

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of )  
Reynolds School District 7 )  
Case No. 22-054-030 )

FINDINGS OF FACT,  
CONCLUSIONS,  
AND FINAL ORDER  
CASE No. 22-054-030

**I. BACKGROUND**

On August 29, 2022, the Oregon Department of Education (Department) received a written complaint from the parent (Parent) of a child (Student) who resides within the Reynolds School District 7 (District). The Parent requested that the Department conduct a special education investigation, as provided by Oregon Administrative Rule (OAR) 581-015-2030. The Department confirmed receipt of this complaint and forwarded the request to the District.

Under state and federal law, the Department must investigate written complaints that allege IDEA violations.<sup>1</sup> The Department must complete the investigation and issue an order within sixty days of receipt of the complaint. OAR 581-015-2030(12). This rule also permits the Department to extend the timeline by mutual agreement of the parties to participate in mediation or local resolution or for exceptional circumstances related to the complaint.<sup>2</sup>

On September 6, 2022, the Department’s Complaint 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 September 20, 2022.

The District submitted a narrative Response on September 20 and most of the documents requested in the RFR. The District provided the remainder of the requested documents on September 23.

The District submitted the following documents on September 20, 2022.

- 1. District’s narrative Response to the complaint
- 2. List of relevant staff members
- 3. Collection of documents from Student’s previous school district, Gresham-Barlow, including:
  - a. Notice of Team Meeting 02/01/21
  - b. Authorization to Use and/or Disclose Educational and Protected Health Information (Parent consented to release of information from Behavioral Learning Network to Gresham-Barlow SD, parent signed 03/12/21)
  - c. Summary of Functional Behavior Assessment (conducted by ABA therapist 04/1/21)

<sup>1</sup> 34 CFR §300.152(a); OAR 581-015-2030(12)  
<sup>2</sup> 34 CFR § 300.152(b); OAR 581-015-2030(12)

- d. Behavior Intervention Plan and Behavior Intervention Implementation Plan (undated)
  - e. Treatment Plan for Applied Behavior Analysis Services (Behavioral Learning Network, undated, but parent signed 04/01/21)
  - f. Notice of Team Meeting 04/05/21
  - g. IEP Progress Report-Measurable Annual Goals 04/14/21
  - h. Notice of Team Meeting 050421
  - i. Meeting Minute 05/17/21
  - j. Student's IEP 05/19/21
  - k. Special Education Placement Determination 05/19/21
  - l. IEP Agenda and Meeting Minutes 05/19/21
  - m. Prior Written Notice 05/19/21)
4. Student's IEP 05/19/21
  5. Prior Written Notice of District decision to create a transfer IEP 06/16/2021
  6. Prior Written Notice to correct clerical errors on the Transfer IEP 07/12/2021
  7. Prior Written Notice proposing placement of Student in Social Communication Classroom at elementary school that is not Student's home school 08/18/21
  8. Notice of Team Meeting 09/20/21
  9. Meeting Minutes 09/23/21
  10. Prior Written Notice to amend IEP 09/23/21
  11. IEP Progress Report-Measurable Annual Goals 01/31/22
  12. Notice of Team Meeting 02/28/2022
  13. Student's IEP 03/16/22
  14. Meeting Minutes 03/16/22
  15. Prior Written Notice 03/16/22
  16. Behavior Support Plan 04/14/22
  17. Special Education Placement Determination 03/16/22
  18. Consent to Conduct Functional Behavioral Assessment 03/30/22
  19. Notice of Team Meeting 04/25/22
  20. Meeting Minutes 05/16/22
  21. ESY Data Collection (including dates from 09/16/21-04/25/22)
  22. IEP Amendment between the Parent and District 06/13/22
  23. IEP Meeting Minutes 06/13/22
  24. Prior Written Notice 06/13/22
  25. IEP Progress Report 06/13/22
  26. Prior Written Notice Individualized Recovery Services Review 06/13/22
  27. Remind messages S. Marino relevant to student's special education services (undated)
  28. Remind messages A. Jones relevant to student's special education services (undated)
  29. General Education Synergy Contact Log relevant to the student's special education dated 09/13/21-08/02/22
  30. Special Education Synergy Contact Log relevant to the student's special education dated 09/13/21-08/02/22

The District submitted the following additional documents on September 23, 2022:

1. Emails relevant to the student’s special education services

The Parent submitted the following documents, which included a narrative rebuttal and additional documents, on September 29, 2022:

1. Complainant 22-054-0[30] Additional Information
2. AJ Communication Log 2021-22
3. 9/7/22 communication log

The Complaint Investigator interviewed the Parent by phone on September 3 and October 7, 2022. The Complaint Investigator read all the documents that the District and the Parent provided and determined that staff interviews were not necessary. The Complaint Investigator reviewed and considered all of these documents, interviews, and exhibits in reaching the findings of fact and conclusions of law contained in this Order. This Order is timely.

## II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under 34 CFR §§ 300.151-153 and OAR 581-015-2030. The Parents allegations and the Department's conclusions are set out in the chart below. The 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 August 30, 2021 to August 29, 2022.

Allegation	Conclusion
<p><b>Placement and Least Restrictive Environment</b></p> <p>The Complaint alleges that, for about a month at the beginning of the 2021-22 school year, the District violated the IDEA’s Least Restrictive Environment provision. During that period, the Student was kept full-time in a self-contained classroom and had no access to typically developing peers, although the Student’s IEP provided for 30 minutes/day non-academic inclusion time.</p> <p><b>(OAR 581-015-2240; 581-015-2250(1)(b) &amp; (c) and (5))</b>  <b>(34 CFR §300-114; 34 CFR §300.116(a) &amp; (e))</b></p>	<p><b>Substantiated</b></p> <p>For several weeks at the beginning of the 2021-22 school year, the Student spent the whole school day in a self-contained class, though the Student’s IEP required that the Student spend time every day in a regular classroom and at recess with typically developing peers.</p>

