

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of)
McMinnville School District #40)

FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 19-054-003

I. BACKGROUND

On January 16, 2019, the Oregon Department of Education (Department) received a written request for a special education complaint investigation from the parents (Parents) of a student (Student) who receives special education services from the McMinnville School District #40 (District). The Department confirmed receipt of the complaint and forwarded it to the District by email on January 17, 2019.

Under state and federal law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue an order within sixty days of receipt of the complaint.¹ This timeline may be extended if the Parents and the District agree to the extension to engage in mediation or local resolution of the complaint, or for extenuating circumstances. A complaint must allege a violation that occurred not more than one year before the date the complaint was received by the Department.² Based on the date the Department received the Complaint, the relevant period for this Complaint is January 17, 2018 through January 16, 2019.

On January 30, 2019, the Department's Complaint Investigator (Investigator) sent a *Request for Response* (RFR) to the District identifying the specific allegations in the complaint to be investigated and establishing a *Response* due date of February 14, 2019.

On February 14, 2019, the District submitted a packet of materials for the Department's Complaint Investigator (Investigator). These materials are listed below:

Table of contents

1. IEP 3.05.2018
2. IEP 3.05.2018 Meeting Notes
3. IEP 3.5.2018 PWN
4. IEP Meeting Notice 3.23.2018
5. Amended IEP 5.09.2018
6. Amended IEP 9.25.2018
7. Amended IEP 9.25.2018 PWN
8. Amended IEP 9.25.2018 Meeting Notes, Agreement, Meeting Notice
9. Amended IEP 10.29.2018
10. Amended IEP 10.29.2018 PWN, Meeting Notes
11. IEP progress report 4.20.2018, 6.15.2018
12. Team Meeting Notices
13. Functional behavior assessment 10.30.2017
14. Revised functional behavior assessment 4.10.2018
15. Rise packet

¹ 34 CFR § 300.152(a); Oregon Administrative Rule (OAR) 581-015-2030(12).

² 34 CFR § 300.152(b); OAR 581-015-2030(5).

16. Attendance, incidents, referrals 2017/2018
17. Attendance, incidents, referrals 2018/2019
18. Documents re: 11.27.2018
19. Certified letter 11.30.2018
20. Student summary
21. Manifestation determination 11.30.2018
22. Expulsion hearing 12.10.2018
23. Grades and attendance
24. Psychology report
25. Eligibility – Emotional Disturbance
26. MWOE schedule and classes
27. Tutor logs
28. Emails between Parents and District
29. Letter to parents re: WESD
30. Transportation forms for student
31. List of district staff

The District submitted additional materials during interviews:

1. IEP goal progress reports written on 11/9/18, 3/5/18
2. Emails from the Case Manager with suggestions about curriculum for study skills
3. Attendance records and report card summaries from MWOE

The Investigator determined that on-site interviews were necessary. On February 19, 2019, the Investigator interviewed the Parents. On that same day, the Investigator interviewed the Middle School Assistant Principal, a Special Education Teacher from the District middle school alternative education program, a Middle School Principal, the Teacher of the alternative computer lab, and the Tutor. On February 20, 2019, the Investigator interviewed the District Special Education Director, a School Psychologist, and the Director of the middle school alternative education program. The Parents submitted materials for review that are listed below:

1. Copies of Student Suspension Reports and Behavior Referrals 2017-2018
2. Copies of Student Suspension Reports and Behavior Referrals 2016-2017

The Investigator reviewed and considered the previously-described documents, interviews, and exhibits in reaching the Findings of Fact and Conclusions of Law contained in this order. Because of the volume of documents associated with the matter and its relationship with a previously-filed matter involving the same parties, the Department extended the issuance date of the final order by one week. After the District raised objections to the process of investigation, the Department further delayed issuance of this order. Department staff conducted additional interviews of District personnel and reviewed documents submitted as part of the investigation in completing this order.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve the Complaint.³ The Parents' 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 on the Discussion in Section IV.

