

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Gresham-Barlow)	FINDINGS OF FACT,
School District and Multnomah County)	CONCLUSIONS,
Educational Service District)	AND FINAL ORDER
)	Case No. 18-054-020

I. BACKGROUND

On March 13, 2018 the Oregon Department of Education (Department) received a letter of complaint (Complaint) from the Parent (Parent) of a student (Student) residing in the Gresham Barlow School District (District) and the Multnomah Educational Service District (MESD). The Parent requested that the Department conduct a special education investigation under Oregon Administrative Rule (OAR) 581-015-2030. On March 14, 2018, the Department confirmed receipt of the Complaint and provided the District and MESD a copy of the Complaint.

On March 19, 2018, the Department sent a *Request for Response* (RFR) to the District and MESD identifying the specific allegations in the Complaint to be investigated and establishing a *Response* due date of April 2, 2018. The District requested an extension of time to prepare its *Response*. The Department granted an extension of time to the District and to MESD to respond by April 9, 2018. The District and MESD completed their *Responses*, which were received by the Department's Complaint Investigator (Investigator) on April 9, 2018. The *Responses* included narrative responses, partial exhibit listing, and the following documents:

1. Request for Assistive Technology Services originally dated April 13, 2013 and re-dated April 14, 2016
2. Disciplinary referrals from First Student, Inc. dated between December 15, 2015 and January 29, 2018
3. Prior Written Notice dated April 17, 2015
4. Notice of Team Meeting dated December 18, 2015
5. Classroom Sensory Strategies dated January 2016
6. Functional Behavioral Assessment dated January 6, 2016
7. Positive Behavior Intervention Plan dated January 6, 2016
8. Woodcock Johnson test results dated January 7, 2016
9. IEP dated January 14, 2016
10. Special Education Placement Determination dated January 14, 2016
11. Summary of Meeting dated April 4, 2016
12. Progress Report dated June 15, 2016
13. IEP Progress Reports – Annual Goals dated June 10, 2016, November 21, 2016, and March 3, 2017
14. In-Class notes by District Autism Specialist dated June 6, 2016, September 23, 2016, October 6, 2016 and November 9, 2016;
15. Daily Attendance Totals, Burlingame Creek dated August 30, 2016 to June 15, 2017

16. Attendance Record, Gresham Barlow High School dated September 9, 2016 through January 6, 2017
17. General Student Data Report by Goals (behavioral) dated August 22, 2016 through June 2017
18. Prior Written Notice dated August 23, 2016
19. Consent for Individual Evaluation dated September 26, 2016 – unsigned
20. Behavioral Incident Reports (in-school) dated September 29, 2016 to January 29, 2018
21. Data chart from Gresham Barlow staff (Transitions) dated October 2, 2016 through October 7, 2016
22. Notice of Team Meeting dated October 31, 2016
23. Incomplete Medical Statement dated November 15, 2016
24. Grade Report dated November 18, 2016
25. Signed Request for Record/Permission to Release Information dated August 25, 2016
26. Classroom narrative from Gresham Barlow staff beginning October 3, 2016 and ending January 6, 2017
27. Bus Protocol dated October 7, 2016
28. Signed Authorization to Use and/or Disclose Educational and Protected Health Information dated November 10, 2016
29. Signed Consent for Evaluation dated November 10, 2016
30. Notice of Team Meeting dated November 10, 2016
31. Incomplete Functional Communication Evaluation by Speech-Language Pathology signed and dated 12/8/2016
32. Incomplete Occupational Therapy Reevaluation dated December 14, 2016
33. Psychoeducational Reevaluation dated January 3, 2017
34. Functional Behavioral Assessment dated January 3, 2017
35. Positive Behavior Intervention Plan dated January 2017
36. Prior Written Notice dated January 4, 2017
37. IEP dated January 6, 2017
38. Prior Written Notice dated January 6, 2017
39. Prior Written Notice dated April 17, 2015 and dated (in handwriting) January 14, 2016
40. Prior Written Notice dated January 6, 2017
41. Eligibility Summary Statement dated January 6, 2017
42. Placement Determination dated January 6, 2017 -- unsigned
43. Disability Statement dated January 6, 2017
44. Monthly Student Progress Report (Behavior graph) beginning February 1, 2017 and ending May 17, 2017
45. Weekly Student Progress Report (Behavior graph) beginning February 1, 2017 and ending May 17, 2017
46. Prior Written Notice dated February 8, 2017
47. Observation Notes from District Autism Specialist dated March 13, 2017
48. Daily reports dated April 3, 2017 through May 16, 2017
49. Grade Report dated June 15, 2017
50. Student Summary dated June 16, 2017
51. IEP Progress Report—Annual Goal dated June 16, 2017