Allegation	Conclusion
<p><b>When IEPs Must Be In Effect</b></p> <p>The Complaint alleges that, during the 2021-22 school year, the District violated the IDEA by not providing special education and related services in accordance with the Student’s IEP. Specifically, the Complaint alleges that the Student repeatedly went into a “break room” for extended periods of time, sometimes up to two hours, during which the Student received none of the specially designed instruction, related services, and accommodations prescribed by the Student’s IEP.</p> <p><b>(OAR 581-015-2220(1)(b); 34 CFR §300.323)</b></p>	<p><b>Partially Substantiated</b></p> <p>The District did not ensure that the Student’s entire IEP was in effect at the beginning of the 2021-22 school year, and the Student’s Teacher was unaware of some IEP components, including the Behavior Support Plan (BSP) and the inclusion plan.</p> <p>The Department has insufficient data to determine whether the Student’s use of break spaces, as provided in the IEP, was excessive or prevented the Student from accessing IEP services.</p>
<p><b>IEP Team Considerations and Special Factors</b></p> <p>The Complaint alleges that, during the 2021-22 school year, the District violated the IDEA by not developing and implementing a behavior support plan to address behavior that interfered with the Student’s learning. The Complaint specifically alleges that the Parent asked for a Functional Behavioral Assessment (FBA) to identify the function of the Student’s self-isolating behavior, but a school psychologist only conducted a cursory assessment based on a single 20-minute observation that did not focus on the target behavior. The Complaint further alleges that, after the Parent expressed concern that the assessment produced inadequate data to create or revise a behavior support plan, the School Psychologist suggested that the Parent conduct the FBA.</p> <p><b>(OAR 581-015-2205(3)(a); 34 CFR §300.324(a)(2)(I))</b></p>	<p><b>Not Substantiated</b></p> <p>The IDEA does not require school districts to develop and implement BSPs. Further, the IDEA requires districts to conduct FBAs only in very specific circumstances related to the exclusionary discipline of students with disabilities.</p>
<p><b>Individualized COVID-19 Recovery Services</b></p>	<p><b>Substantiated</b></p>

Allegation	Conclusion
<p>The Complaint alleges that the District violated the IDEA by not providing Individualized COVID-19 recovery services based on the Student’s unique needs arising from disability due to the impact of the COVID-19 pandemic. Specifically, the Complaint alleges that the Student’s IEP team determined that the Student needed an extensive array of recovery services, which were to be provided in a four-week, 4 hours per day, 5 days per week summer session. The Complaint further alleges that the four weeks were reduced to three weeks, and the District provided no information to the Parent about whether the Student received any or all of the recovery services that the IEP team had determined were needed.</p> <p><b>(OAR 581-015-2229)</b></p>	<p>The District attempted to provide Individualized COVID-19 Recovery Services as determined necessary by the Student’s IEP team. However, the District was unable to complete these services due to an emergency closure.</p>
<p><b>Extended School Year (ESY)</b></p> <p>The Complaint alleges that, during the 365 day complaint period, the District did not collect and/or consider adequate regression and recoupment data to determine the Student’s need for ESY services. The Complaint further alleges that the District informed the Parent that ESY and COVID-19 recovery services would be similar. The Parent has been unable to determine whether the Student was found eligible for ESY or received ESY services during the truncated COVID-19 recovery session.</p> <p><b>(OAR 581-015-2065; 34 CFR §300.106)</b></p>	<p><b>Not Substantiated</b></p> <p>The IEP team, during a meeting in which the Parent participated, reviewed data about the Student’s progress through the school year and determined that there was no evidence of skill regression or extended recoupment time and thus no need for ESY services.</p>

<b>REQUESTED CORRECTIVE ACTION</b>
<ul style="list-style-type: none"> <li>• Staff training <ul style="list-style-type: none"> <li>○ Provide training to the special education team and general education teacher to make sure they are able to implement [the Student]’s IEP.</li> <li>○ Provide training for district special education staff regarding best practices for conducting a functional behavior assessment and develop, review, or revise a behavior intervention plan.</li> <li>○ Provide training for district special education staff regarding the discussion, documentation, and implementation of ESY services so there are no missed opportunities for students to access ESY services.</li> </ul> </li> </ul>

## REQUESTED CORRECTIVE ACTION

- Compensatory education
  - Provide compensatory education for [the Student] for failing to implement [ ] IEP and missed educational opportunities as a result of this.
  - Provide compensatory education for [the Student] for failing to provide [ ] recovery services as agreed upon during the 2022 summer break.
- Facilitated IEP meeting
  - Hold a facilitated IEP meeting to review the data related to what recovery services were provided, where [the Student] is at with [ ] skills to then discuss and determine recovery services for [the Student]'s needs during the 2022-2023 school year.
  - Hold a facilitated IEP meeting to review ESY data for the 2021-2022 school year and determine if [the Student] should have qualified for ESY services given the district's criteria. If the team determines that [ ] should have qualified, provide compensatory education for [the Student] for failing to provide [ ] ESY services.
- Finish conducting the functional behavior assessment with another specialist who is trained in identifying functions of behavior based on data collected. Ensure frequency data is analyzed, functions of behavior aligned with the collected data, include parent and teacher interview, and conduct multiple observations.
- Develop a behavior support plan based on the data collected through the functional behavioral assessment process and interventions that align with the hypothesized function.
- Provide consistent additional adult support [so the Student] can access all [ ] General Education time and individualized instruction.
- Update the current inclusion plan to outline how [the Student] will be supported in the general education classroom and supports that they need to access.

### III. FINDINGS OF FACT

IDEA regulations limit complaint investigation to alleged violations occurring no more than one year before the Department's receipt of the special education complaint. This complaint Investigation did not consider any IDEA violations alleged to have occurred before August 30, 2021. Many facts listed below relate to an IEP drafted by a different school district (District A) before the complaint period but adopted in its entirety by the District and in effect during the complaint period.

1. The Student is 7 years old and in second grade.
2. The Student is eligible for special education as a child with an Autism Spectrum Disorder (ASD) and is currently placed in a self-contained "Social Communication" classroom in a District elementary school.

