

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Clackamas Education)
Service District North Clackamas School)
District 12)
)

FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 18-054-044

I. BACKGROUND

On November 5, 2018 the Oregon Department of Education (Department) received a letter of complaint (Complaint) from the parent (Parent) of a student (Student) residing in the North Clackamas School District (District) and attending a Clackamas Education Service District (CESD) therapeutic placement. The Parent requested that the Department conduct a special education investigation under Oregon Administrative Rule (OAR) 581-015-2030. The Department provided the District with a copy of the Complaint on November 7, 2018.

On November 13, 2018, the Department sent a *Request for Response* (RFR) to the District and CESD, identifying the specific allegations in the Complaint to be investigated and establishing a *Response* due date of November 27, 2018. The District and CESD completed their respective *Responses* and the Department's Contract Investigator (Investigator) received each on November 30, 2018. Each *Response* included a narrative, exhibit listing, and documents referenced below. Because the instant Complaint involves the same school district and education service district and because the instant Complaint involves similar allegations, the Investigator retained materials submitted from a previously-filed complaint, number 18-054-039, to supplement the instant investigation. The documents received from all Parties for both complaints and upon which the investigator relied are as follows:

1. Amended IEP dated September 19, 2017
2. Email correspondence between District and Parent, and between CESD and parent beginning October 23, 2017 through November 5, 2018
3. Prior Written Notice dated November 17, 2017
4. Summary of Meeting dated November 17, 2017
5. Daily Behavioral Tracking Sheets dated between January 4, 2018 and November 8, 2018
6. Behavioral Incident reports including Restraint Reports dated between January 5, 2018 and September 26, 2018
7. Incident Report Details Graph dated January 2018 through May 16, 2018
8. Notice of Team Meeting dated January 16, 2018
9. Prior Written Notice dated January 26, 2018
10. Handwritten Meeting Notes dated January 26, 2018
11. Notice of Team Meeting dated February 22, 2018
12. IEP Notes dated March 8, 2018
13. IEP dated March 8, 2018
14. Placement Determination dated March 8, 2018
15. Prior Written Notice dated March 8, 2018
16. Student's alternate activity schedule with social skills specialist dated April 2, 2018 through April 12, 2018
17. Notice of Team Meeting dated April 6, 2018
18. Prior Written Notice dated April 18, 2018
19. Amended IEP dated April 18, 2018
20. Notice of Team Meeting dated April 23, 2018
21. Prior Written Notice dated May 2, 2018
22. IEP Meeting Minutes dated May 2, 2018

23. Incident Report Details Graph May 17, 2018 through 11/15/2018
24. Functional Behavior Support Plan and Behavior Support Plan dated May 17, 2018
25. Student's preferred activity/Plan B schedule dated May 10, 2018 through May 18, 2018
26. Social Skills Specialist planned intervention notes dated May 1, 2018
27. Social Skills Specialist follow up notes to planned intervention dated May 16, 2018
28. Social Skills Specialist planned intervention notes re: walk outs dated May 17, 2018
29. Social skills specialist preferred activity plan notes dated May 18, 2018
30. Student preferred activity schedule dated between June 4, 2018 and June 8, 2018
31. Notice of Team Meeting dated June 5, 2018
32. IEP Meeting Minutes dated June 12, 2018
33. Prior Written Notice dated June 12, 2018
34. General Authorization for Community Travel executed by Parent on August 30, 2018
35. Google Apps Parent Permission form executed by Parent (undated)
36. Social/Behavioral Intervention and Permissions to Disclose modified by and executed by Parent on August 30, 2018.
37. 2018-2019 Heron Creek Program Family Acknowledgement Form modified by and executed by Parent on August 30, 2018.
38. Authorization for Mediation Administration by Designated Personal executed by Parent on August 30, 2018
39. Heron Creek Participation agreement modified by and executed by Parent (undated)
40. Discipline Data between September 2018 and November 2018
41. Goal Summary between September 2018 and November 2018
42. Student Goal Summary beginning September 2018 through November 2018
43. Student discipline data between September 2018 through November 2018
44. Search and Seizure Reports dated from September 4, 2018 through September 18, 2018
45. Family Feedback forms dated between September 4, 2018 and November 17, 2018
46. Student's Plan B schedule dated between September 5, 2018 and September 10, 2018
47. Social Skills Specialist notes dated September 5, 6, and 10, 2018
48. Parent notification letter regarding communication plan dated September 7, 2018
49. Emails between District and CESD dated between September 11, 2018 and November 5, 2018
50. Emails between District Superintendent and ODE dated September 14, 2018 through September 17, 2018
51. Student's Zone Practice and social skills practice schedule dated October 2, 2018 through October 18, 2018
52. Let's Go Learn testing results dated October 16, 2018
53. Social Skills Specialist notes dated November 1 and 5, 2018
54. Inter-District emails dated from November 3, 2017 through September 5, 2018
55. IEP team meeting notes re: BRA/BS review dated November 15, 2018
56. PPS Grade 2 Phonics Survey – Assessor Copy (undated)
57. Email excerpts created by District/CESD from Parent emails (undated_
58. parent communication chart created by CESD (undated)
59. Student's daily preferred activity (craft) schedule (undated)
60. CESD data percentages chart for school year 2018-2019
61. Behavior Support Plan Addendum (undated)
62. School work completed by Student (undated)

