

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of)
Crook County School District)

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FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 13-054-025

I. BACKGROUND

On September 17, 2013, the Oregon Department of Education (Department) received a letter of complaint from the parent (Parent) of a student (Student) residing in the Crook County School District (District). The Parent requested a special education investigation under OAR 581-015-2030. The Department provided a copy of the complaint letter 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 September 25, 2013, the Department sent a *Request for Response* to the District identifying the specific IDEA allegations in the complaint to be investigated. On October 3, 2013, the District timely submitted its *Response* to the *Request for Response*, with accompanying documentation. On October 14, 2013 and October 16, 2013, the Parent provided additional information by mail to the Department’s contract complaint investigator (complaint investigator), which the complaint investigator provided to the District. This order is timely.

The Department’s complaint investigator determined that telephone interviews of certain District staff were necessary in this case. On October 23, 2013, the complaint investigator interviewed District staff by telephone, including a special education teacher, a principal, and two educational assistants. On October 24, 2013, the complaint investigator interviewed by telephone the District’s special education director. Also on October 24, 2013, the complaint investigator interviewed the Parent by telephone. The complaint investigator reviewed and considered all of the interviews and documents 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 September 18, 2012, to the filing of this complaint on September 17, 2013.²

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

² OAR 581-015-2030(5)

No.	Allegations	Conclusions
1.	<p><u>When IEPs Must be in Effect/IEP Implementation</u></p> <p>The complaint alleges that the District violated the IDEA by failing to implement the Student's Behavioral Intervention Plan (BIP) during an incident on May 14, 2013.³</p> <p>Relevant law: OAR 581-015-2220 and 34 CFR 300.323.</p>	<p><u>Not Substantiated</u></p> <p>The District followed the BIP to the extent practicable on the day in question.</p>
	<p><u>Proposed Corrective Action</u></p> <p>The Parent requests the following corrective action:</p> <p>Remove a particular staff person from the special education classroom and revoke this staff person's Crisis Prevention Intervention (CPI) certification.</p>	<p>No violation is found and thus no corrective action is ordered in this case.</p>

III. FINDINGS OF FACT

Background

1. The Student in this case is presently 11 years old and is in the 6th grade. The Student is eligible for special education as a student with an Emotional Disturbance and Communication Disorder.
2. The Student's current IEP, dated February 22, 2013, provides the following placement: "Special Education room for academics and behavior support. Pull out for Speech/Language to Speech Room with participation in a general education classroom when appropriate." The Present Levels of Academic Achievement and Functional Performance (PLAAFP) in the Student's February 22, 2013 IEP states that the Student is "currently on a shortened daily schedule. [The Student] began the school year attending school from 7:45-11:30. [The Student] now attends school from 7:45 to 12:30", and that the Student's "progress has not been up to [the Student's] potential due to the amount of academic time lost to negative behavior. [The Student] is also on a shortened day schedule." The Student's February 22, 2013 IEP includes annual goals and objectives in mathematics, reading, writing, social adjustment & behavior, communication and self advocacy. The Service Summary in the February 22, 2013 IEP states the District will provide Specially Designed Instruction (SDI) in behavior and in the academic areas identified in the Student's annual goals and objectives.

³ Note that a separate state complaint is also on file with Michael Mahoney, Safe and Healthy Schools Coordinator, regarding use of Restraint under non-IDEA state laws.

3. The Student's IEP team also developed a Behavior Intervention Plan (BIP), and the BIP dated September 6, 2012 was in effect at the time of the incident of March 14, 2013 which is the subject of the complaint in this case. The Student's September 6, 2012 BIP includes a "recommended Behavior Protocol", which states:

"First, [the Student] needs to eat regularly. [The Student's] work & social behavior are rewarded daily based on [the Student's] daily schedule. [The Student] earns choice time at school for completion of work. Mom also rewards [the Student] at home based on [the Student's] daily report.

If [the Student] does start to escalate into loud resistive behavior, calm strong voice & counting signal [the Student] that things are getting serious and [the Student] needs to think about what is going on. If [the Student] does not settle down, give [the Student] the option of Calm Area with Calm Box or sensory activities to calm [the Student]. Offer [the Student] the choice to call [the Student's] mother. If [the Student] goes on [the Student's] own, then allow [the Student] some decision making about when to return. Once there, [the Student] can go ahead and make noise to let off the frustration.

If [the Student] escalates to the point of being destructive to the classroom, or physically violent to staff or students, then call Mom. If unable to contact mom, or violence continues and escalates, or [the Student] leaves school property, law enforcement will be called.

[The Student] will typically let you know when [the Student] is ready to go back to work. A review of what [the Student] has to do when [the Student] returns to class is effective in compliance back in the room.

If [the Student] needs to be restrained (hurting [self] or others), only staff members with current CPI status will be allowed to perform at this level of intervention."

The BIP dated September 6, 2012 also states that the Student can escalate to loud voice and gross motor movement when the Student feels something is "not fair" or seeks to "avoid compliance on work tasks"; and lists recommended strategies and interventions.

