

## BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Portland School District 1J )

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FINDINGS OF FACT,  
CONCLUSIONS,  
AND FINAL ORDER  
Case No. 10-054-013

### I. BACKGROUND

On May 10, 2010, the Oregon Department of Education (Department) received a letter of complaint from legal counsel for an adult student attending school and residing in the Portland School District (District). The complaint requested that the Department conduct a special education investigation under OAR 581-015-2030 (2010).

Under federal and state law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue a final order within 60 days of receiving the complaint unless exceptional circumstances require an extension. OAR 581-015-2030; 34 CFR §§ 300.151-153 (2010). On May 14, 2010, the Department sent a *Request for Response* to the District identifying the specific allegations in the complaint to be investigated. On May 28, 2010, the District submitted a narrative *Response* to only one of the allegations in the *Request for Response*. On June 7, 2010, the Department clarified by e-mail that the District must respond to the remaining allegations set forth in the *Request for Response* by June 11, 2010 and the District timely provided a supplemental narrative *Response* on June 11, 2010. On June 21, 2010, legal counsel for the student provided a written *Reply*.

The Department's contract complaint investigator determined that an on-site investigation would not be necessary and instead, on June 25, 2010, the complaint investigator provided questions to the District by e-mail and requested some additional documents from the District. On June 29, 2010, legal counsel for the student provided additional information concerning those questions by e-mail. On July 1, 2010, the District provided the additional documents requested by the complaint investigator and provided written answers to the questions by e-mail. On July 9, 2010, the Department determined that the circumstances of this complaint, including delays caused by the District's failure to fully address all of the allegations in the initial *Response* and the fact that the student's ability to access FAPE will not be impaired by an extension, supported a 21-day extension of the 60-day time line in this case. The Department's investigator reviewed and considered all of the documents and narrative responses received from the parties in reaching the findings of fact and conclusions of law contained in this order.

### II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under OAR 581-015-2030 and 34 CFR §§ 300.151-153 (2010). The allegations and the Department's conclusions are set out in the chart below. The Department based its conclusions on the Findings of Fact (Section III) and the Discussion (Section IV)

No.	Allegations	Conclusions
(1)	<p><b>Independent Educational Evaluation (IEE)</b></p> <p>The student alleges that the District violated the IDEA by failing to provide the student with an IEE at public expense. Specifically, the student alleges that the District's policy of requiring individuals who request an IEE to pay out of pocket and then request reimbursement from the District violates the IDEA.</p>	<p><u>Substantiated</u></p> <p>The Department concludes that the District's IEE policy violates the IDEA by inappropriately restricting the right to a publically funded IEE. The Department substantiates this allegation.</p>
(2)	<p><b>General Evaluation and Reevaluation Procedures – consent</b></p> <p>The student alleges that the District violated the IDEA by failing to obtain consent for all of the evaluation measures that it conducted. Specifically, the student alleges that the District conducted the Woodcock-Johnson III – Normative Update Tests of Achievement (WJIII NU) without first obtaining the student's consent.</p>	<p><u>Substantiated</u></p> <p>The Department finds that the District failed to obtain consent to evaluate the student using the WJIII NU. The Department substantiates this allegation.</p>
(3)	<p><b>Evaluation and Reevaluation Requirements and Procedures</b></p> <p>The student alleges that the District violated the IDEA by failing to conduct all of the evaluation measures requested by the student or to provide the student prior written notice explaining why the District would not conduct the requested evaluation measures. Specifically, the student alleges that the District failed to conduct or provide notice refusing to conduct evaluations in the areas of adaptive behavior, assistive technology, written language, and cognitive ability.</p>	<p><u>Not Substantiated</u></p> <p>The Department concludes that the District reasonably believed that the parent and student had withdrawn the request for additional evaluations; therefore, the Department does not substantiate this allegation.</p>
(4)	<p><b>General Evaluation and Reevaluation Procedures – failure to complete evaluation</b></p> <p>The student alleges that the District violated the IDEA by failing to complete a reevaluation within 60 school days of obtaining consent. Specifically, the student</p>	<p><u>No Finding</u></p> <p>The Department finds that the failure to complete the TOWL within the applicable timeline was the result of the failure to properly communicate a</p>

