

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Beaverton SD 48J

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FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 14-054-011

I. BACKGROUND

On March 7, 2014, the Oregon Department of Education (Department) received a letter of complaint from the parent (Parent) of a student (Student) residing in the Beaverton School District (District). The complaint requested a special education investigation under OAR 581-015-2030. The Parents 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 March 13, 2014, the Department sent a *Request for Response* to the District identifying the specific IDEA allegations in the complaint to be investigated. The parties agreed to suspend the investigation to pursue local resolution for approximately 7 days. After local resolution could not be achieved, the investigation timeline continued. On April 7, 2014, the District submitted by email its *Response* to the *Request for Response*, with accompanying documentation. The Parent submitted a written *Reply* on April 14, 2014. Due to suspension of the timeline for attempted local resolution and temporary unavailability of a particular critical District staff person for interviews during the investigation, the Department extended the 60-day timeline in this case by a total of 10 days. This order is timely.

The Department's contract complaint investigator (complaint investigator) determined that an on-site investigation would be necessary in this case. The complaint investigator met with the Parent, the Parent's advocate and legal counsel for the Parent on April 17, 2014. On April 17, 2014, the complaint investigator interviewed District staff, including an assistant special education director, a special education teacher, a special education program facilitator, and the District's legal counsel. On April 22, 2014 the complaint investigator interviewed additional District staff: a school psychologist and an instructional assistant (IA). 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 complainant'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 March 8, 2013, to the filing of this complaint on March 7, 2014.²

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

² OAR 581-015-2030(5)

No.	Allegations	Conclusions
1.	<p><u>IEP Team Considerations and Special Factors; Free Appropriate Public Education (FAPE)</u></p> <p>The complaint alleges the District violated the IDEA by failing to adequately address the Student's behavior and frequently removing the Student from the classroom during the 2013-2014 school year, resulting in a denial of FAPE.</p> <p>Relevant Law: OAR 581-015-2205 and 34 CFR 300.320, 300.324 (2), (b)(2); OAR 581-015-2040 and 34 CFR 300.101..</p>	<p><u>Not Substantiated</u></p> <p>The Department concludes that the District's responses to the Student's behavior, especially in light of the Student's significant absence from school, are appropriate under the circumstances. The documentation in this case reveals an insufficient period of time to fully evaluate and revise the District's response to the Student's behavior. The Department also concludes that to the extent the Student did not receive FAPE, the fault lies in the failure of the Student to attend school with any consistency, and not due to the failure to adopt an IEP and Behavior Support Plan (BSP) reasonably calculated to enable the child to receive educational benefit. The Department understands that the Parent believes that the Student suffered trauma from the Student's interaction with District staff, but the Department concludes that consistent attendance by the Student would have allowed the District to implement the Student's IEP and to implement and revise the Student's BSP.</p>
2.	<p><u>Placement of the Child; Least Restrictive Environment</u></p> <p>The complaint alleges the District violated the IDEA and has failed to provide FAPE by failing to provide a placement that meets the Student's needs, specifically because the Student is being removed from the educational environment by being placed into a seclusion room daily and using a desk in the hallway frequently, in lieu of using supplementary aids and services to keep the Student in the regular education environment, during the 2013-2014 school year.</p> <p>Relevant law: OAR 581-015-2250, OAR 581-015-2240 and 34 CFR 300.116, 300.327; and 34 CFR 300.114.</p>	<p><u>Not Substantiated</u></p> <p>Although the number of incidents involving restraint or seclusion is concerning in this case, the Department cannot conclude that the significant number of incidents involving restraint or seclusion of the Student (11 incidents between September 3, 2013 and February 28, 2014) have changed the placement of the child or resulted in an unduly restrictive educational environment for IDEA purposes. The 2012 placement was at a Psychiatric Day Treatment Program. The Student's 2013 placement is Special Class with a focus on social, communication, and academic skills and the Student spent 1 hour and 38 minutes total out of the special classroom due to numerous reported instances of the use of seclusion, which occurred due to behavioral issues with Student. The Student also utilized a calming space, which is a desk in the hallway with an open door to the classroom. These do not constitute a change of placement, as the routine use of the calming</p>