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

	Allegations	Conclusions
1.	<p>IEP Content</p> <p>The Parents allege the District violated the IDEA when it:</p> <ul style="list-style-type: none"> a. Did not develop appropriate goals and specially designed instruction for a variety of the Student's needs; b. Did not include a current and correct Present Levels of Academic Achievement and Functional Performance (PLAAFP); c. Reduced the Student's Specially Designed Instruction in counseling and behavior support despite a demonstrated need for the service; and d. Failed to incorporate the Parent's expressed concerns into the Present Levels of Academic Achievement and Functional Performance, specifically the effect of the Student's Post-Traumatic Stress Disorder diagnosis and its effect on the Student's behavior. <p>(34 CFR § 300.320; OAR 581-015-2200)</p>	<p>Substantiated in Part</p> <ul style="list-style-type: none"> a. The Student's IEP Team developed appropriate goals and specially designed instruction to address the Student's needs with respect to behavior and promoting positive peer relationships. The Department does not substantiate this allegation. b. The District did not update the Student's PLAAFP to accurately reflect the Student's present levels. The Department substantiates this allegation. c. The District acknowledges it did not provide specially designed instruction in the area of counseling as prescribed in the Student's IEP. The Department substantiates this allegation. d. The District acknowledged and was receptive to the Parents' concerns. The Department does not substantiate this allegation.
2.	<p>Least Restrictive Environment</p> <p>The Parents allege the District violated the IDEA when it:</p> <ul style="list-style-type: none"> a. Predetermined the Student's placement when a staff member sent an email to the Parents prior to a placement meeting notifying the Parent that the Student would be placed in a District alternative program; 	<p>Not Substantiated</p> <ul style="list-style-type: none"> a. In response to Parents' request for alternative placements for the Student, a District administrator sent the Parents an email offering three alternative placements, one of which the Parents selected.

	<p>b. Did not consider placement options for the Student that included the general education environment;</p> <p>c. Shortened the Student's schedule through implementation of a Functional Behavioral Assessment rather than an IEP meeting.</p> <p>(34 CFR §300.114; 34 CFR § 300.116; OAR 581-015-2240; OAR 581-015-2250)</p>	<p>b. The District considered placement options that included participation in the general education environment.</p> <p>c. The Student's school day was shortened in February 2018 per Parent's request, then changed to home instruction with a tutor on May 9, 2018 based upon decisions made by the Student's IEP Team.</p>
<p>3.</p>	<p>When IEPs Must Be in Effect</p> <p>The Parents allege the District violated the IDEA when it:</p> <p>a. Did not provide the Parent with progress reports on the Student's IEP goals.</p> <p>b. Did not provide specially designed instruction, supplementary aids and services and accommodations and modifications as prescribed in the IEP.</p> <p>(34 CFR § 300.323; OAR 581-015-2220(1)(b))</p>	<p>Substantiated in Part</p> <p>a. The District sent the Parents timely and regular IEP progress reports in conformity with the Student's IEP. The Department does not substantiate this allegation.</p> <p>b. With the exception of providing counseling services, the District implemented the Student's IEP. As to the delivery of counseling services, the Department substantiates this allegation.</p>
<p>4.</p>	<p>Emotional Disturbance Eligibility Criteria</p> <p>The Parents allege the District violated the IDEA when it did not find the Student eligible for special education as a student with an Emotional Disturbance.</p> <p>(34 CFR § 300.8(c)(4); OAR 581-015-2145)</p>	<p>Not Substantiated</p> <p>At the time of the evaluation, the District School Psychologist provided the eligibility team with sufficient information to arrive at a conclusion that the Student was not eligible for special education services under the category of Emotional Disturbance.</p>
<p>5.</p>	<p>Parent Participation</p> <p>The Parents allege the District violated the IDEA when it did not allow the Parents the opportunities to fully participate in meetings at which multiple decisions were made for the Student. For example, the District did not consider parental input, made placement decisions without consideration of parental input, and refused the Parents' request to view</p>	<p>Not Substantiated</p> <p>The Parents and the District have disagreed over multiple components of the Student's educational program. However, the Parents have consistently been a part of the decision-making process and have not been denied the opportunity to meaningfully participate in meetings regarding the Student's special education program.</p>

	<p>a draft of the Student's IEP before an IEP meeting.</p> <p>(34 CFR § 300.501; OAR 581-015-2190)</p>	
6.	<p>Prior Written Notice</p> <p>The Parents allege the District violated the IDEA when it did not provide the Parents with Prior Written Notice after denying the Parents' requests for specific services, or after making placement decisions without the Parents' involvement.</p> <p>(34 CFR § 300.503; OAR 581-015-2310)</p>	<p>Not Substantiated</p> <p>The District sent the Parents timely and compliant Prior Written Notices.</p>
7.	<p>Disciplinary Removals of More than 10 School Days (Pattern or Consecutive)</p> <p>The Parents allege the District disciplinarily removed the Student from school for more than 10 school days without conducting a Manifestation Determination review because the District improperly did not identify removals as disciplinary action. The Parents allege that sometimes the Student was sent home based on "not a suspension, just take the Student home and we will try again tomorrow."</p> <p>(34 CFR § 300.530(b); OAR 581-015-2415)</p>	<p>Not Substantiated</p> <p>During the 2017-2018 school year, the District did not have knowledge the Student was a student with a disability before the Student was disciplinarily removed for more than 10 cumulative school days that constitute a pattern.</p> <p>During the 2018-2019 school year, the District convened a Manifestation Determination review at the appropriate time after the Student was disciplinarily removed for more than 10 school days.</p>
8.	<p>Free Appropriate Public Education (FAPE)</p> <p>The Parents allege that the cumulative result of the allegations listed above in this complaint resulted in a denial of FAPE to the Student.</p> <p>(34 CFR § 300.101; OAR 581-015-2040)</p>	<p>Substantiated</p> <p>The District's failure to provide the Student with counseling services as required in the Student's IEP resulted in a loss of educational opportunity.</p>

Issues Outside the Scope of This IDEA Investigation

The Parents allege that District staff treated the Parents in an intimidating and hostile manner and that staff has created a hostile learning environment for the Student. These issues are not within the jurisdiction granted under OAR 581-015-2030 and will not be investigated in the current investigative process. The Parents may file a complaint with the Teachers Standards and Practices Commission.