52. General Student Data Report by Goals dated August 22, 2017 through June 20, 2018
53. Daily Attendance Totals, Arata Creek dated August 29, 2017 through March 23, 2018
54. Special Education Placement Determination dated September 20, 2017, unsigned by Parent
55. Progress Report dated November 17, 2017
56. IEP Progress Notes dated November 21, 2017
57. Notice of Team Meeting dated December 6, 2017
58. Observation Notes from District Autism Specialist dated March 13, 2017
59. IEP dated January 4, 2018
60. Prior Written Notice dated January 4, 2018
61. Special Education Placement Determination dated January 4, 2018 – unsigned
62. Prior Written Notice dated February 8, 2017
63. Observation Notes from District Autism Specialist dated February 7, 2018
64. Summary of Meeting notes dated February 23, 2018
65. School Bus rules created for Student dated March 21, 2018

The Investigator determined that in-person interviews were necessary. On April 18, 2018 through April 20, 2018, the Investigator conducted on-site interviews with MESD and District personnel. The Investigator interviewed the Student's Parents via telephone on April 21, 2018.

The Parent submitted the following documents, which were received by the Investigator on April 11, 2018:

1. Behavioral data from Gresham Barlow class notes from October 3, 2016 through December 7, 2016
2. Grade card from Gresham Barlow HS dated October 18, 2016
3. Notice of Team Meeting dated October 31, 2016
4. Notice of Team Meeting dated November 10, 2016
5. Summary of meeting dated November 10, 2016
6. Grade card from Gresham Barlow HS dated November 22, 2016
7. Occupational Therapy Reevaluation dated December 14, 2016
8. Functional communication Evaluation by SLP dated December 19, 2016
9. Behavior report dated December 31, 2016
10. IEP dated January 6, 2017
11. IEP dated January 6, 2017, designated "subsequent draft" by Parent
12. Special Education Placement determination dated January 6, 2017
13. Functional Behavioral Assessment dated January 3, 2017
14. Psychoeducational Reevaluation dated January 3, 2017
15. Prior Written Notice dated January 6, 2017
16. Behavioral data report dated March 20, 2017
17. Disciplinary referrals dated June 8, 2017 and June 9, 2017
18. Trimester Progress report dated November 17, 2017
19. Bus referrals from December 11, 2017 through January 29, 2018
20. Student progress report dated December 31, 2017 (behavioral)
21. Trimester Progress report dated March 2, 2018

- 22. Undated handwritten note regarding bus schedule
- 23. Handwritten and typed meeting notes from parent (undated)
- 24. Parent memorandum regarding Complaint
- 25. Emails between Parent and MESD from August 31, 2016 through April 5, 2018

The Investigator accessed the District Code of Conduct for School Year 2017-2018.

The Investigator reviewed and considered all of the previously-described documents, interviews, and exhibits in reaching the findings of facts and conclusions of law contained in this Order.

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 the twelve months prior to the Department's receipt of the Complaint. The Department must issue a final order within sixty 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 if exceptional circumstances require an extension.¹ This Order is timely.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this Complaint under 34 CFR §§ 300.151-153 and OAR 581-015-2030. The Parent's allegations and the Department's conclusions are set out in the chart below. These conclusions are based on the Findings of Fact in Section III and the Discussion in Section IV. This Complaint covers the one-year period from March 14, 2017 through March 13, 2018.

	Allegations	Conclusions
1.	<p>Parent Participation/IEP Team</p> <p>The Parent alleges that the District and/or MESD violated the IDEA because it:</p> <p>(a) Failed to allow Parent input into placement decisions, and</p>	<p>Not substantiated</p> <p>(a) The parents meaningfully participated the Student's IEP Team Meetings and in the Student's Placement Team Meetings. The District incorporated Parent-requested changes into the Student's IEP. The District listened to, but did not agree with the Parent's conclusions regarding placement of the Student in a general education classroom.</p>

¹ OAR 581-015-2030 (12)