		<p>space/desk in the hallway and potential use of a seclusion room were agreed upon by the IEP team and noted as necessary for the Student in the BSP, based on the unique needs of the Student.</p> <p>The Parent has not suggested or demonstrated any additional supplementary aids and services which would be more successful than the behavior-related goals and strategies that are currently provided in the Student's IEP and BSP to keep the Student in the general education environment. Additionally, because of the Student's excessive absenteeism the District has not had a sufficient opportunity to implement and evaluate the impact of the behavior-related goals and strategies provided in the Student's IEP and BSP nor to develop a new BSP.</p>
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	<p><u>Proposed Corrective Action</u></p> <p>The complainant requests the following corrective action:</p> <p>"The best solution is to find a placement program that will meet [the Student's] unique needs even if it is not with a school in [Beaverton School District]. We have ask[ed] [the District] to consider Serendipity."</p>	<p>No Correction Action is ordered in this case.</p>
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Issues outside the scope of the investigation.

The complaint alleges that the District violated the IDEA by the use of physical restraint and seclusion upon the Student up to eleven times during the 2013-2014 school year. However, this is a State law issue outside of the parameters of the IDEA and its implementing administrative rules. If the Parent wishes to file a complaint regarding state laws for the use of restraint and seclusion, the Parent should contact Mitch Kruska, Student Services Unit/Oregon Department of Education. The complaint also alleges that District staff is not skilled enough to work with the Student. Complaints regarding teachers' professionalism, licensure, training, or ethics may be filed with the Oregon Teacher Standards and Practices Commission.

III. FINDINGS OF FACT

Background

1. The Student in this case is presently eight years old and attended school in the District during portions of the 2013-2014 school year. The Student last attended school in the District on February 28, 2014. The Student is eligible for special education as a student with a Communication Disorder (CD) and Other Health Impairment (OHI) (under "Attention-Deficit, Hyperactive Disorder, Combined." (ADHD). Although the Student has been evaluated for Autism Spectrum Disorder (ASD), the Student is not eligible for special education services under ASD.
2. Before attending a District classroom, the Student attended "Lifeworks", a Psychiatric Day Treatment Program, half-day program provided by the regional ESD. This placement began on March 14, 2011. The Student left that program on March 1, 2013 to transition to "a less restrictive academic setting," the District's Social Communications Classroom (SCC). The Discharge report states that the Student also "will be referred to outpatient care with Lifeworks NW to continue to receive psychiatric oversight as well as individual therapy." Although the District's documentation shows the Student presented with behavior issues in two preschools during 2010 and 2011, the documentation did not reveal that significant behavior continued in the Lifeworks program. Indeed, the March 1, 2013 Discharge documentation states "N/A" in the category of "Behavior" (Within the last year), reports "Physical Aggression" only infrequently and only at home, and further states that "[s]taff no longer observe aggressive behaviors from [the Student], who instead resorts to shutting down behaviors when triggered."

IEP Team Considerations and Special Factors; FAPE; Placement of the Child; Least Restrictive Environment

3. The Student began attendance in the District's Social Communication Classroom (SCC) on March 5, 2013. The Student presented behavior issues beginning the first day of attendance at the SCC, including kicking, hitting, throwing items in the classroom at the teacher and running out of the school. The District's documentation in this case includes several "Physical Restraint and/or Seclusion" incident reports, which document about nineteen incidents of restraint and seclusion that occurred from March 5, 2013 to April 5, 2013.
4. On April 9, 2013, the Student's IEP team, including the Parent, met. The team agreed that the Student's placement in the SCC should be changed and that the Student's behavior interfered with the Student's learning. The April 9, 2013 IEP changed the Student's placement to "Special class, focus on academics, behavior management and social/emotional skills." The Student's April 9, 2013 IEP includes behavior goals and objectives, Specially Designed Instruction (SDI) in behavior and includes accommodations concerning the Student's behavior. On April 11, 2013, the Student began attending the District's Behavior Learning Center (BLC).
5. On April 22, 2013, the District provided a Functional Behavioral Assessment (FBA) and Behavior Support Plan (BSP) for the Student. The BSP includes a protocol for the use of restraint and seclusion. On May 2, 2013, the IEP team met to discuss the Student's FBA and BSP.
6. The Student was absent from school 18 of 44 school days from April 11, 2013 to the end of the 2012-2013 school year. The Parent stated that they believed the Student "could not physically/emotionally attend school (during this time) due to extreme high level of anxiety."
7. During the summer of 2013, the Parent had the Student privately evaluated for Autism Spectrum Disorder (ASD). On August 5, 2013, that evaluation concluded the Student did not qualify for a