3. The Student attended kindergarten in a neighboring school district (District A) during the 2020-21 school year.
4. On May 16, 2021, the Student's Parent and the Student's special education and regular education teachers in District A drafted an Inclusion Plan. The Inclusion Plan provided in part:
  - a. Inclusion Schedule: [The Student] will push into the gen. ed classroom for Art (~15-30 mins), then transition to recess (~15 mins) immediately after as a natural reinforcer. [ ] will return to the self-contained classroom after recess.
  - b. Goal of Inclusion: To increase time in general education with non-disabled peers to practice on-task behavior and demonstrate self-help skills (asking for help appropriately).
  - c. A list of three Social/Emotional IEP goals directly related to increasing inclusion time, which were incorporated into the Student's May 19, 2021 IEP.
5. On May 17, 2021, the Student's IEP team in District A met and began drafting the Student's IEP. Meeting minutes from that date indicated that a second IEP meeting would "review the topics of placement, ESY (extended school year), goals, and general education/inclusion/step-up planning".
6. On May 19, 2021, the IEP team met again to finalize the IEP begun on May 17.

The IEP included in relevant part:

- a. Present levels of functional and developmental performance scores in the low to very low range for communication, daily living, socialization, receptive and expressive language, and other areas.
- b. A statement of how the Student's disability affects involvement and progress in the general curriculum as follows:

As a result of disability, [the Student] has not yet acquired the foundational academic, communication, self-advocacy, and social skills needed to independently access grade level lessons. [The Student's] challenges with social communication and language deficits make it challenging for [ ] to fully access the general education setting independently.

\* \* \* \* \*

To effectively access instruction, [the Student] needs a structured learning environment with a high level of adult support [and] also needs access to visual supports and systems, frequent checks for understanding, support with peer interaction, access to reading support including technology-based applications or peer or adult readers when [ ] disability prevents independent access to text.

c. Special factors for IEP development

- i. Behavior that impedes the Student's learning or the learning of others.  
The IEP noted that "IEP goals in the area of Social/Emotional/Social Skills address these concerns as well as accommodation."
- ii. Communication needs  
The IEP noted that the Student's communication needs "are addressed with speech services, specially designed instruction and classroom supports and accommodations."
- iii. Assistive technology needs  
The IEP noted that the Student's assistive technology needs "are addressed with visual supports and access to technology-based application."

d. Annual Goals

- i. One goal each in reading and math
- ii. One fine motor goal
- iii. Three Social/Emotional goals, one each for turn-taking, hand-raising and asking for help, and socially-appropriate conversation; and
- iv. One Communication annual goal and three objectives addressing aspects of receptive and expressive communication

e. Specially Designed Instruction (SDI)

- i. 120 min/week each Reading and Math SDI, provided by the special education teacher in a special education setting
- ii. 150 min/week Social/Emotional/Social Skills SDI, provided by the special education teacher in a special education setting
- iii. 90 min/month Communication SDI, provided by a speech-language pathologist in a special education setting

f. Related Services

- i. Bus transportation
- ii. 360 min/year occupational therapy, provided by an occupational therapist in a special education setting

g. Aids, Services, and Accommodations

An extensive list of aids, services, and accommodations. Those most relevant to the allegations in this complaint were:

- i. A Step-up Plan for Inclusion, 15 min/day
- ii. Access to adult support "as scheduled on step-up inclusion plan, 15 min/day
- iii. Access to peer models, 20 min/day
- iv. Access to a calming space, 20 min/month
- v. Breaks outlined in a daily schedule, 15 min/day
- vi. A Behavior Intervention Plan (BIP), 15 min/week



#### h. Supports for Personnel

The IEP states that the Supports for Personnel “are necessary for school personnel in order for [the Student] to benefit from instruction in the general education classroom.”

- i. 120 min/year consultation for staff with a learning specialist/special education teacher in general education and special education settings for supporting [the Student’s] effective access to instruction.
  - ii. 60 min/year consultation for staff with a speech and language pathologist in general education and special education for supporting [the Student’s] effective access to instruction.
  - iii. 60 min/year consultation for staff with a behavior intervention specialist in general education and special education settings for supporting [the Student’s] effective access to instruction.
  - iv. 60 min/year consultation for staff with an occupational therapist in general education settings for supporting [the Student’s] effective access to instruction.
7. A BIP incorporated by reference into the IEP as an accommodation focused on a target behavior: “Increase pro-social student skills: follow school routines (including transitions), participate in learning & instruction, communicate needs & wants appropriately.”
8. Meeting minutes from the May 19, 2021 IEP meeting state:
- a. Team met to finalize decisions on IEP development: Placement/inclusion, Goals, and determine need for ESY.
  - b. Reviewed draft of IEP: Goals were updated to reflect priority behavioral needs based on classroom data. Team agreed to start pushing in to Gen Ed for non-academic times: Art and Recess.
  - c. Team agreed to the development of a step-up/inclusion plan to outline criteria for increasing time in Gen Ed.
  - d. Data will be collected for time in gen-ed to reflect participation, whether [the Student] is asking for help as needed and to note any concerning behaviors.
  - e. Team agreed to ESY
9. Special Education Placement Determination

On May 19, 2021, the Student’s placement team in District A considered three placement options: Full inclusion in the regular classroom, with multiple special education sessions per day, or the majority of the day in special education. The team determined that the Student’s Least Restrictive Environment (LRE) was “a specialized program with the majority of the day in special education with a focus on life skills instruction with opportunities for general education inclusion.