	<p>(b) Unilaterally placed the Student in a more restrictive environment without holding an IEP meeting(s) to discuss the new placement.</p> <p>(34 CFR §§ 300.324, 34 CFR 300.327; OAR 581-015-2190, OAR 581-015-2205, OAR 581-015-2210)</p>	<p>(b) MESD changed the location of the Student's services during the complaint period, but did not alter the Student's placement. There have been no changes in the Student's placement during the complaint period.</p> <p>This allegation is not substantiated.</p>
<p>2.</p>	<p>LRE/Placement</p> <p>The Parent alleges that the District and/or MESD violated the IDEA because it placed the Student in a more restrictive environment(s) which was not supported by data and which prevented the Student access to peers.</p> <p>(34 CFR § 300.114; OAR 581-015-2240, OAR 581-015-2250.)</p>	<p>Not Substantiated</p> <p>The Student demonstrates significant behaviors that impact the Student, staff, other students, and the school environment. This requires placement outside of the general education environment. The behavior is tracked and documented. MESD and the District have developed Functional Behavior Assessments (FBAs) and Behavior Intervention Plans (BIPs)..</p> <p>This allegation is not substantiated.</p>
<p>3.</p>	<p>IEP Content and IEP Implementation</p> <p>The Parent alleges that the District and/or MESD violated the IDEA because it did not provide the Student services in accordance with the Student's IEP.</p> <p>(a) The Parent alleges the Student was removed from the bus without notice to the Parent.</p>	<p>Partially Substantiated</p> <p>(a) Not substantiated</p> <p>The District was not obligated to initiate manifestation determination review procedures when the Student was removed from the bus because the Student was provided an alternate form of transportation. The District provided the Parents with timely notice of its decision to initiate an alternate form of transportation for the Student.</p> <p>The Department does not substantiate</p>

	<p>(b) The Parent further alleges that the District and MESD violated the IDEA because it did not document changes or create a new IEP that reflected a change in modifications, accommodations, or services for the student.</p> <p>(c) The parent also alleges that the Student's IEP was not supported by the data regarding the Student's access to peers.</p> <p>(34 CFR §§ 300.323, 300.324, 300.320; OAR 581-015-2220, OAR 581-015-2205.)</p>	<p>this allegation.</p> <p>(b) Substantiated The District and MESD did not timely convene an IEP Team Meeting or amend the Student's IEP to include a one-to-one educational assistant (EA).</p> <p>The Department substantiates this portion of Parent's allegation.</p> <p>(c) Not substantiated This allegation was addressed above in Section 2 (a).</p>
<p>4.</p>	<p>Supplementary Aids and Non-Academic Services</p> <p>The Parent alleges the District and/or MESD violated the IDEA because it did not provide the Student with proper supplementary aids and services and also did not provide the Student an opportunity to participate in extracurricular activities.</p> <p>(34 CFR § 300.107; OAR 581-015-2070, OAR 581-015-2245.)</p>	<p>Not substantiated</p> <p>An Autism Specialist regularly consulted with the Student's teachers regarding behavioral issues and solutions, participated in IEP Team Meetings, and assisted with the Student's bus plan. Also, the Student's behaviors limit the District's ability to allow the Student to safely engage in many extracurricular activities. Nevertheless, the District has attempted to place the Student in a short term extracurricular volunteer position.</p> <p>The Department does not substantiate this allegation.</p>

PARENT'S REQUESTED CORRECTIVE ACTION:

The Districts and the IEP team need to go back and revisit the question of least restrictive environment. First, the Gresham Barlow School District will have to carefully evaluate their options to make sure that they are offering the continuum of services required by the law.

Gresham also need to consider what types of supports and services [the Student] might need at each level including the regular education class, resource room intervention, and special education classes. Gresham will have to abandon the practice of refusing to consider one on one EA support except in limited classes of special needs student and be able to provide such assistance if found appropriate by the team on a case by case basis. The team will have to be prepared to follow the analysis put forth by the Ninth Circuit in determining the least restrictive environment for [the Student]. As indicated, the facts most relevant to this discussion will be from Gresham High School. Therefore, the team will need to include a group of regular education teachers, special education teachers and other specialist who might be responsible for providing modifications or education support for [the Student] at one of the Gresham Barlow School District's high schools. Finally the team will have to consider a list of supports for [the Student] that reflect [the Student's] needs according to the data presented at the meeting that are meaningful, necessary and research based.

If [the Student] is not be placed at a regular high school, there should be an attempt to make sure [the Student] receives the benefits of being a student in a general education environment. There would have to be some accommodations that would provide the student the benefit of what [the Student] lost in January, namely the opportunity to be part of a typical high school experience. Perhaps an opportunity to have breakfast at the high school with [th Student's] typically developing peers might fill this roll. Even better would be the opportunity to engage in extra-curricular activities with supports such as transportation and EA involvement.

Finally, if [the Student] is to remain at Burlingame Creek or Arata Creek for that matter, an effort will have to be made to ensure that [the Student] receives equity. This means that these schools will have to adapt their schedule to that of the Gresham Barlow School District high schools and add staff to ensure that [the Student] has access to teachers certified to teach advanced level subject matter sufficient to prepare [the Student] to receive a general education diploma. [The Student] will have to have access to electives and any physical facilities provided general education students including swimming pools, and extracurricular activities. Lastly, [the Student] will have to have access to the specialist available to students in the general education high school including counselors, career specialist and autism specialists.