At the request of the Investigator, CESD submitted the following documents in advance of in-person interviews:

1. Incident reports for school year 2018-2019
2. Functional Behavior Assessment and Positive Supports and Strategies dated January 16, 2018

3. Social Skills Specialist Notes dated January 16, 2018
4. Social Skills Specialist notes dated January 25, 2018
5. Report card for School Year 2017-2018
6. Parent Consent for Individual Evaluation dated and executed by Parent March 8, 2018
7. Inter-district emails dated between March 16, 2018 and June 14, 2018
8. Social Skills Specialist notes dated April 13, 2018
9. Goals Summary Before and After April Meeting (undated)
10. Social Skills Specialist notes dated May 2, 2018
11. IEP Progress notes updated July 26, 2018
12. Social Skills Specialist notes dated November 13, 2018
13. BSP Progress Monitoring (undated)
14. Summary of acts of class disruptions and violent acts (undated)
15. Hand sketched diagram of school property including outside areas

The Investigator determined that in-person interviews with CESD staff were necessary. On December 18, 2018, the Investigator interviewed CESD personnel, including the Special Education Director and School Principal. The Investigator did not interview District personnel for this Complaint, having conducted comprehensive interviews of District personnel in connection with the complaint number 18-054-039 investigation.

The Parent submitted the following documents to the Investigator:

1. Behavioral and Discipline Incident reports dated between January 5, 2018 and July 11, 2018
2. Amended IEP dated March 15, 2017
3. IEP dated October 17, 2016
4. Notice of Team Meeting dated October 1, 2016
5. Prior Written Notice dated October 17, 2016
6. IEP team meeting notes dated October 17, 2016
7. Special Education Determination Placement dated October 10, 2016
8. Emails between Parent and District dated March 17, 2017 through December 15, 2017
9. Behavioral Data for school year 2016-2017 from MESD
10. Notes from Behavioral meeting dated September 17, 2017
11. Emails between the Parent and CESD beginning January 30, 2018 and continuing through
12. IEP team meeting Minutes dated March 8, 2018
13. Goal summary sheet for school year 2017-2018
14. Behavioral Incident report chart for school year 2017-2018 from CESD
15. Emails between Parent and CESD dated between January 3, 2018 and July 17, 2018
16. Notice of team meeting dated June 5, 2018
17. Prior Written Notice dated June 12, 2018
18. IEP team meeting minutes dated June 12, 2018
19. School work the Student completed in school years 2015-2016, 2016-2017, and 2017-2018.
20. IEP Goal tracking for school year 2018-2019
21. Behavioral Data for school year 2018-2019
22. FBA and BSP dated May 17, 2018
23. Family feedback form dated November 17, 2018 (after complaint was filed)

At the request of the Investigator, the Parent submitted the following data and documents:

1. Email to the US Department of Education Office of Civil Rights dated February 22, 2015
2. Email to Governor Kate Brown dated October 13, 2016
3. Criminal Complaint filed with Clackamas County Sheriff dated December 20, 2016
4. Complaint to US Department of Education Office of Civil Rights dated December 31, 2016
5. Email to US Department of Education Office of Civil Rights dated April 25, 2017

6. Complaint to North Clackamas Superintendent dated June 18, 2017
7. Functional Behavior Assessment dated February 15, 2017, updated May 25, 2017 and updated September 13, 2017.
8. Positive Behavior Intervention Plan from MESD (undated)
9. Email correspondence to City of Portland regarding criminal complaint filed by Parent dated December 27, 2017
10. CESD FBA revision dated January 16, 2018
11. Email to DHS from Parent dated June 4, 2018
12. Email to Clackamas County District Attorney dated October 10, 2018
13. Recordings of IEP Team meetings between November 6, 2017 and November 5, 2018

The Investigator did not interview the Parent in-person for this Complaint. Thorough interviews were completed for complaint number 18-054-039 and the Parent furnished the Investigator with substantial information via email.

The Investigator reviewed and considered the previously-described documents, interviews, exhibits, and complaint number 18-054-039 materials 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 Individuals with Disabilities Education Act (IDEA) violations that occurred within one year prior to the Department's receipt of the complaint. The Department must issue a final order within sixty days of receiving the complaint. This order is timely.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this Complaint.¹ 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 November 6, 2017 through November 5, 2018.

	Allegations	Conclusions
1.	<p>IEP Implementation</p> <p>a. The Parent alleges that the District and CESD violated the IDEA because each did not create and implement an appropriate Functional Behavioral Assessment and did not create and implement an appropriate Behavioral Support Plan.</p> <p>b. The Parent further alleges that the District and CESD failed to provide appropriate counseling services and consultation pursuant to the Student's IEP.</p>	<p>Partially Substantiated</p> <p>a. Substantiated Between January 4, 2018 and May 2018, the District and CESD failed to respond to the Student's challenging behaviors in a timely manner and failed to address the lack of a support plan for the Student's behaviors. The Department substantiates this allegation.</p> <p>b. Not substantiated On multiple occasions, the Parent declined to allow a CESD psychiatrist to access the Student's records. Absent the Parent executing such releases, the CESD psychiatrist was unable to carry out the</p>

