

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
OREGON DEPARTMENT OF EDUCATION**

<b>IN THE MATTER OF LINCOLN COUNTY SCHOOL DISTRICT</b>	)	OAH No. _____
	)	ODE No. _____
and	)	<b>REQUEST FOR DUE PROCESS HEARING</b>
	)	
<b>STUDENT S.C.</b>	)	

**1. COMPLAINANT (DISTRICT) INFORMATION:**

Lincoln County School District  
1212 NE Fogarty St.  
Newport, OR 97365

**2. CHILD (STUDENT) INFORMATION:**

S [REDACTED] C [REDACTED]  
[REDACTED]

Grade: 9<sup>th</sup>  
Primary Eligibility: Other Health Impaired  
School Child Currently Attends: Latham Centers

**3. DISTRICT LEGAL REPRESENTATION:**

Nancy Hungerford and Richard Cohn-Lee  
The Hungerford Law Firm  
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#### **4. CONCERNS – OFFER OF FREE, APPROPRIATE PUBLIC EDUCATION/PLACEMENT**

##### **a. General Background:**

Student is currently a ninth grader attending Latham Centers (“Latham”), a residential private school located in Massachusetts. Previously, student was a ninth-grader at Newport High School (“NHS”) in the Lincoln County School District (the “District”). Student is eligible for special education services under the IDEA under the category of Other Health Impaired (“OHI”) and has been diagnosed with Prader Willi Syndrome (“PWS”), a genetic condition affecting behavior, appetite, growth, sleep as well as resulting in cognitive, intellectual and developmental delays.

Student has attended schools in the District from Kindergarten through 5<sup>th</sup>-grade at Sam Case Elementary School in Newport, Oregon, with the exception of a period during her 3<sup>rd</sup> and 4<sup>th</sup>-grade years when she was enrolled by her parent in the Olalla Center, a day treatment program providing mental health services, in Toledo, Oregon which is within District boundaries.

Student attended Newport Middle School (NMS) in Newport, Oregon during the 2018-19 and 2019-20 school years, and continuing during the 2020-21 school year including remote instruction during COVID. In the fall of 2021, she attended NHS. During that time, Student received special education services through an Individual Education Plan (IEP) that was crafted by the IEP team, consisting of District staff and Student’s Parent. With the assistance of special education teachers and other service providers and the supports written into the IEP, including a behavior support plan (BSP) and a Food Security Plan (FSP), Student was able to attend NMS and NHS, full-time.

Beginning in January 2020, the IEP team met with Dr. Amy McTighe, a PWS expert invited by Student's Parent to address the impact of food security issues on Student's behaviors.

Following the adjustment of Student's schedule to full-time in the SLC in late January 2020, Student experienced no other behavioral incidents through the closure of school due to COVID on March 13, 2020. Student participated in all on-line classes with her SLC teacher during the spring of 2020.

Parent filed a request for due process hearing under IDEA through the Oregon Department of Education on May 21, 2020.

The District held an IEP meeting beginning in late May and concluding June 3, 2020, with Dr. McTighe participating and providing information to the team to assist in revising Student's IEP. In August 2020, Dr. McTighe also provided three hours of inservice on PWS for educators at NMS working directly with Student, and, in early October, 2020, provided an additional three hours of PWS-related inservice with all staff members at NMS.

In August 2020, Student was placed by her Parent in a residential treatment program (the Stabilization and Crisis Unit) operated by the State of Oregon, through the Developmental Disabilities Services department. Throughout the fall and winter of 2020-2021, Student was served in a residential group therapy placement in the Portland area, but the District continued to provide her educational program, remotely, as it did for all other District students during the continued COVID program of Comprehensive Distance Learning (CDL).

On September 18, 2020, the IEP team, including the Parent, met and revised the IEP, BSP, and FSP, incorporating the recommendations of Dr. McTighe throughout. Student continued in CDL with District instructors through the Fall and Winter of 2020-2021, until she was removed from the residential treatment program and rejoined her agemates in early March 2021, returning to NMS for “hybrid” instruction, alternating continued distance learning with on-site instruction in the SLC.

An administrative due process hearing was conducted in October 2020, by ALJ Messecar, with a Final Order being issued on Dec. 22, 2020. ALJ Messecar concluded that the District did not provide Student with a FAPE as required under the IDEA but only for the period of May 21, 2018 to May 21, 2020 [Final Order, p. 3]. Even so, the ALJ ordered no remedy for that violation.

ALJ Messecar’s Order stated in relevant part that:

“The District is to pay the cost of enrolling the student at the Latham Center, including non-medical care, room and board, for the period commencing on the first day of the winter 2021 semester until the District provides TFS in the school-wide setting along with an IEP which addresses all of the inadequacies identified in this order or the next annual IEP which appears to be September 2021.” Final Order, p. 68 [emphasis added].