In the future the Districts need to ensure that all members of the IEP team have a meaningful and informed ability to participate in the IEP process and subsequent decisions relating to the IEP including placement, length of school day, transportation and the provision of supplementary aids and services. The current practice is to confine parental concerns to a small box in the IEP. Instead, Parental concerns should be placed in the relevant sections of the IEP and when the team goes against the parental concerns, an explanation needs to be given as to why the concern was rejected. This means that the practice of providing the IEP to the parents at the IEP meeting will no longer be sufficient. This common practice relegates these concerns to, at best, an afterthought. Instead the IEP should be drafted after the IEP meeting to ensure that the parents' concerns are addressed. Then, as indicated above, the placement decision can be made after the IEP is finalized.

The IEPs should also be required to contain a description of the continuum of service discussed at the IEP meeting and a brief description of the analysis given that incorporates the Ninth Circuits criteria for determining the least restrictive placement appropriate.

These practices should not just apply to the annual IEP process or a change in placement but any request made by any member of the team should be appropriately analyzed and responded to in writing. Requests should be considered and timely revision made to the IEP. A copy of the revised IEP should be provided to the parents and placed in the student's file

In sum, while the analysis required for placement in the least restrictive environment might be awkward and time consuming with all of its requirements, it is the best way to ensure that the best placement decisions are made for [the Student] and all the special education students in the Districts. Informed decision making creates good results and that's good for everyone. At the end, IEP drafting is fluid and evolving, if it appears that it needs to be changed against at some future, time, with appropriate procedures in place, this can be done.

The timeline to resolve the issues listed about varies depending on the issues. Certainly, it is important to recall that [the Student] is currently in the 10th grade At the time of the writing of this complaint, [the Student] had had only three months in the school year. Most of the issues addressed in the complaint could have been resolved in this time frame. Of particular importance regarding prompt action, however, is the Districts' decision to place [the Student] in a taxi cab as opposed to the bus. This decision was fairly recent and, as indicated above, without the benefit of a team meeting. Allowing [the Student] back on the bus would help to ensure [the Student] has continued access with [the Student's] peers. The concerns regarding [the Student's] language on the bus arose earlier in the year. Since that time, [the Student's] medications have been changed and the result that the [inappropriate] talk has been decreased. Furthermore, [the Student] is scheduled to begin ABA therapy at home directed at reducing the incidence of [] inappropriate comments. If this continues to be a problem the District could provide a one on one aid on the bus to supervise [the Student]. This has been done before with considerable success in improving problem behavior. Therefore, Complainant requests that the change back to the bus happens immediately.

III. FINDINGS OF FACT

1. The Student is in the tenth grade and currently attends Arata Creek School, a school run by Multnomah Education Service District (MESD). In the first grade, the Student was found eligible for special education services under the eligibility category of Autism Spectrum Disorder.
2. The Student's disability manifests itself in highly disruptive behaviors in the school environment. The Student invades the personal space of others and will engage in disruptive behavior when anxious. The Student has eloped from the classroom.
3. The Student attended District schools until the sixth grade. After exhibiting significant,

age-inappropriate behaviors, the Student was removed from the District school and enrolled at Arata Creek.

4. MESD operates the "Creek System," a grouping of schools that provide support to students with significant behavioral challenges. Arata Creek School utilizes one-to-one educational assistants (EA) and supports that assist students with the most significant behavioral needs. When students demonstrate their ability to participate in the program successfully without a one-to-one EA, they can move to the Burlingame Creek School. Burlingame Creek School students typically do not have one-to-one EAs on a daily basis. Burlingame Creek School is viewed as a "stepping stone" toward returning a Student to his or her home school program.
5. The Student attended school at Arata Creek School full-time between sixth grade and the eighth grade. When the Student began ninth grade in the Fall of 2016, the Student's Parents requested that Student attend Gresham High School. The District and MESD enrolled the Student in one class period per day in a special education classroom at Gresham High School. The Student attended Burlingame Creek School for the remainder of the day's classes.
6. The Student did not have a one-to-one EA in the Gresham High School classroom, but eventually one of the EAs in that classroom was assigned to the Student as a one-to-one to assist with behavioral concerns. During transitions, the District assigned two staff persons to accompany the Student through the halls to keep the Student safe and to assist the Student with appropriate behavior.
7. The Student's IEP Team convened on January 6, 2017 and developed an IEP that included access to a small classroom environment (4:1 student to staff ratio), sensory support systems, computer access as an incentive for positive behavior, behavioral coaching, and access to time-out areas. The Student's January 6, 2017 IEP does not note assignment of a one-to-one EA to the Student.
8. On or about January 18, 2017 the Student displayed significant adverse behaviors toward other Gresham High School students and the classroom teacher, resulting in the Student's removal from the single class at Gresham High School and returning to Burlingame Creek School for each of the Student's classes.
9. The Student has undergone a Functional Behavioral Assessment and has a Behavior Intervention Plan. While at MESD, a "token economy" was instituted for the Student to reward positive behavior. The Student's classroom also created a "walking space" for the Student to take movement breaks throughout the day. MESD staff forego writing up every one of the Student's outburst and infractions, and will do so only for the most significant outbursts that are accompanied by physical contact.
10. On or about March 6, 2017, MESD contacted the District's Autism Specialist and requested assistance with the Student pursuant to the Student's IEP, which contained an Autism Specialist consult. MESD requested direction regarding reducing some of the