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

	(34 CFR §§ 300.323, 300.324, 300.320; OARs 581-015-2220, 581-015-2205, 581-015-2181)	consultation services described in the Student's IEP. The Department does not substantiate this allegation.
2.	<p>Parent Participation</p> <p>The Parent alleges that the District and CESD violated the IDEA by creating a restrictive communication plan wherein the Parent:</p> <p>a. Could not communicate with the Student's IEP Team; and</p> <p>b. Did not receive timely updates regarding the Student's discipline.</p> <p>(34 CFR § 300.501; OAR 581-015-2190)</p>	<p>Substantiated as to CESD</p> <p>a. CESD had valid reasons to create a communication plan to facilitate information exchanges with the Parent. However, from September 7, 2018 to November 5, 2018, the CESD denied the Parent an opportunity for meaningful participation when it placed an arbitrary limit on the number of Parent-delivered words that would be read per week, regardless of subject matter. The Department substantiates this allegation as against CESD.</p> <p>b. The Student's behaviors impede the Student's learning. CESD did not provide the Parent with timely reports of behavioral incidents and as such, the Parent was denied the opportunity to meaningfully participate in the Student's IEP development and revision. The Department substantiates this allegation as against CESD.</p>
3.	<p>Extended School Year (ESY)</p> <p>The Parent alleges the District and CESD violated the IDEA because each failed to provide Extended School Year (ESY) services to the Student when data existed that evidenced the Student's regression.</p> <p>(34 CFR § 300.106, OAR 581-015-2065)</p>	<p>Substantiated</p> <p>The District and CESD found the Student did not qualify for ESY despite documented evidence indicating the Student had failed to recoup skills. The District and CESD acknowledged the benefit of the Student participating in ESY to build relationships but did not offer the Student a complete ESY program. The Department substantiates this allegation.</p>

<p>4. FAPE</p> <p>The Parent alleges that the District and CESD violated the IDEA because they:</p> <ul style="list-style-type: none"> a. Failed to develop and use alternate and appropriate strategies to address the Student's behavior; b. Failed to provide the Student with an age appropriate education program; c. Failed to provide the Student with ESY; and d. Failed to provide the Student with a 1:1 assistant. <p>(34 CFR § 300.101, OAR 581-015-2040).</p>	<p>Partially Substantiated as to the District²</p> <ul style="list-style-type: none"> a. Substantiated This allegation is partially substantiated as against the District, as discussed above in Section 1(a). b. Not substantiated. The District provided the Student with an academically appropriate educational setting, given the Student's specific needs; c. Substantiated See Section 3, above. d. Substantiated. The District failed to implement the Student's IEP between January 4, 2018 and January 26, 2018 when it removed the supplementary aid/service of a 1:1 aide without convening an IEP team meeting to make such a determination.
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III. FINDINGS OF FACT

1. The Student is eleven years old and in the fifth grade. The Student resides within the District and attends a Clackamas Education Service District (CESD) therapeutic placement.
2. The Student is skilled at making crafts and is entrepreneurial, developing businesses such as selling "pom poms" made out of yarn. The Student also has an active interest in recycling, so much so that a school the Student attended adopted a recycling program of its own. The Student is also physically active and enjoys playing sports such as soccer and basketball.
3. The Student receives special education services under the eligibility of Other Health Impairment (OHI). In the school environment, the Student exhibits behaviors such as walking out of assigned areas, hitting, pushing, throwing items, grabbing, kicking, and slapping. The Student's behaviors have resulted in many incident reports and the deployment of physical restraint by school staff.
4. During the 2016-2017 school year, the Student was removed from a general education classroom school and placed on home instruction. Thereafter, the Student was placed in a Multnomah Education Service District (MESD) therapeutic placement.
5. During the 2017-2018 school year, at the MESD placement, the Student's conduct at school generated multiple Behavior Incident Reports. The reports cite behaviors such as yelling,

² The free appropriate public education (FAPE) analysis only pertains to the District. While alleged against the District and CESD, the District retains FAPE obligations as to the Student.

leaving assigned areas, use of profanity, punching, pushing, and kicking staff, and destruction of property.

6. On November 14, 2017, the Student was disciplinarily removed from school for engaging in numerous violent acts against staff. The District employed physical restraints in response to the Student's conduct.
7. On November 17, 2017, MESD provided the Parent with a Prior Written Notice (PWN) stating that the Student would undergo a change in placement. The PWN indicated the Student would be placed at an interim placement through MESD between November 27, 2017 and December 15, 2017. MESD noted that after December 15, 2017, the District would place the Student somewhere else. The PWN disclosed that the Student "needs a higher level of support than the MESD is able to provide."
8. The decision to issue the PWN indicating an intent to change the Student's placement was based upon the accumulation of Behavior Incident Reports, Behavior Observation Tracking System (BOTS) data, and teacher/administrator observation.
9. On November 20, 2017, MESD contacted the Parent and relayed information regarding an interim placement through MESD.
10. During December 2017, the Parent contacted the District with questions about potential placements for the Student. The District's Special Education Program Coordinator responded, supporting the Student attending the interim placement through MESD, but also noted the Parent was free to explore other potential placements.
11. Beginning December 1, 2017, the Student began receiving educational services at the interim MESD placement. The Student received educational services through MESD until January 4, 2018, when the Student began at a CESD therapeutic program.
12. At the time the Student began attending the CESD therapeutic program, MESD had not yet transferred the Student's complete educational record. CESD had in its possession the Student's IEP, Functional Behavioral Assessment (FBA), and Behavior Intervention Plan (BIP).
13. Upon entering the CESD therapeutic program in January 2018, CESD staff assessed the Student using the "Let's Go Learn" curriculum to determine the Student's present educational levels.
14. After participating in the Let's Go Learn testing, a variety of subtest results were generated in the areas of reading and mathematics and the instruction the Student received was informed by this testing.
15. The Student entered the CESD therapeutic program with an IEP that included a full day of 1:1 adult assistance as a school-wide supplementary aid or service. MESD staff that had worked with the Student during the 2017-2018 school year noted that the 1:1 aide was beneficial to the Student, even as the Student continued to struggle with behaviors and attention to academics.
16. When the Student entered the CESD therapeutic program, the Parent declined to sign a "Release of Information" to allow a psychiatrist working with CESD to access to the Student's information.