No.	Allegations	Conclusions
	alleges that the District failed to conduct a "Test of Written Language" within 60 school days of receiving consent for that evaluation measure.	change in evaluation instruments used and is addressed in the corrective action related to that failure to provide proper notice of the TOWL.
<b>(5)</b>	<p><b>Evaluations and Eligibility Determinations</b></p> <p>The student alleges that the District violated the IDEA by failing to consider all relevant information in determining the student's eligibility for special education and related services.</p>	<p><u>Not Substantiated</u></p> <p>The Department concludes that the District considered all relevant information in determining the student's eligibility on March 8, 2010 and does not substantiate this allegation.</p>
	<p>The student requests the following corrective action:</p> <ol style="list-style-type: none"> <li>(1) Require the District to fund IEEs in the areas of communication, cognitive ability, academics, adaptive behavior, language, and assistive technology;</li> <li>(2) Require the District to convene an eligibility meeting, with a neutral facilitator, to consider the information and recommendations from the IEEs.</li> <li>(3) Require the District to adopt an IEE policy that meets all IDEA requirements without placing any additional burdens on individuals seeking IEEs.</li> <li>(4) Require training for all administrative level personnel within the District's special education department regarding IEE policies and procedures.</li> </ol>	<p>The Department orders corrective action in allegations #1 and #2.</p> <p>Concerning #1, the District must adopt an IEE policy that does not place the condition of payment up front by the parent or student upon the ability to obtain an IEE, and must provide training on the IEE policy to appropriate District staff.</p> <p>Concerning #2, the District must provide training of appropriate District staff concerning the requirement of written consent for particular evaluations.</p>

### III. FINDINGS OF FACT

**Background:**

1. The student is presently 18 years old and graduated from a District high school on June 8, 2010 with a regular diploma. Prior to March 8, 2010, the student qualified for special education as a student with a communication disorder and received services under an IEP.
2. The student's February 25, 2009 IEP, revised on May 5, 2009, in the Present Levels of Academic Achievement and Functional Performance (PLAAFP) section, states that the

student “is currently a junior and qualifies for special education under the category communication/language disorder \* \* \* \* and should graduate with a standard diploma in June 2010.” The PLAAFP section also states that the student’s “disability can affect [the student’s] ability to succeed in the general education classroom. The vocabulary in the general ed. classes can be difficult and [the student] processes information slower than most ... peers.” The PLAAFP identifies the student’s strength as listening comprehension; the student’s reading comprehension is in the low average range. The PLAAFP states that the student “still struggles with the vocabulary but usually can gain meaning from print.”