medical diagnosis of autism, but also concluded the Student met the criteria for diagnoses of Oppositional Defiant Disorder (ODD), Anxiety Disorder, Expressive Language Disorder and Sensory Processing Dysfunction.

8. Consistent with the Student's April 9, 2013 IEP placement, the Student began the 2013-2014 school year in the District's Behavior Learning Center (BLC). At that time approximately eight students attended the BLC and the typical ratio of students in the BLC is one teacher or IA for every three students. The students in the BLC always typically work in very small groups, of no more than three students, or individually with the teacher or an IA.
9. The Student's behavior issues continued beginning on September 3, 2013, the Student's first day of school during the 2013-2014 school year. On September 3, 2013, District staff restrained the Student for approximately 20 minutes, following unsafe behavior including throwing items at District staff. On September 4, 2013, District staff again restrained the Student, for approximately 10 minutes, following unsafe behavior including behavior towards passing students in the hallway and pushing and shoving District staff. On September 24, 2013, District staff twice restrained the Student for approximately five minutes each time, following unsafe behavior, including standing on railings in the hallway, swinging fists at passing people, spitting on a teacher who directed the Student off of the railing; name-calling, and throwing blocks at and pushing other students. On September 4, 2013, the IEP team, including the Parent, met to discuss the Student's FBA and BSP and discuss the restraint that occurred earlier that day. The meeting minutes indicate the Parent stated that the Student "[a]cts out to get sent home", and that the Parent "[k]nows [the Parent] has been manipulated by [the Student]," and that the Parent is "trying not to enable." Parent believes that the Parent was misquoted in the meeting minutes and said "we need to pick our battles." From the beginning of the school year on September 3, 2013, through September 20, 2013, the Student was absent on September 11, 2013, and on September 18, 19 and 20, 2013.
10. The Student did not attend school from September 25, 2013 through November 7, 2013, a total of 31 school days. According to Parent, the Student "could not attend due to anxiety issues affecting [the Student's] mental health." On September 30, 2013, the District sent Parent a Prior Written Notice (PWN) to Parent that stated "The Beaverton School District stands ready to provide special education services as outlined in [the Student's] IEP and placement in the ... [BLC]." This PWN also states "You have elected to keep [the Student] home until the scheduled IEP team meeting on [October 9, 2013]."
11. On October 31, 2013, the Student's IEP team, including Parent, met to discuss the Student's upcoming return to school after the Student's extended absence, and to discuss the Parent's request for a change in placement to a therapeutic setting. The IEP team revised the IEP, including making available additional time-out areas available to the Student. The PWN following the October 31, 2013 IEP meeting, dated November 1, 2013, states in part: meet with classroom teacher, school psychologist, parent and teacher on November 6, 2013 to re-introduce [the Student] to the school plan – the classroom layout, [the Student's] schedule, the expectations for [the Student's] time out options, including a quiet space in the classroom, other available time out areas in the building including the safe room – to be utilized in a pro active, calming area. ... The team agreed that [the Student] will attend a full day of school." The PWN also states that the Student "has not presented sufficient behavioral evidence to warrant a change of placement to a more restrictive setting." The Parent stated in the Parent's *Reply* in this case that the "team refused to consider change in placement. They felt [the Student] had not been in BLC long enough to determine if placement was warranted."
12. On November 19, 2013, District staff secluded the Student for approximately 30 minutes, following unsafe behavior including pushing staff and hitting a mat in the quiet room (a room

alternatively referred to as the safe room, break room and seclusion room by District staff and the Parent). On November 20, 2013, District staff imposed restraint (for approximately one minute) and seclusion (for approximately 17 minutes), following unsafe behavior including knocking over bookshelves, spitting at and attempting to hit District staff.