The Parents allege that the District has falsified some of the Student's attendance, suspension and behavioral records, and has used skewed data from discipline reports to make decisions.

Whether the District falsified records was not central to the Department's investigation, but no findings of document falsification were made. The Parent may address these issues by filing a complaint with the McMinnville School Board.

Requested Corrective Action

The Parent requests the following actions be implemented as resolutions to the Complaint:

1. District to correct discrepancies in attendance records;
2. District to conduct an evaluation and eligibility to determine eligibility under Emotional Disturbance;
3. Following an evaluation in the area of Emotional Disturbance and eligibility determination, District to conduct a facilitated IEP and placement determination meeting, in order to create a robust IEP that addresses each area affected by the Student's disability, with clear and measurable goals. The placement determination meeting to include discussion of access to LRE & extracurricular activities;
4. As compensatory education, District to contract with Sylvan Learning Center to provide instruction in core curriculum (math, reading, writing, science, social studies) until Student reaches grade level;
5. Order the District to provide Parents with prior written notices as required by law;
6. Provide bi-monthly progress monitoring reports on progress toward goals, to include a log the name and service delivery times for all personnel providing specially designed instruction;
7. Expunge all records of behavior and disciplinary actions related to Student's time at the alternative program, because the behaviors in question were a manifestation of the Student's disability, and a result of staff failing to implement the IEP (including the Behavior Support Plan);
8. Oregon Department of Education to conduct a full audit/investigation of the District alternative education program and the impact of attendance at the program on student behavior, academic, and social skills outcomes, as well as an investigation on the numbers of children with behavioral or emotional disturbances who are expelled, drop out, or remove to homebound or home school instruction throughout the District;
9. Provide training to all staff who will have contact with the Student in implementation of the current behavior support plan and new IEP;
10. District to provide (through a third party) training and education for staff to address children with PTSD using trauma-informed practices in the school environment, and;
11. Provide training for staff regarding the significance of parental input throughout the IEP process.

III. FINDINGS OF FACT

1. The Student is thirteen years old and is in the eighth grade. The Student is a skilled musician and demonstrates strengths in the areas of reading and writing. The Student takes classes at a District computer lab for two hours daily, participates in a Band class at a local school, and is receiving tutoring for four hours per week.
2. During the first half of the 2017-2018 school year, the Parents consented to the Student undergoing a special education evaluation. Between December 2017 and January 2018, the District's School Psychologist conducted a file review, Parent and Student interview, cognitive assessment and behavior assessment. The School Psychologist compiled findings from the

evaluation into a report to share it with the Student's team at a February 2018 eligibility meeting.

3. The District School Psychologist reported that the Student's teachers and Parents (each Parent individually and jointly are referred to here as "Parents") rated the Student's levels of "Aggression" and "Conduct Problems" as "Clinically Significant." The Student's classroom teachers, Parents, and the Student all characterized the Student's level of "Defiance/Aggression" as "Very Elevated."
4. The District noted the Student demonstrated many characteristics of Conduct Disorder or Social Maladjustment, which was part of the team's decision to rule out the eligibility category of Emotional Disturbance.
5. On February 13, 2018, an eligibility team convened and found the Student eligible for special education as a student with an Other Health Impairment (OHI). The District considered Emotional Disturbance and Specific Learning Disability as possible areas of eligibility, but found the Student was not eligible for special education services under either of these eligibility categories. All team members, including the Parents, were in agreement with this decision.
6. On March 5, 2018, the Student's IEP Team convened. The Team wrote two goals for Behavior and one goal for Study Skills. The first of the Student's "Behavioral" goals was, "[w]hen given a frustrating situation (i.e., undesired task, demand, and/or undesired peer behavior), with one prompt [the Student] will utilize coping strategies (i.e. take a break, deep breaths, etc.) and return to and remain on task with a calm body and mind for a minimum of 10 minutes . . . across all classroom environments" The second "Behavioral" goal was, the Student "will be given a verbal cue to begin a task or transition with a check to determine that the expectation is understood and begin the task or transition within 1 minutes (sic) on 4 of 5 opportunities over 30 days of data..." The goal for "Study Skills" was, the Student "will demonstrate the characteristic of a self-directed learner 90% of the school day for 5 consecutive weeks . . . come to class prepared; maintain an organization system; turn in work."
7. At the March 5, 2018 IEP Meeting, the Team reviewed the Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP). Key elements of this statement are outlined in the table below:

Elements of PLAAFP	Key Elements Describing Student
Student's overall strengths, interests, and preferences	<ol style="list-style-type: none"> 1. Seventh grade Student; 2. Skilled musician; 3. Academic strengths are in reading and writing; 4. Likes science and technology and is mechanically inclined; 5. Participates well in class and is enthusiastic; and, 6. Growth in self-advocacy and social emotional
Input from Parents, including concerns for enhancing the Student's education.	<ol style="list-style-type: none"> 1. Writing concerns surrounding the process as well as math; 2. Knows information but struggles to get ideas out on paper; 3. Student feels overwhelmed with homework as well as with focus; 4. Parents are concerned that trauma informed school services are not being implemented and this results in more challenging behavior;

	<ol style="list-style-type: none"> 5. Parents are concerned with the current FBA; 6. Parents are concerned that the Student is labeled as a troubled kid, instead of a student that needs support; and, 7. Parents are concerned with the placement options and do not agree with the District's option to provide FAPE.
Present Levels of Academic Achievement including results of recent state or district assessments.	<ol style="list-style-type: none"> 1. Cognitive scores are in the average range as well as academic scores; 2. Struggles to keep track of materials and assignments, has a difficult time completing work in written, digital or group capacities; 3. Forgetful and unorganized in PE; same pattern evident in core classes; 4. All teachers report concerns with lack of organizational skills and on/off task behaviors in the classroom; and, 5. Nearly Meets Level 2 in 5th and 6th grade reading and 5th grade math. Does not meet Level 1 in 6th grade math.⁴
Present Levels of Functional Performance and How Disability Affects Involvement and Progress in the General Education Curriculum	<ol style="list-style-type: none"> 1. Medical Statement: ADHD and PTSD 2/2018; 2. Student is qualified under OHI for ADHD diagnosis and needs supports and specially designed instruction in Behavior and Organization to access education.⁵

8. The Team decided that the Student would receive 30 minutes of specially designed instruction (SDI) in Behavior for 30 minutes per week in the Learning Resource Center (LRC) and the classroom; and 170 minutes per week of SDI in Study Skills in the same settings. The Team also specified that the Student receive "Counseling" two times per month in the Counseling Office.⁶
9. On March 5, 2018, the Team considered a placement in the general education classroom, in the general education classroom with resource room support, and placement in a self-contained class. The Team decided that the Student would participate primarily in general education classes,⁷ and spend one class per day in a Learning Resource Room.
10. On March 21, 2018, the Parents sent the Case Manager an email expressing concern for the Student's education. The Parent listed nine items and remedies that could be incorporated into the Student's IEP. The Case Manager added all nine items to the Parent Concern's section of the Student's IEP (although not verbatim from the Parents' email).
11. The Student's Team changed the Student's placement three times between March 5, 2018 and October 29, 2018. On May 9, 2018, the Team Members agreed to place the Student on Home Instruction provided by a District tutor. The Parents had requested that the Student not attend school for the remainder of the school year because the Student was experiencing

⁴ These assessment scores are undated.

⁵ This section also included information from the evaluation completed with the Student prior to eligibility.

⁶ In its Response the District noted that "it does appear that the related service of counseling has not been provided since May 9, 2018."

⁷ When the team developed this IEP and selected this placement, the Student was already attending classes one period per day at the District alternative program in which students use a variety of software instructional programs.

difficulties with peers and adults in the school environment. The Team did not meet on this occasion to change the IEP. Instead, members of the team discussed the placement change after the Parents requested it, and then District staff sent the Parents an email offering three different placements. The Parents chose the Home Instruction option.