10. On May 19, 2021, District A gave the Parent a Prior Written Notice (PWN).

The PWN stated that IEP team had decided to implement the May 19, 2021 IEP after reviewing and updating all required IEP components. The PWN stated:

In addition, the following changes were made:

- Behavior Intervention Plan was updated
- Inclusion Step-up Plan was created

11. At the end of the 2020-21 school year, the Student moved from District A and enrolled in the District.
12. A June 16, 2021 PWN states that the District proposed “to create a transfer IEP to bring [the Student's] IEP information into our system and to have a working document to provide services compliant with the current IEP.” The PWN explained that the reason for this action was that “[t]he district wished to take this action to determine the best placement to offer the services dictated in the IEP.”
13. The IEP for the Student dated July 12, 2021 appears to be the May 19, 2021 IEP from District A transferred in whole to a District IEP form.
14. A PWN dated August 18, 2021 stated that the District proposed placement in a Social Communication Classroom (SCC) at a District elementary school. The District explained that “the SCC aligns with the May 19, 2021 IEP team decision of less than 40% of the day in regular education ... [and] the SCC program has a focus on life skills instruction with the opportunities for general education”. The PWN also cited the Student's Behavior Intervention Plan as a factor relevant to placement in the SCC program.
15. On September 3, 2021, the Parent emailed the Student's Teacher asking for a copy of the class schedule and inquiring about speech and OT services. The Parent added:

“When we were in [District A], [the Student] was being mainstreamed for 15 minutes a day in a non-academic activity (art) and had an inclusion plan that outlined criteria set for increasing [ ] time in general education. Is there a time that we could discuss what this would look like for this year?”

The Teacher replied on the same day with an outline of the Student's daily schedule:

- 9:05 - 9:15 — arrival 8: breakfast in the classroom
- 9:25 — morning circle
- 9:45 — Work rotations. All work rotations will be 1:1 and small group.
- 10:15 — Specials (PE, Music, Library)
- 10:55 — Work rotations
- 11:20 — Recess

- 11:40 — Handwashing and lunch in the classroom. Then sensory/choice/yoga.
- 12:45 — Work rotations
- 2:00 — Art/ Whole group sensory activity (OT will be here on Mondays to do a whole group activity)
- 2:30 — Snack & Recess
- 3:20 — Afternoon circle & get ready to go home.

The Teacher also answered the Parent's questions about speech and OT services.

The Teacher added:

"I have not seen what [the Student's] inclusion plan from [District A] looked like, and it's not attached to [the] IEP. Is there any chance you have a copy I could take a look at?"

The Parent emailed a copy of the inclusion plan later that day.

16. On September 10, 2021, the Parent sent the Teacher an email asking to schedule an IEP meeting to discuss concerns about speech and pragmatic language.

The Teacher replied:

"We can definitely schedule a meeting. We need to talk about mainstreaming as well. I'll email the team to see when they are available."

17. On September 20, 2021, the District sent the Parent a Notice of Team Meeting confirming a September 23, 2021 check-in IEP meeting.
18. Meeting notes dated September 23, 2021 state that the IEP team discussed the inclusion plan and substituted regular classroom time in math for the time in art described in the inclusion plan from District A. In addition, the team agreed to increase speech-language pathologist (SLP) consultation time to 180 minutes per year and to add 75 minutes per week of communication SDI provided by the Teacher.
19. The District in its Response denies that the Student was in a self-contained setting in violation of the IDEA's LRE provision. The District asserts that beginning in September 2021 the Student had recess with typically developing peers from 10:00-10:20 am and from 3:30-3:45 pm for a total of 35 minutes per day. Beginning after the September 23, 2021 meeting, the Student would also spend 30 minutes per day in a regular education math class.
20. The District's Response denies that the Student missed the services prescribed in the IEP numerous and extended periods of time due to time spent in a break space. The District asserts that most breaks were student-initiated, that the breaks lasted from 5-15 minutes, and that staff checked on the Student every 3-5 minutes. The

District cites two occasions (9/13/21 and 5/12/22) when the Student fell asleep in the break space. In both cases, staff notified the Parent, and the Parent indicated that it was okay for the Student to sleep.

21. In a Reply to the District's Response, the Parent disputes the District's statements about the Student's time in a break space and points out that the IEP provides that the Student should have 20 minutes per month in a calming space.

The Parent's Reply included an activity log indicating numerous instances of the Student becoming upset, and on the following occasions, the Student used a break space or calming space or otherwise separated from class activities:

- a. 12/14 The Student "took a break"
- b. 12/17 The Student "took a break"
- c. 1/7 The Student "ate [ ] lunch in a quiet spot"
- d. 1/27 The Student "took a quick break"
- e. 1/28 The Student "cried in the break space for about 30 minutes"
- f. 2/11 The Student "cried a bit in the break space but then rejoined the group"
- g. 3/1 The Student "fell asleep after lunch and slept for about 15 mins"
- h. 3/29 The Student "shut down for 15 mins or so"
- i. 4/7 The Student "was angry for a good hour"
- j. 4/18 The Student "insisted on taking a break instead of creating the project they had prepared"
- k. 4/19 The Student "refused to participate in art today and opted for the break space [and] proceeded to fall asleep ... from about 3:10-3:40"
- l. 4/20 The Student ""sat down at a table and fell asleep. [ ] slept for about 40 minutes"
- m. 4/26 The Student "chose the break space and then fell asleep for about 45 mins"
- n. 4/27 The Student "fell asleep again. Only slept for about 15 mins"
- o. 5/18 The Student took a break in the break space and fell asleep. [ ] did complain about being tired throughout the morning"