13. On November 21, 2013, the District's Behavior Consultant met with District staff to discuss the Student's behaviors. The Behavior Consultant suggested the emphasis for the Student be on "1.) having a safe day 2.) following the school routine that has been created for [the Student]", along with avoid power struggles and "once the routine created is being consistently followed, the team should slowly increase academic demands." District staff confirmed during the on-site interviews in this case that they understood the focus should be to make the Student feel safe and comfortable at school initially, with the understanding that expectations would be increased when appropriate. The Student attended school 10 of 16 school days from November 1, 2013 through November 26, 2013.
14. On November 26, 2013, the Student's IEP team, including the Parent, met. The team again revised the Student's IEP. After the Parent expressed concern about the Student's anxiety concerning school attendance, and after District staff expressed concern about the safety of the Student and others, the Student's IEP team, including the Parent, agreed that the District would provide "access to personal space inside and outside the classroom" This included a desk in the hallway immediately outside the BLC where the IEP team, including the Parent, agreed the Student would be able to work when the Student chose to do so. The IEP refers to this as "access to personal space inside and outside classroom" in the Supplementary Aids/Services; Modifications; Accommodations section of the Student's November 26, 2013 IEP. However, the Parent's *Reply* in this case states that the Parent understood that the desk in the hallway "was to be used as a Break option for [the Student], not as a permanent place to do ... work for the majority of [the Student's] day. District staff, however, understood that the desk in the hallway would be available as often and as long as the Student chose during the school day.
15. After the November 26, 2013 IEP meeting, the Student began to spend more time at a desk in the hallway reserved exclusively for the Student when the Student chose. The District added an IA to the BLC to ensure that an IA always accompanied the Student when the Student went to space reserved exclusively for the Student, including the desk in the hallway and two areas in the classroom. District staff observed during the on-site interviews that the Student's hallway desk was placed immediately outside of the BLC, and that the Student could look into the BLC and occasionally would weigh in on matters occurring in the classroom, from the hallway. The Student also spent time in the classroom in both areas reserved exclusively for the Student and in common areas.
16. The Student attended school 24 of 28 school days from November 27, 2013 through January 24, 2014. The Student's teacher in the BLC reported during the on-site interviews that the Student's attendance in January of 2014 was a productive, relatively non-eventful period of time. The Student's teacher also reported that because of the Student's relatively consistent attendance in January of 2014, with only two absences, it appeared to be a good time to increase the expectation for school work for the Student and to attempt to get the Student back into the classroom. The BLC teacher thus began to impose more "academic pressure," to which the Student responded mostly favorably. The BLC teacher recalled January as the most productive time with the Student in the BLC, with only two restraint or seclusion incidents.
17. On February 24, 2014, District staff restrained the Student for approximately 5 minutes and secluded the Student for 3 minutes, following unsafe behavior including hitting, kicking and spitting on staff members. On February 25, 2014, District staff restrained the Student for less than

one minute, following pushing and hitting District staff. On February 28, 2014, District staff restrained the Student for less than one minute and secluded the Student for approximately five minutes.