Student sought enforcement of this order in federal district court in Oregon and by order dated March 22, 2021, the court denied the student’s motion. In doing so, the District court noted that “Plaintiff is unable to point to any explicit finding or conclusion by the ALJ explicitly rejecting the September 2020 IEP as inadequate.” Instead, the ALJ made express findings noting the September 2020 IEP went much further than the earlier IEPs,” citing to staff training, behavior and food safety protocols, food security in all in-school environments, increased specially designed instruction including five times the

previous math instruction, and the addition of 100 minutes of weekly behavior and self-care instruction. The District court further interpreted the ALJ's Order as a conditional one, presenting Latham as the intended placement only if the District has not developed an IEP that addresses the inadequacies of the previous IEPs, including total food security. Relatedly, the District Court reviewed the factual record, considered supplemental briefing as to the meaning of the ALJ's Order and drew reasonable inferences and conclusions from the record, including that nowhere did the ALJ conclude that the September 2020 was legally inadequate. Instead, the District Court correctly concluded that "the question is one that must be answered at the administrative level, and not on an expedited basis during an emergency motion for a stay put order before this Court."

During the fall of 2021, Student attended full-time at NHS, which implemented a new IEP developed in June 2021 but retaining the FSP and BSP and other provisions recommended by Dr. McTighe in the September 2020 IEP. Student attended classes in the Learning Center, as well as a regular education elective of her choice, Choir. During this period, Student had no major behavioral incidents that required restraint, seclusion, or suspension from school by the District and only one instance where Student took a teacher-directed break.

On or about April 26, 2021, Student appealed the District Court's ruling to the Ninth Circuit Court of Appeals, which by order dated October 18, 2021, reversed. In doing so, the court interpreted the word "until" in the ALJ's prior order as requiring that Student be first placed at Latham until there was a determination that the District had offered FAPE according to the ALJ's definition. Specifically, the court ordered placement at Latham, "until the [School] District provides TFS in school-wide setting

along with an IEP which addresses all of the inadequacies identified in this order ...."

The Ninth Circuit added that "To be sure, further proceedings, whether judicial or administrative, may consider whether the school district is providing TFS schoolwide, as well as whether a new IEP (either the September 2020 IEP or a subsequent IEP) provides a FAPE that cures the deficiencies in previous IEPs that the ALJ order identifies. Unless and until, however, the conclusion of such proceedings changes S.C.'s educational placement, she must be placed at the Latham Center and remain there at the school district's expense."

On or about August 30, 2021, Student filed a second due process complaint challenging the June 14, 2021 IEP previously developed by the District. An administrative due process hearing in that case was set to begin on March 28, 2022 but after the scheduling of this hearing, Student's legal counsel withdrew the request for hearing.

**b. Specific Allegations:**

In response to the Ninth Circuit's October 18, 2021 ruling, the District began developing a special school within the District's geographic boundaries that addressed these issues. And on February 4, 2022, the District convened an IEP meeting including parent and her legal counsel where it revised student's IEP, including a revised placement offer. Specifically, the District agreed to continue student's placement at Latham "per court order through June of 2022." Starting for the 2022-2023 school year, the District offered and selected the placement of "Public separate school" which allowed: student to be "[l]ocated near home, low student-teacher ratio, access to on-site general education

staff for electives, no food prep on site, Total Food Security, school located on closed campus.” This placement option would also provide interaction with other students from within the District and for interaction with community members through transition services.

The District believes this February 4, 2022 IEP amounts to an offer of FAPE and educational placement in the least restrictive environment, in student’s home community under the IDEA. At this meeting, student’s parent disagreed with the District’s offer of “public separate school.” The parent, even in the light of this special school developed in substantial part to meet the needs of her child, still maintained at the meeting that Latham, an out-of-state, residential facility, was the only placement that could meet her child’s needs.

## **5. MEDIATION**

The District and Student have previously engaged in mediations regarding the two prior due process proceedings referenced in the general background section above, neither of which was successful. Consequently, the District does not believe that mediation would be effective in the instant proceeding.

## **6. RESOLUTION SESSION**

The District is willing to participate in a resolution session with parent within 15 days of the filing of this complaint.

## **7. SCHEDULING PRE-HEARING CONFERENCE**

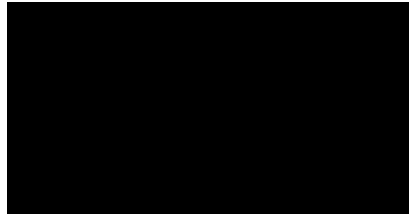
The District is available on the following days for a prehearing conference: April 1, 4, 5, 12, 13, 14, 15, 18, 20, 21, 22, 25, 26, 28 and 29, May 2, 3, 5, 6 as well as additional dates in May.

**8. PROPOSED RESOLUTION**

The District requests an order that it's February 4, 2022 IEP amounts to an offer of FAPE and educational placement in the least restrictive environment under the IDEA and any other remedies that the ALJ deems just and proper.

**MAILED AND E-MAILED TO:**

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*Sent via US Mail and E-mail*



RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of March 2022.

/s/ Nancy J. Hungerford  
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