12. During the 2017-2018 school year, the Student was disciplinarily removed from school for a total of 15.5 days, for the following incidents: Abusive/Inappropriate Language (5 days); Disrespect (1.5 days); Defiance and Disrespect (.5 days); Physical aggression (3 days); Abusive/Inappropriate Language, Defiance, Disrespect (.5 days), Fighting (3 days), Use/Possess Tobacco (2 days).
13. On September 25, 2018, the Team added one class period daily so that the Student could attend Band at the middle school. This amendment to the IEP was agreed upon in a meeting that the Student attended.
14. The Student's IEP was amended again in similar fashion in a meeting held on October 29, 2018. At that meeting, the Team changed the Student's placement to an alternative general education classroom with the continued participation in Band class at the middle school.
15. All IEP elements outlined in the chart above remained the same in the three amendments to the IEP as did the goals, SDI, related services, and supplementary aids and services—with three exceptions. The District included a statement from the Band teacher in the October 29, 2018 IEP amendment. The teacher noted that the Student was "without an instrument in the first two weeks of class but met behavior expectations and participated to the best of personal abilities . . . was respectful . . . had polite and appropriate interactions with other students." In both the September 25, 2018 and the October 29, 2018 IEPs, the District specified that the SDI would be provided across all school sites instead of in the classroom and the LRC. Transportation was added as a related service.⁸
16. On November 5, 2018, the Student began attending the District's alternative education middle school program on a half-day schedule. Out of eleven possible school days, the Student attended nine.
17. On November 27, 2018 in the alternative middle school program, the Student received a referral and was suspended from school for refusing to follow staff directions and for putting hands on two staff members. The District recommended expulsion from school. On November 30, 2018, the District convened a Manifestation Determination review meeting. The Team concluded that the Student's behavior in the November 27, 2018 incident was not the direct result of the District's failure to implement the Student's IEP, nor was the Student's conduct caused by or did it have a substantial relationship to the Student's disability.
18. On December 6, 2018, the District convened an expulsion hearing. After all parties presented testimony, the Expulsion Hearing Officer recommended that the Student be expelled from attending a District school through the end of the third quarter and that the Student be permitted to return to school on April 15, 2019.
19. On December 11, 2018, the District informed the Parents by letter that the Student's expulsion would be placed in abeyance and the Student could return to the previous placement (online school through the alternative education program, tutoring, and Band class).

⁸ In the October 29, 2018 IEP, the amount of service time for counseling was listed as "2" minutes per month. Staff noted this was a typing error—the correct amount was 20 minutes.

20. The District sends out report cards and IEP goal progress reports quarterly. During the Complaint period, the District sent the Parents IEP goal progress reports on April 20, 2018, June 15, 2018, and November 9, 2018.
21. The District sent four Prior Written Notices to the Parents during the Complaint period. The first was sent on March 5, 2018, to inform the Parents the Student was eligible for special education and describe the Student's initial placement. The others were sent on May 9, 2018, September 25, 2018, and October 29, 2018 and each documented changes to the Student's placement.
22. While the Student was attending the LRC class at the middle school in March, April and early May of 2018, the Student received SDI in designated goal areas. The LRC teacher used a specific curriculum to teach behavioral, social, study, and organizational skills. In addition, the same teacher was often in the Student's general education classrooms and was able to provide additional SDI as appropriate. The Student had a Google Chromebook with software designed to help track assignments, due dates, etc. The LRC teacher occasionally scribed for the Student and collected completed assignments to turn in to general education teachers.
23. When the Student attended the middle school alternative education program and worked 1:1 with a tutor, the Student received instruction in academic subjects. The teacher in the online program and the Student's tutor designed and provided instruction specific to the Student's academic needs based upon the Student's IEP. In October 2018, the Student's Case Manager sent suggestions of materials the tutor could use to provide SDI in behavioral and social skills goal areas. However, District staff noted in the interviews that in a 1:1 teaching situation, the Student was cooperative and generally followed directions—although the Student was easily distracted and prone to going off-task.
24. The Parents filed this Complaint on January 15, 2019.

III. DISCUSSION

A. IEP Content

The Parents allege the District violated the IDEA when it failed to write an IEP that contained sufficient content. A student's IEP must include such components as a statement of the child's present levels of academic achievement and functional performance, and a statement of the special education and related services and supplementary aids and services to be provided to the student to advance appropriately toward attaining annual goals, and be involved in the general education curriculum both with children with and without disabilities.⁹

1. Appropriate Goals and Specially Designed Instruction

The Parents allege the IEP did not contain appropriate goals to meet a variety of the Student's needs. The Parents were particularly concerned that the Student's IEP goals did not address the Student's needs given the Student's Post Traumatic Stress Disorder (PTSD) diagnosis. At the Student's March 5, 2018 IEP, the Parents expressed concern about addressing the Student's "challenging behavior," were concerned that the Student needed more support, someone the Student could "turn to and talk with" to feel safe when frustrated. In response to these concerns

⁹ 34 C.F.R. § 300.320; OAR 581-015-2200.

and other inputs, the IEP Team developed two goals in the area of behavior, one of which focused on the Student developing and utilizing coping strategies to appropriately respond to frustrating situations. The IEP Team also proposed that the Student receive 30 minutes of weekly specially designed instruction in the area of “Behavior” and twice-monthly counseling sessions. Academically, the Student was found to be in the “average range” and the Student’s IEP Team concluded that the Student did not need specially designed instruction in academic areas such as reading, writing, or math.

The Student’s IEP Team collected evaluation data and input from IEP Team members to develop a targeted plan of IEP goals and services to address the Student’s needs. The Department does not substantiate this allegation.