17. When new students enter the CESD therapeutic placement, an "Options Form" is completed. The Options Form contains spaces for inputting "Long Term Goals", "Short Term Goals", "Triggers", and "Options". An Options Form was not filled out for the Student.
18. Beginning January 4, 2018, the CESD therapeutic program did not provide the Student with a 1:1 aide. On January 16, 2018, CESD sent a notice to the Parent regarding a meeting to remove the Student's 1:1 aide as a supplementary aid or service on the Student's IEP. The meeting was held on January 26, 2018 without the Parent in attendance. The Parent did not attend because she believed it was fruitless to participate because CESD had already decided to remove the Student's 1:1 aide.
19. On January 16, 2018, CESD staff revised the Student's Functional Behavioral Assessment (FBA) and Behavior Support Plan (BSP) without the Parent in attendance.³ On January 16, 2018, the Student had attended a total of six days of school in the CESD program. CESD's programs do not engage in some of the same support mechanisms that were used at MESD. As such, the Student's BSP was changed to reflect that processes CESD did offer. The use of token economy was removed as well as earned activity time. CESD also opined that the Student engages in behaviors to gain peer relationships.
20. On January 17, 2018, the Parent received an email from CESD stating that the Student became physical with staff.
21. On January 22, 2018, CESD contacted the Parent via email and notified the Parent that the Student punched staff in the face and also bit staff. CESD recommended convening a meeting to discuss what could be done differently for the Student. CESD followed up this email with a letter on January 24, 2018 informing the Parent that the Student attempted to tackle staff, took several swings at staff with a closed fist and then punched staff in the mouth. The Student was suspended for one day and a meeting was scheduled to review the Student's FBA to identify ways to support the Student in managing behaviors.
22. Between January 17, 2018 and May 10, 2018, the Student's behavior generated 39 Incident Reports indicating the Student had engaged in violent acts by either touching, punching (with closed fist), biting, kicking, or tripping staff and/or peers. Incident Reports that were generated between January 17 and May 7, 2018 indicate that the Student has an FBA but that there is not a behavior intervention/support plan for the Student's exhibited behavior. The Incident Reports also note that data related to the Student is being collected.
23. On January 26, 2018, the District removed 1:1 full day adult assistance from the Student's IEP. CESD sent the Parent a PWN noting that CESD wanted to see "the student succeed without 1:1 support" and also noted that CESD's small staff to student ratio was the main factor relevant to the decision. CESD's therapeutic program classes contained five staff for a class size of five to nine students.
24. The District agreed with CESD's position that the Student's 1:1 aide be removed. The January 26, 2018 PWN notes that the District will "review daily tracking data at the annual IEP Meeting and adjust if necessary."
25. On January 29, 2018, CESD notified the Parent that the Student had three incidents that day

³ On or about February 15, 2017, MESD staff had developed a Functional Behavioral Assessment (FBA) and Behavior Support Plan (BSP) for the Student. The FBA and BSP were updated on May 25, 2017, and September 13, 2017. Resources and supports for the Student included: token economy, earned activity times, small class size, high staff to student ratio, bonus points, predictable schedule, calming areas in & out of classroom, Safety Care, and a self-soothing item (stuffed duck). The Student also had an 8-page BSP developed focusing on "impulse control" strategies.

where the Student hit, bit, and pushed a shelf toward CESD staff.