- p. 6/6 The Student “was a bit grumpy this morning but bounced back after ... lunch and took a 15 min nap [and] refused to go to music”
  - q. 6/10 The Student “had trouble transitioning from activity to activity. . . .At one point [ ] went to the breakspace and fell asleep for about 45 mins”
  - r. 9/7 The Student “took a 45 min nap and felt much better afterwards”
22. An IEP Progress Report—Measurable Annual Goals dated January 31, 2022 rated the Student’s progress as 4 (Progress has been made towards the goal. It appears that the goal will be met by the next IEP review) or 5 (Performance is at or above what is required to meet the goal by the next review in all annual IEP goals).
23. A Notice of Team Meeting dated February 28, 2022 confirmed an IEP review meeting to be held March 16, 2022.
24. An IEP dated March 16, 2022 includes the following content relevant to this Complaint:
- a. ESY: Current data shows no regression of skills over school breaks. However, the team would like to review data from Summer Recovery Services and will compare with data taken in September to review regression and length of time for recoupment of skills to determine if ESY services are necessary during the summer of 2022.
  - b. [The Student] qualifies for Recovery Services during the Summer of 2022 due to missed services during Comprehensive Distance Learning. Recovery Services will be provided by the district outside the standard instructional day.
  - c. Special Factors: The IEP notes that the Student exhibits behavior that impedes learning and explains that “IEP goals in the area of Social/Emotional/Social Skills address these concerns as well as accommodations. A Functional Behavior Assessment is being conducted.”
  - d. Annual Goals: The IEP includes annual goals in Reading, Mathematics, Social Skills, Communication Skills, and Motor Skills, each more challenging than in the May 19, 2021 IEP.
  - e. Specially Designed Instruction (all provided in a special education classroom)
    - i. 60 min/week Academic Readiness
    - ii. 60 min/week Written Language
    - iii. 75 min/week Mathematics
    - iv. 150 min/week Social Skills
    - v. 75 min/week Communication Skills
    - vi. 75 min/week Reading

- f. Related Services
  - i. 300 min/year Occupational Therapy
  - ii. 90 min/month Speech/Language Services

- g. Extended School Year Services (ESY)

“Current data shows NO regression and/or recoupment of skills”

- h. The IEP lists 25 accommodations, including the following accommodations relevant to this complaint:
  - i. Step-up Plan for Inclusion and adult assistance fade plan
  - ii. Access to a calming place, 20 min/mon
  - iii. Breaks outlined in a daily schedule and prompt breaks, 15 min/day
- i. Modifications: Modified curriculum, 10 min/week
- j. The IEP includes the same supports for personnel as in the May 19, 2021 IEP except for an increase in SLP consultation from 60 min/year to 180 min/year

25. An Inclusion Plan Annual Review dated March 16, 2022 includes the following:

- a. Inclusion schedule: [The Student] will push into the gen ed class for 30 minutes during math manipulative time. Then [ ] will meet the SC at recess immediately followed by dismissal.
- b. Goal of Inclusion: To increase time in general education with non-disabled peers to practice on-task behavior and demonstrate self-help skills (asking for help appropriately)
- c. IEP goals or objectives directly related to increasing inclusion time: two social skills goals from the IEP

26. The 1:1 Educational Assistance Support Plan (Fade Plan) dated March 16, 2022 states:

- a. “It is never advised that an IEP team assign one-on-one para-educator support to a student for the entire school day unless data indicates that a student requires this level of support in order to access their education.”
- b. The document describes a “fading plan” that includes IEP goals that support independent functioning, a fading plan hierarchy, criteria, and data collection.

27. The meeting minutes dated March 16, 2022 include the following:

- a. Summarized IEP development

- b. The team agreed that a new BSP was needed.
  - c. The team discussed fading 1:1 support for the Student in regular classroom inclusion time, and the Parent expressed misgivings.
  - d. The team agreed to continue the placement in the SCC.
28. A PWN dated March 16, 2022 includes in relevant part:
- a. Description of actions proposed or refused: To review the Student’s IEP, update present levels and goals, create an inclusion and fade plan, conduct an FBA, discuss a BSP, continue current placement.
  - b. Relevant factors: “A draft of the IEP inclusion and fade plans will be provided to parents and attached to the IEP before finalization. The FBA and Behavior Support Plan will be provided to parents and attached to the IEP process when complete.”
29. The Parent signed Consent to Conduct a Functional Behavioral Assessment on March 30, 2022
30. A single page titled “Observation” and dated April 1, 2022. It appears that the observation was conducted between 1:17 p.m. and 1:28 p.m. “FBA Observation” is hand-written on a yellow post-it. One paragraph appears on this page:
- [The Student] approached this examiner and gently said “hi.” [The Student] maintained good social distancing [and] then sat directly next to a teaching assistant at a table who read to the small group a book with large pictures. [The Student] was able to follow along as the book was read shown by good eye contact with the book and remaining seated without excessive movement. [The Student] appeared quiet and patient even though the room was noisy with several staff and students moving about. [The Student] spoke to staff with a low volume. On one occasion [the Student] was pushed by a peer but did not retaliate.
31. A Notice of Team Meeting dated April 25, 2022 confirmed a meeting to be held on May 16, 2022 to: “Follow-up on IEP meeting, discuss ESY, FBA, Recovery Services, and Fade Plan.”
32. Meeting notes dated May 16, 2022 indicate that the team discussed the following issues:
- a. ESY and Individualized COVID-19 Recovery Services: Staff explained that ESY and Individualized COVID-19 Recovery Services would look very similar, but that there were different requirements with different criteria. District staff members addressed the Parent’s concerns about whether the Student needed ESY

because of demonstrated skill regression and slow recoupment time. The SLP shared a table showing the Student's progress toward IEP goals at four points during the school year—9/16/21, 1/4/22, 3/29/22, and 4/25/22—which showed no pattern of regression and slow recoupment.

- b. FBA: The Parent said that the April 1, 2022 observation was not thorough and that it lacked antecedent-behavior-consequence (ABC) data of an FBA. The School Psychologist who conducted the 11-minute observation and wrote the notes quoted in 32 above suggested that the Parent should draft the BSP. The Parent replied that the BSP should be written by a behavior specialist, and behavior consultation time in the Student's IEP could be used for that purpose. The School Psychologist and the Teacher agreed to work on the FBA and BSP.
  - c. Fade Plan. The team discussed plans to increase the Student's time in regular education settings and fade 1:1 assistance as the Student adapted to time in regular education settings.
33. The Student's IEP was revised at the Parent's request on June 13, 2022. The Parent signed a written agreement to revise the IEP without an IEP meeting. Revisions included:
- a. Addition of transportation to enable the Student to access COVID-19 recovery services during the summer.
  - b. Removal of the incomplete FBA, which could be added again after a team meeting and decision.
34. An IEP Progress Report dated August 4, 2022 indicated that, as of June 15, 2022, the student's progress was rated as 4 (Progress has been made towards the goal. It appears that the goal will be met by the next IEP review) or 5 (Performance is at or above what is required to meet the goal by the next review in all annual IEP goals. As of August 4, 2022—the end of the Summer Session—the Student showed neither progress nor regression).