2. Present Levels of Academic Achievement and Functional Performance (PLAAFP)

The Parents allege that the District violated the IDEA when it did not update the Student’s PLAAFP. The Student’s October 29, 2018 IEP PLAAFP are nearly identical to those in the Student’s March 5, 2018 IEP. Even though the Student advanced from seventh grade to eighth grade, the Student’s October 29, 2018 PLAAFP continued to note that the Student was a “7th grade student.” Also, by October 29, 2018, the Student’s schedule consisted of receiving academic instruction online and through a District-provided tutor, with one 45-minute general education elective at the middle school. However, the Student’s October 29, 2018 PLAAFP seem to reflect the Student’s schedule from the 2017-2018 school year, indicating that the Student attends multiple classes at the District middle school, as the PLAAFP notes that the Student “is most often absent or tardy to periods 3, 4, 5 which is (sic) Band, Science, and math.” In short, the Student’s October 29, 2018 IEP present levels are not present. The Department substantiates this allegation.

3. Counseling Services

The District acknowledges that since May 9, 2018, it did not provide the required amount of counseling services to the Student. The Department recognizes the District’s admission of this issue and substantiates the allegation.

4. Parents’ Concerns

The Parents allege the District failed to incorporate their concerns about the effect of the Student’s PTSD into the PLAAFP. In fact, the District did acknowledge in the PLAAFP that the Parents were concerned about PTSD and its effects on the Student’s behavior. The District was receptive to the Parents’ concerns and considered the Parents’ concerns when developing the Student’s IEP. The Department does not substantiate this allegation.

B. Least Restrictive Environment

1. Predetermined Placement

The Parents allege the District predetermined a placement for the Student and informed the Parents about such predetermination in an email. A school district fails to comply with the IDEA’s requirements when it engages in predetermination, which typically constitutes a school district independently developing an IEP, then presenting it without parent input and participation.¹⁰ In

¹⁰ *W.G. v. Board of Trustees of Target Range School Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992).

May 2018, the Parents requested the Student not attend school because they felt the Student was being harassed by peers and negativity associated with the Student's school environment. The Parents discussed this with District staff by telephone and email. On May 9, 2018, a District administrator sent the Parents an email offering three alternative placements. One of alternative placements was home tutoring, which the Parents selected. The Department did not find that the District engaged in placement predetermination here, and thus does not substantiate this allegation.

2. Consideration of General Education Environment as a Placement Option

The Parents allege the District did not consider the general education environment among the options when it changed the Student's placement. To the maximum extent appropriate, school districts must ensure that students with disabilities are educated with students who do not have disabilities.¹¹

The District did consider general education options in three of the four placement decisions. The District selected general education with support for the Student's placement in the March 5, 2018 and October 29, 2018 IEP Meetings. The District maintained an objective of placing the Student in the general education environment for Band, a class the Student excelled in and enjoyed. At the same time, there were multiple indicators to show that—given the Student's behaviors and demonstrated need—the Student's placement in settings more restrictive than the general education environment was appropriate. The Department does not substantiate this allegation.

3. Shortening the Student's School Day

The Parents allege that the District shortened the Student's schedule through implementation of a Functional Behavioral Assessment rather than an IEP Meeting. Placement decisions for a student with a disability must be determined by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of evaluation data, and placement options.¹² The record shows that the Student's school day was shortened on February 1, 2018, per parent's request. Then, the Student's placement was shifted to home instruction with a tutor on May 9, 2018. The latter decision was made by the Student's IEP Team. The Department does not substantiate this allegation.

C. When IEPs Must Be In Effect

1. IEP Goal Progress Reports

The Parents allege the District did not provide IEP goal progress reports as required. Each student's IEP must include a description of when periodic reports on the progress a child is making toward meeting annual goals will be provided.¹³ Here, the IEP Team agreed that the Student's progress would be reported "in conjunction with school report cards." There were four report card reporting periods during the Complaint period. The District sent the Parents timely and regular IEP goal progress reports, on April 20, 2018, June 15, 2018, and November 9, 2018. The Department does not substantiate this allegation.

¹¹ 34 CFR § 300.114; OAR 581-015-2240.

¹² 34 CFR § 300.116; OAR 581-015-2250.

¹³ 34 CFR § 300.320; OAR 581-015-2200.

2. Delivery of Specially Designed Instruction

The Parents allege the District did not provide the Student with the specially designed instruction, supplementary aids and services, and accommodations and modifications that were prescribed in the Student's IEP. School districts must provide special education and related services to a student with a disability in accordance with the student's IEP.¹⁴ There is sufficient evidence to demonstrate that, with the exception of the related service of counseling as describe above, the District implemented the Student's IEP, inclusive of providing the Student with the specially designed instruction prescribed by the IEP. The Department does not substantiate this allegation.

