaint in this case on April 9, 2012, the student's IEP team, including the parent, held a facilitated IEP meeting and developed a new IEP for the student, including a "Behavior Support/Safety Plan."

Meeting Notice and Parent Participation

9. As noted in finding #5, District staff called the parent on March 8, 2012 to set up a meeting concerning the FBA. The District and the parent had to reschedule the first meeting due to a conflict of the parent, for April 4, 2012, and the parties agreed to reschedule this meeting for April 5, 2012. The parent was not notified that a particular District staff person, the SLP, would be at the April 5, 2012 meeting. The parent expressed concerns in the complaint filed in this case about the sharing of confidential information concerning the student with the SLP. The District did not identify this meeting as an IEP team meeting and did not provide a written IEP team notice of this meeting because "they saw the results of the FBA impacting the behavior plan only." The District's *Response* states that "The meeting on April 5, 2012 was to discuss the FBA and plan for how to respond to the information resulting from this evaluation. Present at the meeting were all team members who were needed to address the needs of the student. These included the learning specialist, school psychologist, speech language pathologist and the parent. Without the speech language pathologist, the team would not have been complete or able to address the communication needs of the student in relation to the observed behaviors."
10. The meeting notes of the April 5, 2012 meeting include that "[The parent] questioned why [the SLP] was attending the meeting on behavior. [The SLP] explained that the target

behavior and intervention are directly related to [the student] communicating appropriately at school.” During the on-site investigation the complaint investigator interviewed all persons present at the April 5, 2012 meeting. All agreed that the parent asked the SLP to leave, but when asked why the parent wished the SLP to leave, the parent did not provide an explanation. District staff all observed that after this request, the parent expressed anger and stood up and took a break. The meeting continued with all present. District staff all observed that the parent fully participated in the meeting including discussion of the FBA and discussion of the incident that occurred at the bowling alley.

IEP Implementation

11. The student’s October 26, 2011 IEP does not provide for a communication notebook. Communication notebooks are not required for all students in the District, but they are completed for all students in the special education self-contained class. The parent did not identify precisely what behaviors of the student were not noted in the student’s communication notebook, but which should have been there.

IV. DISCUSSION

The parent first alleges that the District failed to timely complete the FBA in this case. The Department finds that the parent provided written consent for the FBA of the student on October 26, 2011, and that the FBA was not completed until March 8, 2012, and was not discussed at a meeting with the parent until April 5, 2012, well after the 60th school day, February 23, 2012, following the parent’s written consent to the FBA in this case.

The federal Office of Special Education and Rehabilitative Services has stated that FBAs may qualify as an evaluation or reevaluation under Part B of the IDEA, and trigger all of the related procedural safeguards.⁴ Additionally, OAR 581-015-2110(5) provides that, an evaluation or reevaluation must be completed within 60 school days from written parent consent * * * to the date of the meeting to consider eligibility, continuing eligibility or the student’s educational needs.” The Department sustains the allegation that the District failed to timely complete the FBA in this case. In its *Response*, the District asserts that no significant behaviors were noted until February 6, 2012. First, the FBA date of completion was not within 60 school days from the parent’s written consent to the FBA. Second, other subsequent similar behaviors involving the student not respecting physical boundaries were noted in the student’s communication notebook on November 2, 2011, November 3, 2011 and November 8, 2011. The Department concludes that the appropriate remedy is training of appropriate District staff concerning evaluation timelines pursuant to IDEA. Additionally, the Department’s review in this case revealed no indication that the delay in completion of the FBA impacted services provided to the student or the student’s ability to access the student’s educational program.

The other aspect of the complaint concerning the FBA is that the FBA is not an adequate assessment because the evaluator did not consider the entire content of the student’s communication notebook and behaviors noted by the student’s teachers to the parent. However, the behavior addressed in the FBA (dated March 8, 2012), clearly addresses the types of behavior revealed in the communication notebook. The Department thus does not sustain the allegation that the FBA is not an adequate assessment.

⁴ *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007)

The parent also alleges that the District failed to provide proper notice of the April 5, 2012 meeting. The District's *Response* in this case asserts that "[t]he team did not use a written team meeting notice due [to] the fact that they saw the results of the FBA impacting the behavior plan only." However, the Department concludes that the April 5, 2012 meeting, appropriately viewed as an evaluation planning meeting under OAR 581-015-2115, still requires that if the student's IEP team meets to review the FBA, the parent must be invited to participate⁵ and the requirements concerning notice of IEP meetings apply. OAR 581-015-2190 requires written notice of meetings concerning the evaluation of the student, and requires that the notice state "who will attend."⁶ The Department finds that the District failed to provide proper written notice of the April 5, 2012 meeting in this case, and failed to inform the parent who would be attending the meeting, and specifically failed to inform the parent that the SLP would attend the meeting. The Department concludes that the appropriate remedy is training of appropriate District staff on proper, written notice of team meetings.

The Department does not sustain the allegation that the parent was not allowed to meaningfully participate in the IEP meeting on April 5, 2012. Although the parent was upset by the presence of the SLP, all indications in the record are that the parent meaningfully participated in the meeting. Additionally, the Department finds that although the District did not provide proper written notice that the SLP would be attending the meeting, the attendance of the SLP at the April 5, 2012 meeting was appropriate to address the communication aspect of the behaviors noted in the FBA.

Finally, the parent alleges that the District failed to note particular behaviors of the student in the student's communication notebook. The Department does not find sufficient facts upon which to conclude that the student's communication notebook omits particular behavioral incidents. Therefore, the Department need not reach a conclusion on whether the student's October 26, 2011 IEP or the then ongoing FBA required particular entries concerning the student's behavior.

V. CORRECTIVE ACTION⁷

In the Matter of Lincoln County SD
Case No. 12-054-009

#	Action Required	Submissions ⁸	Due Date
(1)	<u>Training:</u> The District must provide appropriate training of all appropriate District special education staff and any ESD or other evaluation staff working with the District	Evidence of completed training; If providing training by e-mail:	September 28 2012

⁵ OAR 581-015-2115(2)

⁶ OAR 581-015-2190(2)(b)

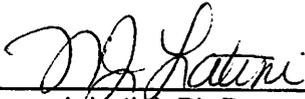
⁷ The Department's order shall include corrective action. Any documentation or response will be verified to ensure that corrective action has occurred. OAR 581-015-2030(13). The Department requires timely completion. OAR 581-015-2030(15). The Department may initiate remedies against a party who refuses to voluntarily comply with a plan of correction. OAR 581-015-2030(17), (18).

⁸ 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.

⁹ Initial Verification: items listed in "Submission."

	<p>regarding the following:</p> <ul style="list-style-type: none"> • Evaluation and reevaluation timelines • Identifying when an IEP team meeting is required • Providing proper IEP team meeting notices <p>The District may provide this information by e-mail or in a meeting.</p>	<ul style="list-style-type: none"> • Distribute materials to appropriate staff and request "read receipt:" • Copy ODE on the distribution of materials to staff members ; • List of staff members and position <p>If providing training in person:</p> <ul style="list-style-type: none"> • Agenda • Attendance roster identifying names and positions of attendees • Copy of the training materials 	
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Dated: June 6, 2012



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

Mailing Date: June 6, 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).