18. The Student has not attended school in the District since February 28, 2014. The Parent has not submitted to the District a medical statement indicating the Student is unable to attend school. In the Parent's *Reply* in this case, the Parent asserts that the Student has been traumatized by the Student's interactions with District staff and is "refusing to return to school." The Parent also lists in the *Reply* various impacts upon the Student of attendance at the District's BLC, including being physically ill from the stress, being afraid of teachers and refusing to allow hugs from the Parent to calm the Student. However, District staff reviewed this list and did not observe in the Student, when the Student attended school, the issues listed by the Parent, except occasional asthma issues. The District's records indicate that as of April 7, 2014, the date of the District's *Response* in this case, the Student has been absent for 67 out of 137 school days from the beginning of the 2013-2014 school year, which began on September 3, 2013. A monthly breakdown of days absent and school days reveals: September, 2013, 7 absences out of 19 school days; October, 2013, 23 absences out of 23 school days; November, 2013, 6 absences out of 16 school days; December, 2013, 2 absences out of 14 school days; January, 2014, 2 absences out of 18 school days; February, 2014, 8 absences out of 17 school days; March, 2014, 19 absences out of 19 school days.
19. District staff interviewed in this case consistently observed that the Student's significant number of absences prevented consistent work with the Student by District staff and in the development of relationships between the Student and other students. The Student's BLC teacher observed that the Student did make some progress on one of the Student's social IEP goals, related to social skills and friendship, and in math. However, the Student's absenteeism resulted in constant attempts to recoup any progress made by the Student upon the Student's return following absences. District staff also believed that the Student's absenteeism, not the behavioral strategies in the Student's BSP, prevented consistency and progress concerning the Student's behavior issues. District staff also observed that the Student's placement prior to enrollment in District classrooms, which was a half-day Day Treatment Program, differed significantly in several respects from the District classrooms, including that it is not a full-day program, and did not impose the expectations and structure required of a student in the District's SCC or BLC classrooms.
20. District staff reported during the on-site interviews in this case that the Student occasionally requested access to the quiet room (also known as the safe room or seclusion room) to take a break. District staff reported that this room has a plug in it that the Student uses to plug in the Student's personal "i-pad". The Parent's *Reply* acknowledges that removal to the "seclusion room" is not a daily occurrence, but attests that the Student is frequently placed into a seclusion room, in lieu of using supplementary aids and services to keep the Student in the classroom.

IV. DISCUSSION

1. IEP Team Considerations and Special Factors; FAPE

The complaint alleges the District violated the IDEA by failing to adequately address the Student's behavior and frequently removing the Student from the classroom during the 2013-2014 school year, resulting in a denial of FAPE. The District argues in its *Response* that "the Student's absenteeism prevented staff from implementing the actions and decisions the IEP team agreed upon to address the Student's aggressive and dangerous behaviors."

OAR 581-015-2040 provides that Districts must provide "special education and related services to all school-age children with disabilities," and defines "school age children" as "children who have not yet reached 21 years of age on or before September 1 of the current school year." Special education is defined as "specially designed instruction that is provided at no cost to parents to meet the unique needs of a child with a disability."³ Additionally, FAPE is broadly defined in the 2006 Part B regulations as special education and related services that are provided at public expense, under public supervision and direction, without charge; meet the standards of the State Education Agency; include an appropriate preschool, elementary school, or secondary school education in the state involved, and are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 through 34 CFR 300.324.⁴ The contours of an appropriate education must be decided on a case-by-case basis, in light of an individualized consideration of the unique needs of each eligible student.⁵ The Supreme Court has developed a two part test to determine the appropriateness of an educational program: 1) the procedural requirements of the IDEA must be met; and 2) the IEP must be developed and reasonably calculated to enable the child to receive educational benefit.⁶ The IDEA does not include a minimum number of service hours and a district satisfies its FAPE obligations so long as it offers a program that allows a student to make educational progress.⁷ Districts are not required to maximize a student's educational performance to provide a FAPE.⁸

The investigation in this case reveals that the District was somewhat surprised by the Student's significant behavior issues upon enrollment, because all indications from the Student's cumulative file were that the Student's behavior issues in preschool had not continued during the Student's enrollment in the regional ESD's half-day Day Treatment Program. However, once the District observed the Student's behavior issues, the IEP team placed the Student into the BLC classroom and developed a BSP for the Student, during the 2012-2013 school year. During the 2013-2014 school year, the IEP team revised the Student's IEP three times to address the Student's behavior issues. Although the Parent argues that the District's responses to the Student's behavior were inadequate, the Department agrees with the District that the Student's absenteeism effectively stymied the necessary consistent application of the behavior strategies which were developed by the District in response to the Student's particular behavior issues. This conclusion is supported by the fact that when the Student had only two absences (out of 18 school days) in January of 2014, the BLC teacher observed progress in the Student's behavior, and the Student's behavior issues decreased during this time. The Department cannot ignore the significant impact of the Student's prolonged and frequent absences during the 2013-2014 school year. Additionally, the Parent's advocate noted in an email dated September 27, 2013 "We are aware that Student's attendance does not provide Student with the much needed education..." Due to the excessive absences here, there is no conclusive evidence that the Student's IEP was the catalyst for the Student's behavior issues. The record does show that the IEP team discussed the Student's behavior in team meetings and complete a BSP for the Student in a timely manner.