### **Independent Educational Evaluation**

3. On January 4, 2010, the parents of the student requested by letter a 3-year reevaluation of the student. The parents specifically requested evaluation in the areas of cognitive ability, academics, adaptive behavior, language, and assistive technology. On January 11, 2010, one of the parents of the student and the student signed a consent for evaluation for “clinical evaluation of language fundamentals – IV (CELF-IV); language sample; hearing screen; teacher checklists; test of written language.” From February 4, 2010 to February 11, 2010, the District conducted evaluations of the student, including the CELF-IV, OWLS, language sample, hearing screen, teacher checklists, and Woodcock-Johnson III Normative Update Tests of Achievement.
4. On February 12, 2010, the IEP team met to discuss the student’s continued eligibility for special education services. The Prior Written Notice (PWN) issued on that date states that the student’s “eligibility for special education services is being extended past the due date of 2/12/2010. [S]pecial education services will continue until next team meeting.” The PWN stated that some members of the team needed more information before determining eligibility.
5. On March 5, 2010, the District mailed to the student a copy of its IEE criteria, which states that “the parent, on his or her own, must call the provider, schedule the IEE and pay for it. The parent may then submit an invoice to the District for payment. The District may grant an exception to these requirements on the basis of parental financial hardship. The determination of financial hardship will be based upon whether the student qualifies for free and reduced lunch.”
6. An internal, District document entitled "Procedures for Independent Educational Evaluations (IEEs) at District Expense" states, “After the parent submits an invoice for payment, the District will decide whether it will pay for the IEE or initiate a due process hearing to establish that the District evaluation is appropriate or the evaluation obtained by the parent does not meet District criteria. Payment is not based on whether the IEE report contains relevant information or data [that] staff use for educational planning or services.”
7. On March 8, 2010, the IEP team met, and although the parent and advocate disagreed, the remaining team members concluded that the student “no longer qualifies for special education services under the category of communication/language disorder and will not receive special education services.” The PWN issued on March 8, 2010 by the District states that the action was based on “file review, speech/language evaluation report (Clinical Evaluation of Language Fundamentals, Oral-Written Language Scales, Language Sample, hearing Screen, teacher check-lists), Woodcock-Johnson Tests of Achievement III Written Language subtests, teacher input, student grades/transcript.” The meeting minutes from the

March 8, 2010 IEP meeting state: "IEE – family will seek outside eval. for speech & language" and that "family will work with school on procedures."

### **General Evaluation and Reevaluation Procedures**

8. The written consent signed by the parent and student on January 11, 2010 included consent for a "Test of Written Language" but did not include consent for the WJIII NU evaluation. The District asserts that the "test of written language" consent did not specifically refer to the Test of Written Language (TOWL) but refers to the fact that the student "would be evaluated in the area of written language." In its *Supplemental Response*, the District states that the "special education teacher and case manager (speech pathologist) agree to add the TOWL to the list of assessments to be completed." The parties agree that, after the January 11, 2010 consent form was signed, District staff discovered that the District did not possess the TOWL; the District administered a substitute assessment, the WJIII NU, to the student. The parties also agree that the District failed to obtain specific consent for that WJIII NU and failed to provide notice of the change in the assessment administered.

### **Evaluation and Reevaluation Requirements and Procedure**

9. The student alleges that despite a written request on January 4, 2010, the District failed to conduct or provide notice refusing to conduct evaluations in the areas of adaptive behavior, assistive technology, written language, and cognitive ability. After the request for specific evaluations, District staff informed the student and a parent that assessments in adaptive behavior, assistive technology, and cognitive ability were not necessary to determine the student's eligibility. Assessments in cognitive ability and adaptive behavior had been administered in 2007 and fell within the average range. District staff advised the student and parent that there would need to be an additional planning discussion if they wanted to pursue assessments in adaptive behavior, cognitive ability, and assistive technology. The parent and student did not request an additional evaluation planning meeting, and this meeting did not occur. The District did not issue a PWN because District staff believed the student and the parent were satisfied with the selection of assessment tools recommended by District staff.

### **General Evaluation and Reevaluation Procedures**

10. As noted above, the District did not conduct the TOWL because it did not have that particular assessment. Instead, the District administered the WJIII NU evaluation to assess the student's written language abilities.

### **Evaluations and Eligibility Determinations**

11. The student alleges that the District violated the IDEA by failing to consider all relevant information in determining the student's eligibility for special education and related services. Specifically, the student alleges the District did not conduct evaluations, as requested by the student or the student's parent, in adaptive behavior, assistive technology, written language and cognitive ability, and did not issue a PWN explaining why. The District considered the requested evaluations, but advised the student and parent that the evaluations were not necessary to determine the student's continued eligibility under a communication disorder.

## IV. DISCUSSION

### 1. Independent Educational Evaluation (IEE)

The student alleges that the District violated the IDEA by failing to provide the student with an IEE at public expense. Specifically, the student alleges that the District's policy of requiring individuals who request an IEE to pay for the evaluation up front and request reimbursement from the District violates the IDEA.