D. Emotional Disturbance Eligibility Criteria

The Parents allege the District erred when it did not find the Student eligible for special education as a student with an emotional disturbance. Upon completion of assessments and other evaluation materials, a team must determine whether the student has an eligible disability.¹⁵ A student can be found eligible for special education under the category of emotional disturbance if the student exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (1) An inability to learn that cannot be explained by intellectual, sensory, or health factors; (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (3) Inappropriate types of behavior or feelings under normal circumstances; (4) A general pervasive mood of unhappiness or depression; (5) A tendency to develop physical symptoms or fears associated with personal or school problems; and (6) The term includes schizophrenia but does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.¹⁶

Between December 2017 and January 2018, the District's School Psychologist conducted a file review, Parent and Student interview, cognitive assessment and behavior assessment. The School Psychologist compiled findings from the evaluation into a report and shared it with the Student's team at a February 2018 eligibility meeting. After a discussion and based upon the School Psychologist's findings, the Student's eligibility team concluded that the Student did not meet the eligibility criteria for emotional disturbance. All members of the team, including the Parents, agreed with this decision. The Department does not substantiate this allegation.

E. Parent Participation

The Parents allege the District violated the IDEA when it did not allow them the opportunity to fully participate in meetings. Specifically, the Parents felt their concerns about the Student's PTSD and other identified Student needs such as anxiety, lack of support from school staff, and opportunities to participate in the general education curriculum were given insufficient consideration by the District when presented to the IEP Team. A school district must "provide one or both parents the opportunity to participate in meetings with respect to the identification, evaluation, IEP and educational placement" of the Student, as well as the provision of a free appropriate public education (FAPE).¹⁷

The District allowed the Parents to express their concerns regarding the Student and considered the Parents' concerns in developing the Student's IEP. For example, the District was agreeable to consider the benefits and detriments of Parents' desire to increase the Student's participation

¹⁴ 34 CFR § 300.323; OAR 581-015-2220.

¹⁵ 34 CFR § 300.306; OAR 581-015-2120.

¹⁶ 34 CFR § 300.8(c)(4); OAR 581-015-2000(4)(a)(D).

¹⁷ 34 CFR § 300.322; OAR 581-015-2190.

in the general education curriculum. The IEP Team discussed this, but based on the Student's demonstrated need, ultimately selected a more restrictive placement than one the Parents preferred. During the Complaint period, the Parents and the District disagreed over many aspects of the Student's educational program. The Department did not find that the Parents have been denied the opportunity to meaningfully participate in meetings regarding the Student's special education program. The Department does not substantiate this allegation.

F. Prior Written Notice

The Parents allege that the District did not provide them with Prior Written Notice after it made placement decisions or denied the Parents' requests for services. Issuance of a Prior Written Notice is required when a school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of a child or the provision of FAPE.¹⁸ The notice must conform to specific requirements with regard to form and content, including but not limited to the action proposed and the reason for the action.¹⁹

During the Complaint period, the District sent the Parents timely and compliant Prior Written Notices on forms entitled "Prior Notice of Special Education Action." After the District Expulsion Hearing Officer recommended that the Student be expelled, the District did not send the Parents a "Prior Notice of Special Education Action" form. Rather, the District sent the Parents a written correspondence noting that the Student's expulsion would be held in abeyance and the Student could return to the Student's previous placement (online schooling, tutoring, and Band class). The Department does not substantiate this allegation.

G. Disciplinary Removals of More than Ten School Days

The Parents allege the District disciplinarily removed the Student from school for more than ten school days without conducting a Manifestation Determination review. A school district may remove a child from school for violating the school's code of conduct, including suspension, for up to ten school days in a school year to the same extent, and with the same notice, as for children without disabilities.²⁰ If a Student is disciplinarily removed for more than ten consecutive days, or more ten cumulative days in a school year that constitute a pattern, the District must conduct a Manifestation Determination review.²¹

Under these circumstances, a student who has not been found eligible for special education and related services may avail themselves of the above-described protections if the school district had knowledge that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred.²² A school district is deemed to have such knowledge if, before the behavior that precipitated the disciplinary action occurred, one of the following happened: (1) the student's parent expressed concern in writing to District supervisory personnel or the student's teacher that the child was in need of special education related services; (2) the student's parent requested an evaluation of the child; or (3) the student's teacher or other District staff expressed specific concerns about the Student's pattern of behavior directly to District supervisory personnel.²³

¹⁸ OAR 581-015-2310(2)(b).

¹⁹ OAR 581-015-2310.

²⁰ 34 CFR § 300.530; OAR 581-015-2405.

²¹ 34 CFR § 300.530; OAR 581-015-2415.

²² 34 CFR § 300.534; OAR 581-015-2440.

²³ 34 CFR § 300.534; OAR 581-015-2440.