## IV. DISCUSSION

### Placement and Least Restrictive Environment

The Complaint alleges that for about a month at the beginning of the 2021-22 school year, the District violated the IDEA's LRE provision. During that period, the Student was kept full-time in a self-contained classroom and had no access to typically developing peers, although the Student's IEP provided for 30 minutes per day non-academic inclusion time.

The IDEA requires that school districts must make available a continuum of alternative placements to meet the needs of students with disabilities. Points on the continuum



range from instruction in regular classes to instruction in hospitals or institutions. Districts must “[m]ake provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.”<sup>3</sup>

Although the IDEA states a preference for instruction in the regular class setting, LRE is not a particular point on the continuum; it is the concept that each student with a disability should be educated with typically developing peers to the maximum extent appropriate given their individual needs. The IDEA provides that:

To the maximum extent appropriate, children with disabilities ... are educated with children who are non-disabled; and “[s]pecial classes, separate schooling, or other removal ... from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be satisfactorily achieved.”<sup>4</sup>

A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.<sup>5</sup>

The IDEA describes the procedures for selecting placement for a student with a disability.<sup>6</sup> A team that includes the parents and other persons knowledgeable about the student, the evaluation data, and the placement options determine the LRE for the individual student.<sup>7</sup> In selecting the LRE, the team must consider any potential harmful effect on the student or on the quality of services. The placement decision follows IEP development and must be based on a student’s completed IEP. The team must determine placement at least once per year. The student’s placement must be as close as possible to the student’s home, and the student must be educated in the school he or she would attend if nondisabled unless implementation of the IEP requires a different school.

In this case, the placement determination in District A was a self-contained life-skills classroom with opportunities for general education inclusion. The District adopted District A’s placement determination and placed the Student in a life-skills classroom with opportunities for general education inclusion.

The IEP in effect in both District A and the District incorporated a Step-up Plan for Inclusion (Inclusion Plan) as an IEP accommodation. The Inclusion Plan provided that the Student would have 15-20 minutes/day in art class followed by a 15 minute recess period. Between the beginning of the 2021-22 school year and September 23, 2021, the Student had no scheduled time with typically developing peers.

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<sup>3</sup> 34 CFR §300.115; OAR 581-015-2245

<sup>4</sup> 34 CFR §300.114; OAR 581-015-2240

<sup>5</sup> 34 CFR §300.116(e); OAR 581-015-2250(5)

<sup>6</sup> 34 CFR §300.116; OAR 581-015-2250

<sup>7</sup> The placement team is frequently but not necessarily the IEP team.

The description in the District's Response of the Student's recess time in September 2021 differs from the Teacher's contemporaneous report of the Student's class schedule. The Teacher's emails to the Parent prior to the September 23 IEP meeting indicated no inclusion time. However, there is no dispute that following the September 23 IEP meeting, the Student had both regular class time and recess time with typically developing peers at least as much as the IEP prescribed.

The Department substantiates this allegation.

### **When IEPs Must Be In Effect**

The complaint alleges that, during the 2021-22 school year, the District violated the IDEA by not providing special education and related services in accordance with the Student's IEP. Specifically, the complaint alleges that the Student repeatedly went into a "break room" for extended periods of time, sometimes up to two hours, during which the Student received none of the SDI, related services, and accommodations prescribed by the Student's IEP.

The IDEA provides that at the beginning of each school year, school districts must have in effect an IEP for each student with a disability.<sup>8</sup> A school district must make special education and related services available to a student in accordance with an IEP.<sup>9</sup> The IEP of a student with a disability must be accessible to teachers and other service providers responsible for IEP implementation, and the District must ensure that all providers are aware of their specific responsibilities for implementing the IEP.<sup>10</sup>

At the beginning of the 2021-22 school year, the Teacher was unaware of some accommodations in the IEP that the District had adopted in its entirety from District A. Most relevant to the complaint, the Teacher was unaware of the inclusion plan or the BSP until the Parent provided copies of those documents.

The Student's self-isolating behavior concerns the Parent, who believes that the Student has missed IEP services. According to information in the District Response and in the communication log the Parent shared, the total amount of time the Student spent apart from scheduled class activities was 475 minutes between September 13, 2021 and September 7, 2022. That could add up to a significant portion of the SDI and related services that the IEP prescribes. However, the IEP also prescribes break time of 15 minutes per day and use of calming space 20 minutes per month for a total possible 300 minutes/month of break time. Cumulatively, over the period from September 12, 2021 to September 7, 2022, the IEP provided significantly more than 475 minutes of break time. The available data is insufficient to quantify any possible lost educational opportunity.

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<sup>8</sup> 34 CFR §323(a); OAR 581-015-2220(1)(a)

<sup>9</sup> 34 CFR §300.323(c)(2); OAR 581-015-2220(1)(b)

<sup>10</sup> 34 CFR §300.323(d); OAR 581-015-2220(3)

The Department substantiates the allegation that the Student's IEP was not fully implemented until September 23, 2021 because the Teacher and other providers were unaware of at least some of the IEP's components. The Department is unable to determine whether the Student's use of break time was excessive or constituted a material failure to implement the Student's IEP.

### **IEP Team Considerations and Special Factors**

The Complaint alleges that, during the 2021-22 school year, the District violated the IDEA by not developing and implementing a BSP to address behavior that interfered with the Student's learning. The Complaint specifically alleges that the Parent asked for an FBA to identify the function of the Student's self-isolating behavior, but a school psychologist only conducted a cursory assessment based on a single 11-minute observation that did not focus on the target behavior. The Complaint further alleges that, after the Parent expressed concern that the assessment produced inadequate data to create or revise a BSP, the School Psychologist suggested that the Parent develop the BSP.