26. On February 9, 2018, the Student hit a peer in the face. The February 9, 2018 Incident Report notes that such behavior is noted in the Student's FBA, however, the Student did not have an intervention or support plan to address this kind of behavior. The Incident Report further indicates that the staff would continue to collect data.
27. At the Student's March 8, 2018 IEP Team Meeting, CESD and the District agreed to temporarily assign the Student a 1:1 aide between March 12, 2018 and April 18, 2018 and collect data to determine if a 1:1 aide was necessary. The IEP noted that the IEP Team would meet on April 18, 2018 to review data and evaluate the appropriateness of a 1:1 aide. Also during that meeting, the Parent signed a consent for evaluation for a new FBA.
28. On March 13, 2018, the Student threatened to kill a staff member. Thereafter, between March 14, 2018 and March 21 2018, the Student was searched daily for weapons.
29. On March 20, 2018, the Parent filed a complaint with CESD regarding the Student's placement and educational experience.
30. On April 6, 2018, the Parent was informed that the Student had been observed by a School Psychologist and that the Student's FBA would be written together by the IEP Team at an April 18, 2018 Meeting.
31. On April 6, 2018, the Parent and CESD School Principal exchanged emails resulting in the School Principal stating that it would be better for someone else to answer the Parent's questions if the Parent was "going to continue to call [the Principal] a liar."
32. On April 12, 2018, CESD notified the Parent that the Student would be searched due to a threat on April 11, 2018 to stab peers and staff. The Parent responded that if the Student was making these types of threats, CESD was responsible for that behavior.
33. On April 14, 2018, the Parent emailed CESD and inquired about bruising on the Student. In response, CESD filed a report with the Department of Human Services.
34. On April 18, 2018, the IEP Team met with the purpose of amending the Student's IEP and to develop a revised Functional Behavior Assessment (FBA) and Behavior Support Plan (BSP). The Student's previous IEPs dated March 15, 2017 and March 8, 2018 did not contain a supplementary aid, service or modification/accommodation regarding a BSP. However, each IEP contains supports for school personnel from a Functional Behavioral Assessment/Development of the Positive Behavior Support Plan. The Student's March 8, 2018 IEP was amended on April 18, 2018 to provide a BSP as a supplementary aid/service; modification and accommodation.
35. During April 2018, the Student's classroom behavioral data sheets do not contain data for the following dates: April 11, 17, 20, 23, 26 and 27. The Student's behavioral data sheets contain only partial tracking information for April 9, 10, 12, 13, 23, and 24. There is handwritten notation in the absence of data stating, "unable to track."
36. On April 18, 2018, the Student's 1:1 aide "trial period" ended and CESD removed the Student's assigned 1:1 aide.
37. On May 2, 2018, CESD sent the Parent a PWN stating that the data taken between March 12, 2018 and April 18, 2018 during the Student's trial period with a 1:1 aide did not support

providing the Student with a 1:1 aide.

38. On May 2, 2018, the CESD Special Education Director sent a letter to the Parent advising that CESD would be adopting a communication plan wherein all Parent communication to the IEP Team Members would be filtered through the Special Education Director. The communication plan was implemented due to the volume of communications and increasing tension between the Parent and CESD staff.
39. At the Student's May 2, 2018 IEP Meeting, the IEP Team reviewed data and discussed whether the Student qualified for Extended School Year (ESY) services. The Student had qualified for ESY every school year since the second grade. The District representative noted the Student had qualified the previous year. The IEP Team noted that it would "look at ESY by May 15th."
40. On May 21, 2018, the Parent contacted the CESD's FBA Specialist, suggesting changes to the Student's draft FBA and BSP.
41. On June 5, 2018, CESD issued a Notice of IEP Team Meeting for June 12, 2018, noting that on June 1, 2018, IEP Team Members confirmed attendance, but on May 25, 2018, the Parent indicated she would not attend an IEP Team Meeting to discuss ESY.
42. The June 12, 2018 IEP Team Meeting went forward without the Parent. The IEP Team reviewed data to determine whether ESY services were appropriate for the Student. The IEP Team determined that the data did not indicate that the Student needed ESY in the areas of behavior or academics.
43. The IEP Team further noted that the Student's anticipated fifth grade teacher for the 2018-2019 school year would be present for the ESY program. The IEP Team decided that "relationship building and development is very important for [the Student]." As such, the District and CESD agreed to offer one day per week of ESY to assist the Student in building a relationship with the Student's fifth grade teacher and other potential staff to help promote greater success for the beginning of the 2018-2019 school year.
44. On June 12, 2018, the Parent was sent a PWN noting that the Student did not qualify for ESY services based on the data reviewed by the IEP Team, but that the Student would be welcome to attend ESY one day per week to help support the Student with relationship building in advance of the 2018-2019 school year. The PWN noted that the Parent could select which day of the week (Tuesday, Wednesday, or Thursday) the Student would attend ESY, and that a decision needed to be communicated to the District by June 18, 2018 so that transportation could be arranged.
45. While attending the CESD therapeutic school during the 2017-2018 school year, the Student was disciplinarily removed from the CESD program for 4.5 days. The Student's disciplinary removals were due to either physical aggression against staff, physical aggression against peers, or property damage.
46. Between January 4, 2018 and July 11, 2018, the Parent received 106 written behavioral incident reports from CESD. The reports include incidents of the Student's failure to follow directions, expression of aggression toward and injury to peers and staff, and incidents of property damage that occurred both inside and out of the classroom. The Student had 94 incidents of "danger to others," 70 incidents of violent acts, and 91 reported incidents of classroom disruption.