The Department concludes that the District's responses to the Student's behavior, especially in light of the Student's significant absence from school, are appropriate under the circumstances. The difficulty with the Parent's argument that the responses to the Student's behavior were not appropriate is that the documentation in this case reveals an insufficient period of time to fully evaluate and revise the District's response to the Student's behavior, and a lack of sufficient time

³ OAR 581-015-2000(34)

⁴ 34 CFR 300.17

⁵ *Board of Educ. of the Hendrick Hudson Cent. Scho. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982).

⁶ *Id.*

⁷ *M.N. and H.N. ex rel. J.N. v. New York City Dep't of Educ., Region 9* (Dist. 2), 110 LRP 20287 (S.D.N.Y 3/25/10).

⁸ *J.L. v. Mercer Island School District*, 55 IDELR 164 *W.D. Wash. 2010).

with the Student in school for the District to develop other more appropriate strategies. The Department also concludes that to the extent the Student did not receive FAPE, the fault lies in the failure of the Student to attend school with any consistency, and not due to the failure to adopt an IEP and BSP reasonably calculated to enable the child to receive educational benefit. The Department understands that the Parent believes that the Student suffered trauma due to restraint and seclusion and from the Student's interaction with District staff, but the Department concludes that consistent attendance by the Student would have allowed the District to implement the Student's IEP and to implement and revise the Student's BSP. Here, the District was constructively denied the ability to implement the IEP or to provide FAPE, when the child was regularly kept from school. There is no evidence in the record that the Student was enrolled in home school programs or receiving any form of alternate instruction at the time of this investigation. The Department does not substantiate the allegation that the District failed to adequately address the Student's behavior resulting in a denial of FAPE to the Student.

2. Placement of the Child; Least Restrictive Environment; FAPE

The complaint alleges that the District violated the IDEA and failed to provide FAPE by failing to provide a placement that meets the Student's needs, and by failing to ensure that the Student is educated to the maximum extent appropriate with children who do not have a disability, and that the Student is being removed from the educational environment by being placed into a seclusion room daily in lieu of using supplementary aids and services to keep the Student in the regular education environment, during the 2013-2014 school year. In the Parent's *Reply*, the Parent clarified that the Parent is arguing that the District failed to provide a placement that meets the Student's unique needs and that the Student was "frequently (not daily)" placed into a seclusion room in lieu of using supplementary aids and services during the 2013-2014 school year.

School districts must ensure that the educational placement of a child with a disability is determined by a group of persons, including the parents, and other persons knowledgeable of the child, the meaning of the evaluation data and the placement options; that placement is made in accordance with the most recent IEP; and that placement is made in conformity with the Least Restrictive Environment provisions of the IDEA.⁹ A school district must ensure that a continuum of alternative placements is available for students and these placement options include: regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.¹⁰ In selecting the least restrictive environment (LRE), consideration is given to any potential harmful effect on the child or the quality services which she or he needs.¹¹ The IDEA's LRE provisions require that a child be placed to the maximum extent appropriate, with children who do not have a disability.¹² The IDEA and its regulations do not directly address the use of restraint and seclusion in school. However, if such methods are necessary for a particular child to receive FAPE or to enable the child to participate in extracurricular and nonacademic activities they should be incorporated into the child's IEP or BIP.¹³ Finally, the IDEA restricts use of time-out spaces or seclusion of a student in the same way it would restrict other in-school disciplinary methods or teaching methods in general. To the extent the use of time-out space or seclusion is inconsistent with the student's IEP, it is considered a denial of FAPE.¹⁴

⁹ OAR 581-015-2250(1)

¹⁰ OAR 581-015-2245

¹¹ OAR 581-015-2250(4)

¹² OAR 581-015-2240

¹³ *Letter to Anonymous*, 57 IDELR 49 (OSERS 2010).