The academic and practice-oriented special education literature is rife with guidance about FBAs and BSPs; however nothing in the IDEA expressly requires a school district to develop a BSP, and the only requirement for an FBA in the IDEA and its implementing regulations appears in the provisions governing exclusionary discipline of students with disabilities.<sup>11</sup> In Oregon, a school district must conduct an FBA and develop or revise a BIP for a student with a disability who has an IEP if the student has "placed the student, other students, or staff at imminent risk of serious bodily injury as a result of the student's behavior."<sup>12</sup>

The IDEA does not ignore the need to address challenging behavior in students with disabilities. The statute and regulations provide that, in developing an IEP, the IEP team must consider several specified special factors.<sup>13</sup> If a student's behavior impedes the student's learning or that of others, the IDEA requires an IEP team to "consider the use of positive behavioral interventions and supports, and other strategies to address that behavior."<sup>14</sup> If the IEP team determines that a student exhibits behavior that the IEP should address, the team may incorporate the behavioral interventions and supports into the IEP or may create a separate BSP. Assuming that an IEP team determines that the IEP must include positive behavioral interventions and supports, the team must rely on assessment information to determine what IEP content (SDI, related services, modifications, accommodations, etc.) is needed to address. However, the IDEA does not expressly require an FBA in this situation.

Nevertheless, IEP teams must complete reevaluation procedures when "the public agency determines that the educational or related services needs, including improved

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<sup>11</sup> 34 CFR §300.530 et seq; OAR 581-015-2400 et seq. See also OAR 581-015-2181.

<sup>12</sup> OAR 581-015-2181

<sup>13</sup> 34 CFR §300.324(a)(2); OAR 581-015-2205(2)

<sup>14</sup> 34 CFR §300.324(a)(2)(I); OAR 581-015-2205(2)(a)

academic achievement and functional performance, of the child warrant a reevaluation.”<sup>15</sup> On March 22, 2022, the Student’s IEP team determined that conducting an FBA was warranted, following the Parent’s request, and received consent for this reevaluation. When conducting evaluations, public agencies must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent.”<sup>16</sup> Additionally, public agencies must “not use any single measure or assessment as the sole criterion for determining . . . an appropriate educational program for the child.”<sup>17</sup> After receiving consent for a FBA to determine the function of the Student’s self-isolating behavior, the District conducted a single observation in fulfillment of this reevaluation.

The Department has issued guidance concerning essential elements of quality FBAs.<sup>18</sup> That guidance notes, “The outcome of an FBA is to identify the function of a student’s behavior, student strengths, and student needs in order to build effective, individualized plans. Typically, the FBA process involves both direct and indirect assessments of the student’s behavior. Functional assessment procedures typically include these four activities:

1. Review of records, including prior interventions and results.
2. Formal and informal measurement procedures.
3. Observations of the student’s behavior in more than one setting and at various times.
4. Interviews with individuals familiar with the student, including school staff, family members, and the student.”

Despite receiving consent for an FBA, the District did not sufficiently complete the required procedures.

The Department substantiates this allegation.

### **Individualized COVID-19 Recovery Services**

The Complaint alleges that the District violated the IDEA by not providing COVID-19 recovery services based on the Student’s unique needs arising from disability due to the impact of the COVID-19 pandemic. Specifically, the Complaint alleges that Student’s IEP team determined that the Student should receive an extensive array of recovery services, which were to be provided in a four-week, 4 hours per day, 5 days per week summer session. The Complaint further alleges that the four weeks were reduced to 3 weeks, and the District provided no information to the Parent about whether the Student received any or all of the recovery services that the IEP team had determined were needed.

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<sup>15</sup> 34 CFR § 300.303(a)(1)

<sup>16</sup> 34 CFR § 300.304 (b)(1)

<sup>17</sup> 34 CFR § 300.304(b)(2)

<sup>18</sup> <https://www.oregon.gov/ode/students-and-family/SpecialEducation/GeneralSupervision/Documents/Oregon%20Abbreviated%20School%20Day%20Program%20Placement%20Guidance.pdf>

The IDEA does not include any provisions specific to the COVID-19 pandemic. The Office of Special Education Programs (OSEP) at the U.S. Department of Education has offered non-regulatory guidance on the issue providing FAPE to students with disabilities in circumstances in which a school district is unable to provide services in accordance with IEPs. In the past, OSEP has addressed situations in which students with disabilities lost educational benefit through disruption in implementation of their IEPs due to public health emergencies,<sup>19</sup> teacher strikes,<sup>20</sup> or natural disasters.<sup>21</sup> In each circumstance, OSEP stated that following an interruption in the delivery of IEP services, students' IEP teams must make individualized determinations as to whether, and to what extent, it may be necessary to provide services to compensate for lost educational opportunities and benefits. OSEP repeated this guidance during the COVID-19 pandemic.<sup>22</sup>

The Department issued a new Oregon Administrative Rule (OAR)<sup>23</sup> in late December 2021 that conforms to OSEP guidance. This rule provides that students with IEPs may be eligible for Individualized COVID-19 Recovery Services. The need for Individualized COVID-19 Recovery Services is an individualized, case-by-case decision by students' IEP teams.