47. CESD staff emailed the Parent Incident Reports involving the Student. Incident Reports were emailed to the Parent anywhere between three and ten days after the incident. One incident report was emailed thirteen days after an incident. Three incidents that occurred on March 14, 15, and 20, 2018 were reported on April 2 and 3, 2018. Beginning in February 2018 and continuing through March 2018, no incidents were reported to the Parent on the same date they occurred.
48. On August 30, 2018, the Parent executed permissions for the Student for school year 2018-2019. Among these documents was a "Participation Agreement" which included how CESD was going to communicate with the Parent. The Parent handwrote the following on the document in the communication section, "email only unless I need to pick up my [child] due to a medical emergency or large behavioral issue."
49. The Parent executed a "Social/Behavioral Intervention and Permissions to Disclose" on August 30, 2018. The Parent handwrote the following after giving consent for the Student to participate in social/behavioral services based on the Student's IEP and /or BSP: "I do not consent for [CESD psychiatrist] to work with [the Student] or staff in relationship to [the Student]. I am willing for a different psychiatrist other than [CESD psychiatrist] to work with [the Student]." On two previous occasions during the 2017-2018 school year, the Parent declined to allow the CESD psychiatrist access to the Student's records.
50. On September 7, 2018 via mail and again on September 10, 2018 via email, the CESD Special Education Director notified the Parent that she would only read 1,000 words of Parent email/written communication per week. The Special Education Director enforces this protocol by cutting and pasting emails from the Parent into a Word document, conducting a word count to a limit of 1,000, then stops reading the correspondence and any subsequent correspondence from the Parent for the remainder of the week. If the first email of the week does not total 1,000 words, the Special Education Director will read subsequent emails until the word limit is met. Thereafter, the Special Education Director will not read any further communications from the Parent.
51. From the beginning of the 2018-2019 school year until November 5, 2018, the Student's behavior has generated seven Incident Reports, all of which occurred in September 2018.

IV. DISCUSSION

A. IEP Implementation

The Parent alleges that the District and CESD violated the IDEA because neither created or implemented an appropriate Functional Behavioral Assessment (FBA) and Behavioral Support Plan (BSP) for the Student. The Parent further alleges that the District and CESD failed to provide the Student with appropriate counseling services and consultation services pursuant to the Student's IEP.

1. FBA and BSP

A school district must review or revise a student's existing FBA if a student places themselves, other students, or staff at imminent risk of serious bodily injury as a result of the student's behavior.⁴ Serious bodily injury is defined as "any significant impairment of the physical condition of a person, as determined by qualified medical personnel, whether self-inflicted or inflicted by

⁴ OAR 581-015-2181.

someone else.”⁵ Additionally, a school district must ensure a Student’s behavior intervention plan⁶ appropriately addresses student’s need.⁷

On January 16, 2018, CESD staff met and revised the Student’s FBA and BSP, which had last been updated when the Student attended an MESD program at the beginning of the 2017-2018 school year. After CESD staff updated the Student’s FBA and BSP, between January 22, 2018 and May 5, 2018, the Student engaged in violent behaviors toward both CESD staff and peers. The Student was involved in 106 behavioral incidents, including 71 violent acts. Many of the incident reports note that the Student has an FBA related to the Student’s exhibited behaviors, but that the Student does not have a “Behavior intervention/support plan” for the Student’s exhibited behavior.

Despite this substantial record of behavioral incidents, the Student’s BSP was not revised for much of the latter part of the 2017-2018 school year. On March 8, 2018, the Parent was furnished with and signed a consent to evaluate for a new FBA. However, no collaborative FBA meeting was held until May 2018. Only in May 2018 did CESD engage with an FBA specialist to begin creating a new FBA and BSP for the Student. The District and CESD failed to respond to the Student’s challenging behaviors when it failed to timely and appropriately review and revise the Student’s FBA and BSP. The Department substantiates this allegation and orders corrective action.

2. Counseling Services

At the beginning of each school year, a school district must have in effect an IEP for each child with a disability within the school district’s jurisdiction. A school district must provide special education and related services in accordance with the student’s IEP.⁸ A material failure to implement an IEP constitutes a violation of the IDEA. “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.”⁹

The Student’s IEP provides for a 30-minute psychiatric consult to be provided between March 8, 2018 and March 9, 2019. This consultation is in the form of direct support to staff. CESD employs a psychiatrist to provide consultation services to CESD staff in conformity with its students’ IEPs. To undertake this service successfully, the CESD psychiatrist must be able to review records and communicate with staff regarding a student’s diagnoses, educational history, and academic progress.

When the Student entered the CESD therapeutic program, the Parent declined to sign a release of information to enable the CESD psychiatrist to interact with the staff and provide the consultation as outlined in the Student’s IEP. The Parent continued to decline to execute a release of information in May 2018. Again, on August 30, 2018, the Parent again declined to release any information to the CESD psychiatrist regarding the Student.

Despite CESD’s efforts, the Parent, on three separate occasions, declined to allow the CESD psychiatrist to access the Student’s records. As a result, the psychiatrist, and consequently the District and CESD, could not carry out the consultation service described in the Student’s IEP. The Department does not substantiate this allegation.

⁵ ORS 339.285(4).

⁶ For this Order’s purposes, the terms “Behavior Support Plan” and “Behavior Intervention Plan” are used interchangeably.

⁷ OAR 581-015-2181(3).

⁸ 34 CFR § 300.323; OAR 581-015-2220.

⁹ *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 822 (9th Cir. 2007).

B. Parent Participation

The Parent alleges that the District and CESD violated the IDEA when they created a restrictive communication plan resulting in the Parent being unable to communicate with the Student's IEP Team, and when each failed to provide the Parent with timely reports regarding the Student's behavior in school.