OAR 581-015-2305 provides:

#### **"Independent Educational Evaluation**

(1) A parent of a child with a disability or suspected disability has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district.

(a) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the school district responsible for the education of the child.

(b) "Public expense" means that the school district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

(2) If a parent requests an independent educational evaluation at public expense, the school district must provide information to parents about where an independent educational evaluation may be obtained, and the school district criteria applicable for independent educational evaluations.

(3) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation, the qualifications of the examiner, and cost, must be the same as the criteria the school district uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(a) Except for the criteria in subsection (3), a school district may not impose conditions, or timelines related to obtaining an independent education evaluation at public expense.

(b) The school district must provide parents an opportunity to demonstrate that unique circumstances justify an independent education evaluation that does not meet the district's criteria.

(4) If a parent requests an independent education evaluation at public expense, the school district must, without unnecessary delay, either:

(a) Ensure that an independent educational evaluation is provided at public expense unless the school district demonstrates in a hearing under OAR 581-015-2345 that the evaluation obtained by the parent did not meet school district criteria in accordance with (3); or

(b) Initiate a due process hearing under OAR 581-015-2345 to show that its evaluation is appropriate."

These rules are consistent with the federal regulations concerning independent educational evaluations. See 34 CFR § 300.502. The comments related to 34 CFR § 300.502 in the *Federal Register* provide, in part:

“Proposed Section 300.502 (Independent educational evaluation (IEE)) has been amended to (1) add that, upon request for an IEE, parents must be given information about agency criteria applicable for IEEs; (2) clarify, in Section 300.502(e)(1), that the criteria under which an IEE is obtained must be the same as that of the public agency ‘to the extent such criteria are consistent with the parent’s right to an IEE,’ and (3) explain that an explanation of parent disagreement with an agency evaluation may not be required and the public agency may not delay either providing the IEE at public expense or, alternatively, initiating a due process hearing.”

*Federal Register*, Vol. 64, No. 48 (March 12, 1999) at 12411.

At all times relevant to this case, the District had policies and procedures in place concerning the availability of IEEs. The student alleges that these policies and procedures violate the IDEA by requiring parents and adult students to provide advance payment for IEEs and request reimbursement from the District once the evaluation has been completed. The policy allows for the District to provide advance payment for an IEE on the basis of “parental financial hardship.” The policy indicates that financial hardship determination is based on whether or not the student qualifies for free or reduced lunch. The Department concludes that this policy and the related internal procedures violate the IDEA by adopting criteria that are inconsistent with the right to an IEE.

The IDEA and the analogous Oregon laws do not address the issue of advance payment for IEEs. In its *Response*, the District cites a prior Oregon Due Process hearing decision, DP 04-110, which concluded that “[a]bsent any clear legal authority to the contrary, the District’s policy requiring the parent to pay in advance for an IEE was not in violation of the IDEA and applicable federal and state regulations.” However, the analysis in DP 04-110 is not controlling in the instant case. In DP 04-110, the parent had paid for the IEE, so the hearing officer never considered the issue of whether the policy, on its face or through its application, effectively denied the parent the right to a publically-funded IEE. In this case, the student alleges that the District’s policy denied the student access to an IEE.

The United States Department of Education’s Office of Special Programs addressing the issue of advance payment for IEEs in *Letter to Heldman*, 20 IDELR 621 (OSEP 1993). The federal regulation concerning IEEs in place at the time of the letter is identical to the current IEE regulation in all pertinent parts. See 34 CFR § 300.503 (1993); 34 CFR § 300.502 (2010). The letter acknowledges that federal law does not address the issue of whether a district should provide advance payment or require reimbursement when a parent or adult student requests an IEE at public expense. The letter also indicates that the practice of requiring reimbursement is not prohibited as long as the requirement does not effectively deny a parent or adult student the right to a publically-funded IEE.