¹⁴ See *OSEP Memorandum 95-16*, 22 IDELR 531 (OSEP 1995).

As the Department concluded in the discussion of the previous allegations in this case, the documentation provided by the District in this case reveals that a determination of whether the Student's placement is appropriate and whether FAPE has been denied has been complicated by the Student's significant absenteeism in this case. Upon reviewing the documentation; however, the Department simply cannot conclude that the Student's placement is not reasonably calculated to enable the child to receive educational benefit. As discussed above, there are indications that even minimal relatively consistent attendance by the Student resulted in progress toward the Student's IEP goals and resulted in reduced behavior issues by the Student. Additionally, although the number of incidents involving restraint or seclusion is concerning in this case, the Department cannot conclude that the significant number of incidents involving restraint or seclusion of the Student alone (11 incidents between September 3, 2013 and February 28, 2014) is indicative of an unduly restrictive placement. The record also hints that the number of restraints and seclusion episodes subsequent to behavior issues could be lessened with consistent school attendance and application of the BSP for the Student. Also, for general IDEA purposes, the temporary seclusion of students due to their behavior issues that result in the threat of harm to the student or others does not constitute a change of placement under the continuum of IDEA placements, nor trigger the IDEA's procedural protections.¹⁵ Additionally, a student's temporary and voluntary use of "cool down" space or "time out area" or a desk in the hallway does not constitute a change of placement for IDEA purposes.

Additionally, concerning the argument in the Parent's *Reply* that the use of the desk in the hallway constitutes removal from the Student's placement, the Department finds that argument is not supported by the documentation that was provided in this case. It is clear that the use of exclusive personal spaces for the Student, including the desk in the hallway, were expressly provided for in the Student's IEPs, beginning with the November 26, 2013 IEP. Thus, use of the desk in the hallway is not a removal from the Student's placement, but rather it is simply an accommodation which was an integral part of the Student's Free Appropriate Public Education (FAPE) and was individually tailored for the Student by the Student's IEP team. Furthermore, the use of the desk in the hallway was consistent with the suggestions made by the District's Behavior Specialist. The use of safe room and restraint along with a calming space are all also noted as necessary on the Student's April 22, 2013 FBA and BSP. Walking out the classroom and taking a break as a 'calmer' is written on the April 20, 2013 IEP as a calming strategy for Student. There is a measurable annual goal for Student related to the independent and prompted use of these calming strategies on the April 2013 IEP.

As noted above, the Student's behavior has resulted in some use of seclusion, as revealed in the incident reports provided by the District in this case and summarized in the findings of fact.¹⁶ However, the Parent has not suggested or demonstrated the need for any additional supplementary aids and services which would be more successful than the behavior-related goals and strategies provided in the Student's IEP and BSP. Additionally, because of the Student's frequent absenteeism the District has not had a sufficient opportunity to implement and evaluate the impact of the behavior-related goals and strategies provided in the Student's IEP and BSP.

Based on the foregoing, the Department does not substantiate the allegation that the District failed to provide FAPE by failing to provide an appropriate placement that meets the Student's

¹⁵ *Honig v. Doe*, 559 IDLR 231 (U.S. 1988)

¹⁶ Note that while this order does not address the state laws related to the appropriate use of restraint and seclusion, the student's use of a "cool down" space or desk in the classroom, or just outside of the open classroom door, that provides access to the classroom environment and which the student is able to freely move to and from, does not constitute a "seclusion" under state law. See OAR 581-021-0550.

needs and that the District placed the Student in a seclusion room in lieu of using supplementary aids and services.

CORRECTIVE ACTION¹⁷
In the Matter of Beaverton School District
Case No. 14-054-011

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

Dated this 13th Day of May, 2014



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

Mailing Date: May 13, 2014

¹⁷ 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)).