The IEP team for each student with an IEP must consider the impact of the COVID-19 pandemic on the implementation of the eligible student's IEP<sup>24</sup> and the impact of COVID-19 on the student's "ability to engage in their education, develop and re-establish social connections with peers and school personnel, and adapt to the structure of in-person learning."<sup>25</sup>

An IEP team that decides a student needs Individualized COVID-19 Recovery Services must amend the student's IEP to reflect that decision<sup>26</sup> and must provide PWN describing the services to be provided, the initiation and duration of the services, and the frequency, amount, location, and provider of the services.<sup>27</sup> Individualized COVID-19 Recovery Services may include, but are not limited to: (a) special education and related services; (b) supplementary aids and services; (c) additional or intensified instruction; (d) social emotional learning support; and (e) peer or adult support.<sup>28</sup>

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<sup>19</sup> Questions and Answers on Providing Services to Children with Disabilities During an H1n1 Outbreak (December 2009)

<sup>20</sup> OSEP Letter to Bergament (December 2013)

<sup>21</sup> Non-Regulatory Guidance on Flexibility and Waivers for Grantees and Program Participants Impacted by Federally Declared Disasters (September 2017)

<sup>22</sup> Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act (September 2021); OSEP Letter to Wolfram and Mandlawitz (January 2022)

<sup>23</sup> OAR 581-015-2229 Individualized COVID-19 Recovery Services

<sup>24</sup> OAR 581-015-2229(3)(c)

<sup>25</sup> OAR 581-015-2229(3)(a)

<sup>26</sup> OAR 581-015-2229(5)

<sup>27</sup> OAR 581-015-2229(7)

<sup>28</sup> OAR 581-015-2229(2)

In this case, the IEP team considered the impact of COVID-19 on the Student and determined that recovery services were needed. The IEP team identified an extensive array of services in the areas in which the Student received special education during the school year (i.e., communication, social skills, behavior, academic readiness, math, reading, and written language). The offered COVID-19 Recovery Services were described as a specified number of SDI hours per week. The services were to be provided during a 2022 summer school session, which was originally scheduled for four weeks. An emergency closure cut the duration of the summer session to three weeks, a circumstance beyond the District's control. Despite this emergency closure, the District made provisions to ensure the total amount of required Individualized COVID-19 Recovery Services were provided to the Student. Regardless, the Student was not provided with Individualized COVID-19 Recovery Services as prescribed in the IEP. The IEP team had an obligation to reconsider provision of these services in light of the changing District context and failed to do so.

During the three summer session weeks, the Student received Individualized COVID-19 Recovery Services as described in the PWN. The Student's August 4, 2022 IEP Progress Report shows little or no progress toward the Student's annual goals, but it also shows no regression since the June 15, 2022 IEP progress report.

In its Response to this Complaint, the District stated that, at the Student's next IEP meeting, the IEP team would consider whether the Student might need additional Individualized COVID-19 Recovery Services during the 2022-23 school year or during summer 2023.

The Department substantiates this allegation.

### **Extended School Year**

The Complaint alleges that, during the 365 day complaint period, the District did not collect and/or consider adequate regression and recoupment data to determine the Student's need for ESY services. The Complaint further alleges that the District informed the Parent that ESY and Individualized COVID-19 Recovery Services would be similar. The Parent has been unable to determine whether the Student was found eligible for ESY or received ESY services during the truncated individualized COVID-19 recovery services session.

ESY services refers to special education and related services provided to a student with a disability at no cost to parents, beyond the normal school year, and in accordance with the student's IEP.<sup>29</sup> Federal IDEA regulations provide that school districts must make available ESY services if a student's IEP team determines that such services are needed for the student to receive a FAPE.<sup>30</sup> Oregon special education rules require school districts to develop criteria for determining a student's need for ESY related to skill regression and recoupment time, based on documented evidence or predictions

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<sup>29</sup> 34 CFR §300.106(b)

<sup>30</sup> 34 CFR §300.106(a)

according to the professional judgment of the IEP team.<sup>31</sup> The purpose of ESY services is to enable the student to maintain skills rather than to acquire new skills.<sup>32</sup>

In this case, the Student's IEP team determined that there was no data indicating skill regression during school breaks and extended periods of recoupment time. The team discussed this at the May 16, 2022 IEP meeting, at which the Parent participated. The SLP reviewed with the Parent the data available about the Student's progress toward IEP goals. The Parent's concern about a lack of pre-break data is understandable; pre- and post-break valid and reliable assessment data may even be best practice. However, though the ESY OARs require school districts to establish criteria to identify skill regression and recoupment time, they do not expressly require pre- and post-break data, nor do they require that documented evidence be numerical.

The Student's IEP team, including the Parent, reviewed data, some descriptive and qualitative and some quantitative, about the Student's performance relative to IEP goals from 9/16/21 to 4/25/22. Progress toward some goals appeared to be steady and a few—especially social skills goals—appeared slow or even flat. None of the data demonstrated regression.

The Department does not substantiate this allegation.

## V. CORRECTIVE ACTION<sup>33</sup>

In the Matter of Reynolds School District 7  
Case No. 22-054-030

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

Action Required	Submissions	Due Date
<p>1. Special education administrative staff will develop a plan for ensuring that before the beginning of every school year</p> <ul style="list-style-type: none"><li>The IEPs for each Student eligible for special education are complete, including behavior plans, inclusion plans, and other separate documents necessary for IEP implementation</li></ul>	<p>The District will submit to the Department a copy of written procedures for ensuring that IEPs are in effect at the beginning of every school year.</p>	<p><b>January 15, 2023</b></p>

<sup>31</sup> OAR 581-015-2065(5)

<sup>32</sup> OAR 581-015-2065(4)

<sup>33</sup> 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)).

<ul style="list-style-type: none"> <li>To provide electronic copies of IEPs to all staff members responsible for implementing them, and ensure that staff members understand their roles and responsibilities with respect to each IEP</li> </ul>		
<p>2. The District must complete an appropriate FBA.</p>	<p>The District will submit to the Department a copy of the completed FBA.</p>	<p><b>December 1, 2022</b></p>
<p>3. The IEP team must consider the need for Individualized COVID-19 Recovery Services in light of the Student's current circumstances, including the change in provision of Individualized COVID-19 Recovery Services previously prescribed by the IEP team due to circumstances outside the District's control.</p>	<p>The District will hold an IEP meeting to discuss the need for Individualized COVID-19 Services and provide a copy of the resulting IEP to the Department.</p>	<p><b>December 1, 2022</b></p>

Dated: this 27<sup>th</sup> Day of October, 2022




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Tenneal Wetherell  
Assistant Superintendent  
Office of Enhancing Student Opportunities

E-mailing Date: October 27, 2022

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).)