Student's adverse behaviors. The District's Autism Consultant observed the Student and provided recommendations to MESD. On March 20, 2017, the IEP Team met pursuant to a former agreement at the January 6, 2017 IEP Meeting to meet at a future date.

11. On April 20, 2017, the Student shouted racial epithets throughout the school, eloped from staff, and had to be physically separated from a teacher upon whom the Student forced a hug. The Student was then placed in a room alone and the door was closed for five minutes during which time the Student screamed and pounded on the door. The Student's Parents were invited to participate in a debriefing meeting regarding the incident. In response, the Parent declined to participate, instead suggesting the school team contact the District's Autism Specialist.
12. On May 2, 2017, MESD contacted the District and advised that the Student had become assaultive with staff. The Student was suspended. MESD then gave the District notice that it would be requesting a one-to-one EA to address the Student's behavior. On May 3, 2017, MESD and the Parent met to discuss the Student moving from Burlingame Creek School back to Arata Creek School. A plan was developed where, beginning in the 2017-2018 school year, the Student would attend the "higher level of structure" program at Arata Creek School, and the Student would be provided with a one-to-one EA.
13. On May 17, 2017, prior to and upon boarding the school bus, the Student attempted to assault Burlingame staff and a student.
14. On May 19, 2017, the District approved the addition of a one-to-one EA for the Student. The Student's teacher was to prepare an amended IEP and send it to the Parents via certified mail. However, neither the amended IEP nor the certified mail receipt were produced by the District, MESD, or the Parent.
15. On August 14, 2017, MESD gave the Parent's notice via email that the Student would be attending Arata Creek School with a one-to-one EA. MESD stated that the one-to-one would be "faded" out once the Student's need for restraints were reduced and once the Student demonstrated an "increase in compliant behavior within the classroom and school environment."
16. On August 25, 2017, the Parent emailed the District and stated that the Student did not need one-to-one support. The Parent opined that a one-to-one was more restrictive and that the decision was not subject to a team review. The Parent finally stated that the decision to move the Student to Arata Creek School was MESD's decision and that [the Parent] did not consent to the move.
17. Beginning August 27, 2017, MESD tracked the behavioral data of the Student in various areas, including anger management, avoiding disruptions, following directions, inappropriate talk, language, remaining on-task during assignments, peer interactions, personal space, respectful and cooperative interactions, and remaining in the Student's seat.

18. On September 20, 2017, MESD held a placement meeting, which was attended by the Student's Parent.
19. In the Student's November 21, 2017 Progress Notes, MESD noted that the Student has 1:1 support that has helped with the Student's significant behaviors, but that such behavior is "far from extinguished."
20. On December 12, 2017, the Student's teacher emailed the Parents, asking for their concerns to be included in the Student's January 2018 IEP.
21. At the beginning of the second semester of the 2017-2018 school year, the Student's teacher engaged a local library for a possible volunteer position for the Student. The Parents have contacted the library but the volunteer opportunity has not come to fruition at this time. The District and MESD have cited safety concerns in response to Parent requests that the Student participate in non-academic or extracurricular activities.
22. The Student's January 4, 2018 IEP contains comparable supplementary aids/services, modifications, and accommodations as the January 6, 2017 IEP, with some exceptions. For example, the January 4, 2018 IEP added a new accommodation of, "Access to 1x1 behavioral and academic support."
23. The Student's January 4, 2018 IEP's Statement of Nonparticipation Justification states that because of the Student's disruptive behaviors, need for consistent routines, and potential for running from the classroom, the Student requires a highly structured educational environment and consistent monitoring.
24. On January 9, 2018, the District's Autism Specialist set up a meeting with the Student's one-to-one EA as well as the teacher at Arata Creek School, which took place on January 24, 2018.
25. Between November 2017 and January 2018, the Student engaged in self-injurious behavior on the school bus and consistently made offensive comments, toward other students and the bus driver. The Student rode a bus with elementary age children, as well as middle and high school age students. The District received multiple calls from parents regarding the language and behaviors their children had learned from or observed from the Student.
26. MESD noticed a meeting for Friday February 23, 2018 to discuss alternate transportation for the Student. The only person in attendance at the meeting was the MESD Student Services Director. The meeting summary notes that the family will be contacted "to let them know that a cab will start picking up [the Student] for rides to and from school." The Parents did not participate in the meeting to discuss alternate transportation for the Student. The Parents contend they were not notified of the decision to change the Student's transportation from bus to taxi.