The Department concludes that the District’s policy concerning payment for IEEs does not adequately protect the rights of parents and adult students with regard to IEEs. Specifically, the Department concludes that the District’s method of determining financial hardship denies individuals who do not qualify for free or reduced lunch programs – but are unable to advance payments for an evaluation – the right to a publically-funded IEE. In this case, the District’s

failure to advance payment for the requested IEE effectively denied the student access to an IEE, and the existing policy creates a likelihood that other, similarly-situated individuals will also be denied access. Therefore, the Department orders the District to revise its IEE policy to ensure that the policy does not effectively deny a parent or adult student the right to a publically-funded IEE. See *Corrective Action*.

In the initial complaint, the student proposes that the District provide advance payment for the IEE and reconvene the student's eligibility team to consider the new evaluation data. However, the student's eligibility for special education and related services terminated upon the student's graduation from the District with a regular diploma. The Department concludes that, based on the student's lack of eligibility for special education, the student's proposed solutions would be inappropriate, and the Department orders no corrective action specific to the student.

## **2. General Evaluation and Reevaluation Procedures**

The student alleges that the District conducted the WJIII NU evaluation without obtaining the student's consent. OAR 581-015-2110 requires that, "[b]efore conducting any evaluation or reevaluation, the public agency must obtain informed written consent for evaluation in accordance with OAR 581-015-2090 and 581-015-2095."

The District stated in its *Supplemental Response* in this case that it "recognizes that the parent should have been notified of the change of test instrument." The District then argues that the WJIII NU evaluation was in the area of "writing as indicated on the evaluation notice/consent form using a comparable individually administered standardized assessment." However, the District also recognizes in its *Supplemental Response* that the District agreed to perform the TOWL and that the District used the WJIII NU evaluation as a substitute for the TOWL. The consent form signed by the student and parent provides for an assessment referred to as "Test of Written Language." The Department finds that the phrase "Test of Written Language," capitalized on the original form, refers to a specific assessment and not a general assessment of written language. The student never provided written consent for the District to conduct a WJIII NU. Therefore, the Department substantiates the allegation that the District administered an assessment for which the student did not provide written consent. See *Corrective Action*.

## **3. Evaluation and Reevaluation Requirements and Procedures**

The student alleges that the District failed to conduct or provide notice refusing to conduct evaluations in the areas of adaptive behavior, assistive technology, written language, and cognitive ability.

OAR 581-015-2105 provides, in part:

### **"Evaluation and Reevaluation Requirements**

\* \* \*

(4) Reevaluation:

(a) The public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with OAR 581-015-2115, subject to subsection (b) and OAR 581-015-2110(2):



(A) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(B) If the child's parents or teacher requests a reevaluation.

(b) A reevaluation for each child with a disability:

(A) May occur not more than once a year, unless the parent and public agency agree otherwise; and

(B) Must occur at least every three years, unless the parent and public agency agree that a reevaluation is unnecessary.”

As discussed above, the District did evaluate the student in the area of written language. However, the District did not administer assessments in the areas of adaptive behavior, assistive technology, and cognitive ability after these assessments were requested in writing on January 4, 2010. It appears that District staff thought that they had sufficiently addressed the request for these particular evaluations when staff advised the parent and student that these particular assessments were not necessary and that there would have to be an additional evaluation planning meeting if these assessments were to be pursued. The student and parent did not request an additional evaluation planning meeting. The Department also finds that the student and parent did not pursue these particular evaluations at the March 8, 2010 IEP meeting. At that meeting, the parent and student stated they would be requesting an IEE in speech and language but did not indicate any interest in evaluations in the areas of adaptive behavior, assistive technology, and cognitive ability. Though the District failed to document its determination that some of the requested evaluations were unnecessary, the District's conclusion that the parent and student no longer sought these particular evaluations, initially requested on January 4, 2010, is reasonable under the circumstances. Therefore, the Department does not substantiate the allegation that the District failed to conduct requested evaluations or provide a PWN explaining the refusal.