1. 2017-2018 School Year

The record shows that over the course of the 2017-2018 school year, the Student was disciplinarily removed from school for more than 10 school days. On September 8, 2017, the Student was suspended from school for five days for an incident involving “Abusive/Inappropriate Language.” The record does not show that there were any outstanding special education evaluation requests or expressed concerns about the Student’s special education eligibility or patterns of behavior before the September 8, 2017 incident. Three days later, on September 11, 2017, the District obtained signed consent to conduct a functional behavioral assessment. This event marks a date in the record where specific concerns were raised about the Student’s behaviors. The specific behaviors, which are noted in the Student’s functional behavioral assessment, are disrespect toward authority, defiance, swearing/profanity, and disruptive classroom behaviors.

After September 11, 2017, the Student was disciplinarily removed from school for 8.5 cumulative school days that constitute a pattern.²⁴ Specifically, the Student was suspended for: Disrespect (1.5 days), Defiance and Disrespect (.5 days), Physical aggression (3 days), Abusive/Inappropriate Language, Defiance, Disrespect (.5 days) and Fighting (3 days). Each of these incidents reflected behaviors substantially similar to one another and also shared similarities with the observable behaviors that prompted the District to conduct the fall 2017 functional behavioral assessment.

Beginning with the relevant date of September 11, 2017, the Student was disciplinarily removed for 8.5 cumulative school days during the 2017-2018 school year that constitute a pattern. While it may have been prudent to convene a Manifestation Determination review prior to the Student’s disciplinary removals exceeding 10 days for substantially similar behaviors, one was not required. The Department does not substantiate this allegation as to the 2017-2018 school year.

2. 2018-2019 School Year

During the 2018-2019 school year, the District had knowledge of the Student’s disability. Once the Student faced more than 10 days of disciplinary removals, the District timely convened and conducted a Manifestation Determination review. The Department does not substantiate this allegation as to the 2018-2019 school year.

H. Free Appropriate Public Education (FAPE)

The Parents allege that the cumulative result of the allegations listed above in this complaint resulted in a denial of FAPE to the Student. Each school district is responsible for providing a free appropriate public education to all school-age children with disabilities for whom the school district is responsible.²⁵ A failure to implement an IEP may deny a child a free appropriate public education, provided that the failure in implementation “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.”²⁶

²⁴ In April 2018, the Student consented to a District staff search of the Student’s backpack, which resulted in the discovery of two partially smoked cigarettes and a lighter. The Student was suspended for two days. There is no indication that this incident bears a substantial similarity to the Student’s behavior in previous or subsequent incidents that resulted in a disciplinary removal.

²⁵ OAR 581-015-2040.

²⁶ *Van Duyn v. Baker Sch Dist.*, 502 F.3d 811, 822 (9th Cir. 2007).

The IEP Team agreed the Student had difficulty establishing and maintaining relationships with others. The Student, the Parents, and District staff all noted that this affected the Student socially as well as with schoolwork and grades. At least in part because of this, the IEP Team decided it appropriate for the Student to receive counseling twice per month. However, after May 9, 2018, the District did not provide the Student with this service. There is more than a minor discrepancy between the District agreeing to provide 14 counseling sessions between May 2018 and January 2019—and providing no counseling sessions—the former of which represents the number of counseling sessions the Student should have received during the Complaint period. Based on this, the Department substantiates the allegation that the District denied the Student a FAPE with respect to the delivery of counseling services.

CORRECTIVE ACTION²⁷

In the Matter of McMinnville School District 40
Case No. 19-054-003

	Action Required	Submissions²⁸	Due Date
1.	<p>a. To address denial of FAPE and to support increasing inclusion in general education, provide 14 hours of compensatory education services, including counseling provided by a board (TSPC or other) licensed professional, based on the student’s updated present levels of academic and functional levels of achievement inclusion in general education.</p> <p>b. With the Parent, develop a schedule for providing the fourteen (14) hours of compensatory services during non-school hours.</p>	Submit a copy of the schedule, signed by the Parent and a District representative to ODE.	June 30, 2019
2.	Maintain a service log of services provided	Submit a copy of the log to ODE and the Parent	To be based on Parent/District schedule of services

²⁷ The Department’s order shall include any necessary corrective action as well as documentation to ensure that the corrective action has been completed (OAR 581-015-2030(13)). The Department expects and requires the timely completion of corrective action and will verify that the corrective action has been completed as specified in any final order (OAR 581-015-2030(15)). The Department may initiate remedies against a party who refuses to voluntarily comply with a plan of correction. (OAR 581-015-2030 (17) & (18)).

²⁸ 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@ode.state.or.us; fax number (503) 378-5156.

			<ul style="list-style-type: none"> • Following completion of seven hours • Following completion of fourteen hours
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Dated: this 3rd Day of June, 2019

Candace Pelt, Ed. D

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

Mailing Date: June 3, 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).)