27. On Monday February 26, 2018, the Parents received notice about the change in the Student's transportation from bus to taxi cab.
28. During the Complaint period, the Student averaged three disciplinary referrals per month. Staff does not create referrals for every disciplinary incident. Rather, staff only documents the most egregious violations, which include making racial epithets, engaging in threatening behavior toward staff, and physically threatening and/or harming other students.

IV. DISCUSSION

1. IEP Implementation

The Parent alleges that the District and/or MESD violated the IDEA because it:

- (a) failed to allow Parent input into placement decisions, and
- (b) unilaterally placed the Student in a more restrictive environment without holding an IEP meeting(s) to discuss the new placement

A. Parental Input/Participation

A parent must be invited to an IEP team meeting.² A school district must provide parents with an opportunity to meaningfully participate in the development of a child's IEP. However, the IDEA does not require school districts to comply with parent demands without investigating other alternatives.³ If the IEP team cannot reach a consensus, the school district must determine the appropriate services and provide parents with prior written notice of the district's proposals and refusals regarding the child's educational program.⁴

The Parents were active IEP team meeting members in developing each of the Student's IEPs. The District and MESD scheduled follow-up meetings to check in with the Parents regarding the Student's progress and also modified portions of the Student's IEP after discussions with the Parents. By email, MESD solicited Parents' concerns as part of developing the Student's IEP. These concerns were integrated into the "Parent Concerns" sections of the Student's IEP.

In the Spring of 2017, MESD proposed moving the Student from Burlingame Creek School back to Arata Creek School because the Student's behavior had deteriorated and more one-to-one assistance was needed. The Parents preferred the Student remain at Burlingame Creek School until the end of the 2016-2017 school year because they did not want the Student to go through the rigors of attending three schools in the same school year. MESD welcomed the Parents' input and agreed to not move the Student from Burlingame Creek School to Arata Creek School until the beginning of the 2017-2018 school year.

² OAR 581-015-2190.

³ *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 657 (8th Cir. 1999).

⁴ *Letter to Richards*, 55 IDELR 107 (OSEP 2010).

The Parents attended IEP meetings, provided input regarding their concerns, had their concerns memorialized as part of the Student's IEP, and were successful in their request to keep the Student at Burlingame Creek School through the end of the 2016-2017 school year. The only significant change the District and MESD have failed to make regarding the Student was the Parent's request to move the Student back to a general education classroom. The District declined this request based upon the Student's behavior and safety concerns for the Student and other students. The Parents have been active participants in the IEP process. The District has fully engaged the Parents in discussions regarding the Student's educational program. The Department does not substantiate this allegation.

B. Placement in a More Restrictive Environment Without a Team Meeting

The Parents allege that the District and/or MESD violated the IDEA when it moved the Student to Arata Creek School from Burlingame Creek School to begin the 2017-2018 school year. The Parents assert that Arata Creek School is a more restrictive environment and the move constituted a change of placement.

In developing its regulations, the U.S. Department of Education did not define the term "educational placement," although the "Department's longstanding position is that placement refers to the provision of special education and related services *rather than a specific place, such as a specific classroom or specific school.*"⁵ The Ninth Circuit has concluded that "under the IDEA a change in educational placement relates to whether the student is moved from one type of program – i.e., regular class – to another type – i.e., home instruction. A change in the educational placement can also result when there is a significant change in the student's program even if the student remains in the same setting."⁶

In *Letter to Fisher*, the Office of Special Education Programs (OSEP) advises that a change in educational placement occurs when there is a substantial or material alteration to the student's educational program.⁷ OSEP identifies the following four factors that must be examined in determining whether there has been a substantial or material alteration to a student's educational program: (1) whether the child will be able to be educated with nondisabled children to the same extent; (2) whether the child will have the same opportunities to participate in nonacademic and extracurricular services; (3) whether the new placement option is the same option on the continuum of alternative placements; and (4) whether the educational program set out in the child's IEP has been revised.⁸ OSEP states that each of the foregoing are "factors" that must be considered.