When IEPs Must be in Effect/IEP Implementation

4. On May 14, 2013, at approximately 12:20 p.m., a behavior incident occurred when only an Educational Assistant (EA) and the Student were in the classroom. It was reported that the following occurred. The Student became angry when the EA told the Student to finish a lesson on the computer. The Student got up and sat in the teacher's chair and rolled it around the room. When asked to get out of the chair, the Student reportedly left the room twice, and then went back into the room and began pinching and kicking the EA and also began cursing at the aide in a loud voice. The special education teacher entered and observed the Student's behavior, including the EA protecting herself from the Student's kicks with the Student's feet. The special education teacher asked the Student to sit in the "calm space" or sit in the big chair. The Student ran at the special education teacher and EA with a fist raised. The Student stood in front of the sensory chair and the special education teacher took the Student by the arm and put the Student into the sensory chair. The Student got back up and advanced on the special education teacher and EA, kicking and striking at both. The special education teacher told the Student three times to leave them alone and that the Student had the entire rest of the room, and the Student responded by cursing and stating the Student would "kill you". The special education teacher offered the Student the Student's bubbles or clay, or to bounce a ball, but the Student responded by cursing. The special education teacher told the Student that if the Student did not stop hitting and hurting them

they would restrain the Student. The Student replied, "You can't touch me." The special education teacher advised, "We can if you are hitting and hurting people." The special education teacher and the EA retreated to a table, and the Student advanced with the Student's hands up in a striking position. The special education teacher said, "If you don't stop hitting us we will restrain you." The Student again cursed and went to a chair and the special education teacher and EA went to a table on the other side of the room. The Student again came forward with hands up and the special education teacher again said, "Don't hit us or we will restrain you." The Student came towards them and struck the EA on the arm. By that time a second EA had entered the room, and the special education teacher asked the second EA to time the restraint. The special education teacher and the first EA restrained the Student, using a two-person restraint. This restraint involves staff standing on either side of the Student, facing in the direction the Student is facing, and each placing an arm of the Student down and slightly back, while bending the Student forward. This restraint lasted for approximately 45 seconds, and the Student initially tried to bite the EA's hand and tried to pinch the EA, and then spit on the special education teacher and EA's shoes and blew snot on the floor while being restrained. During the restraint, the special education teacher asked 3 or 4 times if the Student was going to calm down. The Student said "okay" eventually, and the restraint ended and no further behavior problems occurred that day.

5. The EA and special education teacher did not attempt to phone the Student's mother during the incident, both stating that there simply was not time due to the nature of the aggressive behavior of the Student. The special education teacher notified the Parent of the behavior incident and restraint by telephone, at approximately 12:32 p.m.
6. All District staff involved during the behavior incident on May 14, 2013, the special education teacher and both EAs, had completed Crisis Prevention Intervention (CPI) training prior to the incident.
7. The Parent believes that the threat of imminent use of restraint during the incident prevented the Student from de-escalating the behavior, and that restraint is to be used only as a last resort.

IV. DISCUSSION

When IEPs Must be in Effect/IEP Implementation

The complaint alleges that the District violated the IDEA by failing to implement the Student's Behavior Intervention Plan (BIP) during an incident on May 14, 2013. Thus, the Department's task in this case is to review the facts of the incident to determine if the actions of District staff comport with the actions required by the Student's BIP.

A Behavior Intervention Plan (BIP) is a set of positive behavior interventions and supports along with other strategies designed to assist a student whose behavior impedes the student's learning or the learning of others.⁴ A BIP may be developed on a case-by-case basis, taking into account a particular student's behavioral needs.⁵ The failure to properly or consistently implement the behavioral interventions in a student's BIP can amount to a denial of FAPE.⁶ The US Department of Education's Office of Special Education Programs (OSEP) has also noted that IEP teams should consider the use of positive behavioral interventions tailored to a child's unique needs.⁷

⁴ 34 CFR 300.324(a)(2)(i).

⁵ 34 CFR 300.530(a).

⁶ Guntersville City Board of Education, 47 IDELR 84 (SEA AL 2006).

⁷ *Letter to Anonymous*, 50 IDELR 228 (OSEP 2008).

Finally, a District's excessive or poorly documented use of aversive interventions, such as restraint or seclusion, even if required components of a BIP, can qualify as an IDEA violation.⁸

Here, the District's documentation, along with the interviews of District staff, demonstrates that the District followed the protocol established in the Student's BIP appropriately in this case. The Parent has offered no information supporting a different conclusion. The failure to contact the Parent by telephone immediately, occurred due to the aggressive and immediate nature of the Student's violent behavior and the Student's resistance to the attempts made by District staff to de-escalate the Student's behavior, consistent with the Student's September 6, 2012 BIP. The Department concludes that District staff followed the protocol set forth in the BIP to the extent possible in this case. District staff tried to verbally redirect the Student as provided in the protocol in the Student's BIP many times, and provided alternatives to the Student's inappropriate behavior by suggesting the calm space or the big chair and by suggesting other alternatives that might appeal to the Student and help the Student modify the behavior which included use of preferred activities such as clay, bubbles, and bouncing a ball. The Department agrees with the Parent's belief that restraint is to be used only as a last resort, or when the Student is continuing to engage in behavior harmful to the Student or others. The Student's BIP appropriately states restraint may be used only if the Student is engaging in behavior harmful to the Student or others. Here the Student's biting, kicking, pinching, and punching was hurting others or had the clear intent of harming others. The Department therefore concludes that the situation faced by District staff justified the use of the restraint in this case by appropriately trained District staff, consistent with the Student's IEP and BIP. The Department does not sustain the allegation that the District failed to implement the Student's IEP or BIP during the behavior incident on May 14, 2013.

CORRECTIVE ACTION⁹

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

Dated this 30th Day of October, 2013



Sarah Drinkwater, Ph.D.
Assistant Superintendent
Office of Learning/Student Services

Mailing Date: October 30, 2013

⁸ Baltimore County Public Schools, 6 ECLRP 21 (SEA MD 2008).

⁹ The Department's order shall include any necessary corrective action as well as documentation to ensure that the corrective action has been completed (OAR 581-015-2030(13)). The Department expects and requires the timely completion of corrective action and will verify that the corrective action has been completed as specified in any final order (OAR 581-015-2030(15)). The Department may initiate remedies against a party who refuses to voluntarily comply with a plan of correction (OAR 581-015-2030(17) & (18)).