1. Communication Plan

A parent has the right to participate in the identification, placement, evaluation, and development of their child's IEP.¹⁰ Within that context, a school district may create a communication plan if a parent's communication demands are overwhelming school staff so long as the parent is still able to participate in the IEP team process.¹¹

From the beginning of the Student's placement at CESD, the relationship between the Parent, District, and CESD has been strained. On August 30, 2018, the Parent responded to a "Participation Agreement" regarding how CESD was going to communicate with the Parent. The Parent expressed a preference for "email only unless I need to pick up my [child] due to a medical emergency or large behavioral issue." The Parent has sent a high volume of emails, which CESD and the District have characterized as angry and confrontational. Adding to this tension-filled communications is the fact that the Parent would on occasion not receive timely responses to inquiries about the Student's academic program. In response to the Parent's frequency of communications, CESD initiated a communication plan where the Parent was required to direct all communications to the CESD Special Education Director. This communication plan was not overly restrictive and did not seriously infringe on the Parent's participation in the Student educational program.

This changed on September 7, 2018. CESD altered the communication plan to only read one email per week, set a word limit for reading of 1,000 words per week, and a refusal to read about incidents that occurred at previous placements. After the Parent sent 1,000 words of text in an email, CESD would not consider the subject matter, regardless of its content. This communication plan sets an arbitrary limit on communication between the Parent and CESD and seriously infringes on the Parent's ability to participate in the Student's educational process. Given the historic behavioral data of the Student, the Student may have consecutive days in a single week where the Student is not accessing education due to escalated behaviors. By failing to consider even the subject matter of emails throughout the a school week after specified word limit is reached, CESD failed to recognize the Parent's right to be informed and to have input into the Student's education. As a consequence of initiating this particular form of communication plan, CESD failed to allow the Parent meaningful participation in the Student's educational program from September 7, 2018 to November 5, 2018. The Department substantiates this allegation.

2. Discipline Reports

For a child whose behaviors impede learning, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior.¹² Here, the Student's behavior has continuously impeded the Student's learning. It is imperative that the Parent and other members of the Student's IEP Team know and understand both the Student's triggers and possible interventions or support for challenging behaviors. The District and CESD failed to update the Parent in a timely basis regarding behavioral incidents involving the Student.

¹⁰ OAR 581-015-2290.

¹¹ Forest Grove School District v. Sutdent, 118 LRP 48402 (D.Ore 11/27/18)

¹² OAR 581-015-2205(3)(a).

Incident reports involving the Student were emailed to the Parent between three and ten days after the underlying incident, with one incident report being sent to the Parent thirteen days after an incident. By failing to deliver to the Parent important incident reports related to the Student's behavior, the Parent was deprived of timely information regarding the Student's behavior, how it was impeding the Student's learning, and how strategies would be employed to address that behavior. The Department substantiates this allegation against the District and CESD.

C. Extended School Year (ESY)

The Parent alleges the District and CESD violated the IDEA because each failed to provide ESY services to the Student when data existed that evidenced the Student's regression. Public agencies must "ensure that extended school year services are available as necessary to provide a free appropriate public education to a child with a disability." Additionally, "extended school year services must be provided only if the child's IEP team determines, on an individual basis, that the services are necessary for the provision of free appropriate public education to the child."¹³

School districts must develop criteria for determining the need for ESY services. Criteria must include regression and recoupment time based on documented evidence or, if no documented evidence, on predictions according to the professional judgment of the team. "Regression" means significant loss of skills or behaviors in any area specified on the IEP as a result of an interruption in education services. "Recoupment" means the recovery of skills or behaviors specified on the IEP to a level demonstrated before the interruption of education services.¹⁴

The Student had qualified for ESY every previous year since second grade. At the time ESY for 2018 was considered, the Student's operative IEP contained goals centered on three different behaviors: responsibility, respect, and safety. Each of those behaviors had subsets of more precise behaviors and expectations for the Student. During the 2017-2018 school year, the Student's regression and recoupment was measured based upon the Student's return from spring break.¹⁵ The Student failed to recoup skills to the level shown prior to spring break in two areas: responsibility (stay in seat/raise hand) and respect (identifying feelings and expressing them appropriately). Specifically, the Student's behavioral data averages fell substantially during the weeks of April 2, 2018 and April 9, 2018, the two weeks following CESD's spring break between March 26, 2018 and March 30, 2018.

CESD and the District concluded that the Student did not qualify for ESY, despite the existence of documented evidence indicating the Student had failed to recoup skills over the spring break period to a level demonstrated before the interruption. The IEP Team acknowledged the benefit of the Student participating in ESY to build relationships with staff and the Student's projected fifth grade teacher, but did not offer the Student a complete ESY program. The Department substantiates this allegation and orders corrective action.

D. FAPE

1. Failure to develop and use alternate and appropriate strategies to address the Student's behavior

The Parent alleges the District and CESD denied the Student a free appropriate public education (FAPE) when it failed to develop and use alternate and appropriate strategies to address the Student's escalating behavior.¹⁶ The measure of educational benefit is whether the Student

¹³ 34 CFR § 300.106; OAR 581-015-2065.

¹⁴ OAR 581-015-2065.

¹⁵ In Spring 2018, the Student had not attended a CESD program through either a summer or winter break.