The Student's educational program as expressed in the Student's IEP remained the same upon being moved to Arata Creek School for the 2017-2018 school year. With respect to being educated with nondisabled children, the Student was not educated with nondisabled students at Burlingame Creek School. This remained unchanged when the Student was moved to Arata Creek School. As to non-academic and extracurricular activities, the Student did not participate in these at either Arata Creek School or Burlingame Creek School

⁵ *D.M. v. N.J. Dept. of Educ.*, 801 F3d 205, 216 (3rd Cir 2015) (Emphasis in Original).

⁶ *N.D. v. State Dept. of Educ.*, 600 F3d 1104, 1116. (9th Cir. 2010).

⁷ *Letter to Fisher*, 21 IDELR 992 (OSEP 1994).

⁸ *Id.*

because of the significant behaviors the Student exhibits at school. Finally, Arata Creek School is the same option on the continuum of alternative placements as Burlingame Creek School, i.e. a special school.

Applying the *Fisher* factors, the Student's move from Burlingame Creek School to Arata Creek School did not constitute a change of placement. The Department does not substantiate this allegation.

2. LRE/Placement

The Parent alleges that the District and/or MESD violated the IDEA because it placed the Student in a more restrictive environment(s), which was not supported by data and which prevented the Student access to peers.

To the maximum extent appropriate, children with disabilities are educated with children who do not have disabilities, and removal of children with disabilities from the regular educational environment should occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁹

Here, the Student has demonstrated significant behaviors since the sixth grade. The Student was moved to Arata Creek School during middle school to address these behaviors. During ninth grade, the IEP Team agreed to a plan where the Student attended a class on a high school campus with nondisabled peers. The Student's classroom behavior was disruptive to the learning of other students and could not be managed by the high school campus staff, despite dedicating an educational assistant (EA) to the Student and having two EAs designated to accompany the Student in the campus hallways during daily transitions. It was determined that the Student could not remain on task or participate in a regular education classroom appropriately, even with the introduction of supplementary aids such as continuous supervision.

Because of the Student's documented behaviors, MESD and the District have refrained from placing the Student in a general education environment. MESD has documented the most severe incidences of this behavior and has documented the effect the Student's behavior has had on other peers. Both MESD and the District have recorded the severest incidences, have tracked daily behaviors, and have fully developed Functional Behavior Assessments (FBAs) and Behavior Intervention Plans (BIPs). The Student exhibits such significant behaviors that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The Department does not substantiate this allegation.

3. IEP Content and IEP Implementation

The Parent alleges that the District and/or MESD violated the IDEA because it did not provide the Student services in accordance with the Student's IEP. The Parent alleges the Student was removed from the bus without notice to the Parent. The Parent further alleges

⁹ 34 CFR § 300.114; OAR 581-015-2240.

that the District and MESD violated the IDEA because it did not document changes or create a new IEP that reflected a change in modifications, accommodations, or services for the Student. The Parent also alleges that the Student's IEP was not supported by the data regarding the Student's access to peers.

A. Bus Removal

The suspension of a student with a disability from transportation may constitute a change of placement—triggering manifestation determination review procedures—if a district has been transporting the student, suspends the student from the transportation as a disciplinary measure, and provides no other form of transportation.¹⁰

The District provides transportation to the Student as a "Related Service" under the Student's IEP. The Student was removed from the bus because of well-documented self-injurious and unsafe behavior, as well as offensive comments directed toward the bus driver. Rather than exclude the Student from transportation altogether, the District decided to provide an alternative form of transportation for the Student, specifically, employing a taxi cab to pick up the Student for rides to and from school. The District chose to provide an alternative form of transportation for the Student on Friday February 23, 2018. Parents were notified of the District's decision by email on Monday, February 26, 2018.

The District was not obligated to initiate manifestation determination review procedures when the Student was removed from the bus because the Student provided an alternate form of transportation. The District provided the Parents with timely notice of its decision to initiate an alternate form of transportation for the Student. The Department does not substantiate this allegation.