#### **4. General Evaluation and Reevaluation Procedures**

The student alleges that the District violated the IDEA by failing to conduct the TOWL assessment within 60 school days of written consent for this evaluation. OAR 581-015-2110(5)(b) states that “[a] reevaluation must be completed within 60 school days from written parent consent (or from the date the evaluation is initiated under OAR 581-015-2095(3)(c)) to the date of the meeting to consider eligibility, continuing eligibility, or the student's educational needs.” That rule also provides three exceptions to the 60 school day timeline, none of which apply to the case at hand. Therefore, the District was required to conduct the TOWL within 60 school days of written consent for the evaluation. The District never conducted a TOWL with respect to the student.

The Department finds that the District failed to administer the TOWL within 60 school days of written consent for that particular assessment. However, the Department concludes that the failure to complete the TOWL within 60 school days was not the result of inefficient or delayed evaluation procedures but was the result of the District's failure to properly communicate the change in evaluation measures used to assess the student in the area of written language; the failure to notice the change in evaluation instrument is addressed in the discussion above. The Department issues no finding with regard to this allegation.

## 5. Evaluations and Eligibility Determinations

The student alleges that the District violated the IDEA by failing to consider all relevant information in determining the student's eligibility for special education and related services. In the student's *Reply*, the student clarified that the relevant information not considered by the eligibility team was the information that would have resulted from the evaluations in adaptive behavior, assistive technology, and cognitive ability that were requested but never conducted. As discussed above, the Department finds that the District's conclusion that the parent and student no longer sought these particular evaluations was reasonable under the circumstances.

The Department concludes that the student's eligibility team considered all relevant information in reaching the March 8, 2010 determination that the student was no longer eligible for special education and related services and does not substantiate this allegation that the District violated the IDEA by failing to do so.

## V. CORRECTIVE ACTION<sup>1</sup>

*In the Matter of Portland SD 1J*  
Case No. 10-054-013

#	Action Required	Submissions <sup>2</sup>	Due Date
(1)	<p><u>Amendment of Policy and Training:</u><sup>3</sup></p> <p>The District must adopt an amended IEE policy that does not place conditions upon the receipt of an IEE that effectively deny parents and adult students their right to a publically-funded IEE. Additionally, the District shall provide training to all special education staff, case managers and administrators concerning the amended IEE policy.</p>	<p>Submit to ODE for approval an electronic copy of the proposed IEE policy revision.</p> <p>Evidence of completed training, to include: a copy of the amended IEE policy and training materials and an attendance roster or distribution list identifying name and position of attendees.</p>	<p><b>August 30, 2010</b></p> <p><b>October 15, 2010</b></p>

<sup>1</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).

<sup>2</sup> Corrective action plans and related documentation as well as any questions about this corrective action should be directed to Rae Ann Ray, Oregon Department of Education, 255 Capitol St. NE, Salem, Oregon 97310-0203; telephone – (503) 947-5722; e-mail: [raeann.ray@state.or.us](mailto:raeann.ray@state.or.us); fax number (503) 378-5156.

<sup>3</sup> Initial Verification: The Department will review the written confirmation to District staff and the distribution list.

(2)	<u>General Evaluation and Reevaluation Procedures</u>  The District shall provide training to all special education staff, case managers, and administrators concerning appropriate procedures for communicating a change in evaluation procedures to parents or adult students, including the requirements of notice and consent and the applicable timelines.	Evidence of completed training, to include: a copy of the training materials and an attendance roster or distribution list identifying name and position of attendees.	<b>October 15, 2010</b>
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Dated: July 28, 2010

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Nancy J. Latini, Ph.D.  
Assistant Superintendent  
Office of Student Learning & Partnerships

Mailing date: July 28, 2010

APPEAL RIGHTS: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this Order with the Marion County Circuit Court or with the Circuit Court for the County in which you reside. Judicial review is pursuant to the provisions of ORS 183.484.