¹⁶ The free appropriate public education (FAPE) analysis here only pertains to the District. While alleged against the

makes progress appropriate in light of the child's circumstance.¹⁷

The District denied the Student a FAPE when between January 22, 2018 and May 5, 2018 the Student engaged in violent behaviors toward both CESD staff and peers. The Student was involved in 106 behavioral incidents, including 71 violent acts. Many of the incident reports note that the Student has an FBA related to the Student's exhibited behaviors, but that the Student does not have a "Behavior intervention/support plan" for the Student's exhibited behavior. Despite this substantial record of behavioral incidents, the Student's BSP was not revised for much of the latter part of the 2017-2018 school year. On March 8, 2018, the Parent was furnished with and signed a consent to evaluate for a new FBA. However, no collaborative FBA meeting was held until May 2018. Only in May 2018 was a new FBA and BSP developed for the Student. The Department substantiates this allegation as against the District.¹⁸

2. Failure to provide the Student with an age appropriate education program

School districts must provide a free appropriate public education to all school-age children with disabilities for whom the district is responsible. The Student entered the CESD therapeutic program with a most recent IEP, Functional Behavioral Assessment and Behavior Intervention Plan. Upon entering the CESD therapeutic program, school staff tested the Student to determine an appropriate instructional level. CESD utilized the "Let's Go Learn" curriculum to develop an appropriate educational program for the Student. The instruction the Student received was based on this testing. The District, through CESD, delivered to the Student an appropriate educational program for the Student to make progress in light of the Student's circumstances.

Additionally, the District, through CESD, placed the Student in a classroom environment with a high staff-to-student ratio. CESD's classes contained five staff for a classroom containing five to nine students. This setting allowed for CESD staff to provide necessary interventions to build the Student's self-regulations skills and develop positive peer relationships.

The District provided the Student with an academically and socially appropriate educational setting, given the Student's specific needs. The Department does not substantiate this allegation.

3. ESY

Substantiated as against the District. See Section C.

4. 1:1 Aide

At the beginning of each school year, a school district must have in effect an IEP for each child with a disability within the school district's jurisdiction. A school district must provide special education and related services in accordance with the student's IEP. School districts must provide a free appropriate public education to all school-age children with disabilities for whom the district is responsible.¹⁹

The Student's March 15, 2017 IEP contained a provision describing the supplementary aid/service of "1:1 adult assistance full day." During the time the Student attended Multnomah Education Service District (MESD) programs, the Student was provided with a 1:1 aide. MESD

District and CESD, the District retains FAPE obligations as to the Student.

¹⁷ Andrew F. v. Douglas County, 137 S.Ct. 988 (2017)

¹⁸ It is important to note that the record reflects the Student has made remarkable progress in the area of behavior when the Student returned for the 2018-2019 school year with a fully implemented FBA and BSP. *The Student had* only seven incident reports during the month of September and no incident reports for the month of October.

¹⁹ 34 CFR § 300.101; OAR 581-015-2040.

staff noted that the 1:1 aide was beneficial to the Student, even as the Student continued to struggle with behaviors and attention to academics. In January 2018, when the Student began attending the CESD therapeutic program, the Student did not receive 1:1 aide services. Between January 4, 2018 and January 26, 2018, the Student did not receive full-day 1:1 adult assistance. On January 26, 2018, the District removed the 1:1 aide supplementary aid/service from the Student's IEP and sent the Parent a Prior Written Notice (PWN) noting that CESD wanted to see "the student succeed without 1:1 support" and also that CESD's small staff to student ratio was the main factor relevant to the decision. Indeed, while CESD's staff to student ratio was small, the Student did not receive the equivalent of full-day 1:1 adult assistance.

The District failed to implement the Student's IEP between January 4, 2018 and January 26, 2018 when it removed the supplementary aid/service of a 1:1 aide without first convening an IEP Team Meeting to make such a determination. The Department substantiates this allegation and orders corrective action.

V. CORRECTIVE ACTION²⁰

*In the Matter of North Clackamas School District and Clackamas Education Service District
Case No.18-054-044*

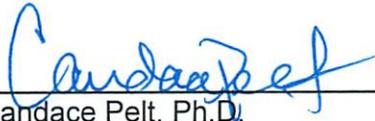
Based on the facts provided, the following corrective action is ordered.

	Action Required	Submissions²¹	Due Date
1.	a. The Clackamas ESD (CESD) Director of Special Education (and other CESD administrators and staff as selected by the CESD) will participate in a conference call with ODE staff to discuss the implementation of the Corrective Action and any associated questions.	E-mail verification of call completion, including listing of call participants.	Not later than January 14, 2019
		Submit for ODE review copies of any policies, procedures, and staff information described under "Action Required 1.b.	Not later than January 14, 2019
	b. Review, and revise, if needed, existing CESD and therapeutic program policies, procedures, and staff information related to enrolling students; reviewing, revising, and implementing the student's IEP; and ensuring the provision of procedural safeguards. Specifically include any procedures for coordinating communication between and	Complete a policy and procedure interview with ODE Staff.	Not later than January 31, 2019
		Submit draft, with edits showing, for ODE review and approval.	Not later than February 15, 2019

²⁰ The Department's order includes corrective action. The order includes documentation to be supplied to ensure the 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).)

²¹ 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: raeannray@state.or.us; fax number (503) 378-5156.

Dated this 4th Day of January 2019



Candace Pelt, Ph.D.
Assistant Superintendent
Office of Student Services

Mailing Date: January 4, 2019

Appeal Rights: Parties may seek judicial review of this Order. Judicial review may be obtained by filing a petition for review within sixty days from the service of this Order with the Marion County Circuit Court or with the Circuit Court for the County in which the party seeking judicial review resides. Judicial review is pursuant to the provisions of ORS § 183.484. (OAR 581-015-2030 (14).)