B. Failure to Document Changes or Create a New IEP

Changes to a student's IEP may be made either by the entire IEP team at an IEP team meeting or upon agreement of the IEP team. In making changes to a child's IEP between annual IEP team meetings, the parent of a child with a disability and the school district may agree to not hold an IEP team meeting to make these changes. The school district and the parent may instead develop a written document to amend or modify the child's current IEP.¹¹

As early as the first half of the 2016-2017 school year, the Student was assigned a one-to-one EA for behavioral intervention while attending high school with nondisabled peers. On or about January 18, 2017, it was determined that the Student could not remain on task or participate in a regular education classroom appropriately. The Student returned full-time to Burlingame Creek School with a one-to-one EA specifically to address the Student's behavior. The Student continues to have an assigned one-to-one EA. However, the Student's IEP was not amended to include the services of a one-to-one EA until the January 4, 2018 IEP was developed.

¹⁰ *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, Office of Special Education and Rehabilitative Services (November 1, 2009).

¹¹ 34 CFR § 300.324(a)(4); OAR 581-015-2225(2)(a).

On August 14, 2017, MESD gave the Parent's notice via email that the Student would be attending Arata Creek School with a one-to-one EA, but did not update the Student's IEP or hold an IEP Team Meeting to discuss the one-to-one EA until January 4, 2018.

Because the District and MESD did not timely convene an IEP Team Meeting or amend the Student's IEP to include a one-to-one EA, the Department substantiates this portion of the allegation.

4. Supplemental Aids and Services

The Parent alleges the District and/or MESD violated the IDEA because it did not provide the Student with proper supplementary aids and services and also did not provide the Student an opportunity to participate in extracurricular activities.

A. Consultation by Autism Specialist

School districts must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP team, to provide nonacademic and extracurricular services and activities in a manner to afford children with disabilities an equal opportunity for participation in those services and activities.¹²

The Parents contend that the District's Autism Specialist was not aiding the Student or staff regarding the Student's significant behaviors. The Autism Specialist consultation is included as a support for the Student pursuant to the January 4, 2018 and January 6, 2017 IEP.

The District Autism Specialist has consistently observed the Student during class, offered assistance to teachers in providing behavioral interventions, responded to inquiries from MESD regarding the Student's behavior, and has attempted to actively participate in the Student's IEP. The Autism Specialist also assisted in developing the Student's bus protocol.

The District Autism Specialist assisted the Student's teachers with addressing the Student's behavioral issues and worked toward developing strategies and solutions. The District Autism Specialist has also participated in IEP meetings and has assisted with the Student's bus protocol, all with an aim toward affording the Student an opportunity to participate successfully in academic and nonacademic activities. The Department does not substantiate this allegation.

B. Extracurricular Activities

During the Student's IEP Meetings, the Parents have requested that the Student be included or considered for any extracurricular activity so that the Student can make friends and have access to peers. School districts must take steps to provide supplementary aids and services determined appropriate and necessary by the child's IEP team to provide nonacademic and extracurricular services and activities in a manner to afford children with disabilities an equal

¹² 34 CFR § 300.107; OAR 581-015-2070.

opportunity for participation in those services and activities. These services may include meals, recess periods, athletics, transportation, recreational activities, special interest groups or clubs sponsored by the school district.¹³

Recognizing this, the District and MESD cannot include the Student in many extracurricular activities at the present time because of the Student’s significant behaviors and the risk posed to the Student, staff, and other students.

The District and MESD understand the need for the Student’s safe socialization and participation in nonacademic activities. The Student’s teacher has attempted to obtain a voluntary position for the Student at a public library. Also, MESD is attempting to allow the Student to engage more with people and peers.

Presently, the Student’s inappropriate and unsafe behavior limits the District and MESD’s ability to allow the Student to engage in many extracurricular activities. With this in mind, the District has nevertheless sought out extracurricular options for the Student, identifying a volunteer opportunity for the Student at a local library that the Student may participate in safely and successfully. The Department does not substantiate this allegation.

V. CORRECTIVE ACTION¹⁴ *

In the Matter of Portland School District 1J
Case No. 18-054-020

Based on the facts provided, the following corrective action is ordered.

	Action Required	Submissions¹⁵	Due Date
1.	Professional Development Using information and assistance from the ODE County Contact, provide training on procedures for reviewing and revising IEPs following annual reviews to selected staff members at	Submit evidence of completed planning, including agenda and training date.	June 8, 2018

¹³ 34 CFR § 300.107; OAR 581-015-2070.

¹⁴ 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).

¹⁵ Corrective action submissions 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.

	<p>both schools attended by the student in the time period of this complaint.</p> <p>Selected staff members will include special education case managers and others who may be responsible for convening IEP meetings.</p>	<p>Submit evidence of completed training, including agenda, materials, and signed attendance log.</p>	<p>September 30, 2018</p>
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Dated: this 11th Day of May 2018



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

Mailing Date: May 11, 2018