

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Sweet Home School) FINDINGS OF FACT,
District) CONCLUSIONS,
) AND FINAL ORDER
) Case No. 20-054-006

I. BACKGROUND

On March 9, 2020, the Oregon Department of Education (Department) received a letter of complaint (Complaint) from the parent (Parent) of a student (Student) residing in the Sweet Home School District (District). The Parent requested that the Department conduct a special education investigation under Oregon Administrative Rule (OAR) 581-015-2030. The Department provided the District with a copy of the Complaint on March 9, 2020.

On March 17, 2020, the Department sent a *Request for Response* (RFR) to the District identifying the specific allegations in the Complaint to be investigated. The date for response had been extended due to the statewide pandemic shutdown. The Complaint was abated until June 8, 2020. On June 11, 2020, the District remitted its response via regular mail to the Complaint Investigator. The *Response* included a narrative, and the following documents upon which the Investigator relies are as follows:

1. Interdistrict email dated March 11, 2020.
2. Facsimile cover sheet from Corvallis School District to District dated March 9, 2020 without any attached documents.
3. Student's attendance records for school years 2017-2018, 2018-2019, and 2019-2020.
4. Student's detailed attendance report from September 4, 2018 to June 21, 2019.
5. Student's detailed attendance report from September 3, 2019 to March 9, 2020.
6. Student's detailed attendance report from September 1, 2017 to June 14, 2018.
7. SST Referral Form school year 2018-2019.
8. Handwritten note to "Barbi" dated January 9, 2019.
9. SST Intervention/Action Plan dated September 25, 2018.
10. Follow up meeting intervention summary dated December 18, 2018.
11. Follow up meeting intervention summary dated February 2019.
12. Follow up meeting intervention summary dated April 22, 2019
13. Handwritten group sheets, undated, no reference
14. Correspondence from District to Parent dated November 2, 2017
15. Email/text from District to parent dated January 9, 2019

The Department's Complaint Investigator determined that in person interviews were required. The Complaint Investigator interviewed the Parent online via Zoom chat on June 19, 2020. The school principal was interviewed via telephone on June 25, 2020; the Student's first grade teacher and the school's SPED teacher were interviewed via telephone on July 2, 2020. Prior to the District interviews, the Complaint Investigator requested the District provide responsive documents. The District did not provide any further responsive documents upon the Complaint Investigator's second request.

The Complaint Investigator requested additional documentation from the Parent. The Parent submitted the following:

1. Samples of Student's first grade work
2. BASC results based on input from Student's first grade teacher dated November 28, 2018

The Parent also executed a Release of Records and submitted it to the Student's current school

district. On or about June 23, 2020, the Complaint Investigator received the following documents from the Student's current school district:

1. Student's Birth Certificate
2. Sweet Home School District Language Use Survey dated August 11, 2017
3. Student's Health File dated August 23, 2017
4. Dental screening dated October 5, 2017
5. Dental Screening dated September 12, 2018
6. SST Intervention/Action Plan Form dated September 25, 2018
7. Kindergarten Vision screening certificate dated October 17, 2018
8. SST Follow-Up Meeting Intervention Summary dated November 6, 2018
9. SST Follow-Up Meeting Intervention Summary dated December 20, 2018
10. Handwritten notation of phone call to Principal Riggs dated January 9, 2019
11. First Grade Vision screening certificate dated January 31, 2019
12. SST Referral Form Summary, data taken between October 2018 and January 2019
13. SST Follow-Up Meeting Summary dated February 6, 2019
14. Dental screening certificate dated February 20, 2019
15. SST Follow-Up Meeting Intervention Summary dated April 22, 2019
16. Dental & Vision Certificate Form dated October 10, 2019
17. SIPPS K-3 Placement Assessment dated October 14, 2019
18. Permanent record folder cover dated October 15, 2019
19. Vision screening results dated October 22, 2019
20. Elementary grade stickers: not generated due to Covid-19 pandemic
21. Second grade year-end report letter from classroom teacher, not dated
22. Grade report for school year 2019-2020, only first semester recorded
23. First grade report card from Sweet Home School District, school year 2018-2019
24. Kindergarten report card from Sweet Home School District, school year 2017-2018
25. Cumulative photo record, undated
26. Correspondence from Sweet Home School District to Parent dated May 25, 2018
27. Elementary School Permanent Record Card
28. OR Certificate of Immunization Status dated October 10, 2019
29. Language Use Survey dated October 10, 2019
30. Elementary test stickers, NNAT, single test dated November 22, 2019
31. Naglieri Nonverbal Ability Test (NNAT) results dated November 22, 2019
32. General School Question Survey, undated

The Department's investigator reviewed and considered all of these documents, interviews, and exhibits in reaching the findings of facts and conclusions of law contained in this order

The Department has jurisdiction to resolve this Complaint.¹ Under federal and state law, the Department must investigate written complaints that allege Individuals with Disabilities Education Act (IDEA) violations that occurred within one year prior to the Department's receipt of the complaint. This Complaint covers the one-year period from March 10, 2019 to March 9, 2020. The Department must issue a final order within sixty days of receiving the complaint; however, given the extension of the timeline due to the statewide Covid-19 pandemic shutdown and resulting lack of access to relevant educational records, this Order is timely.

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

II. ALLEGATIONS AND CONCLUSIONS

The Parent's allegations and the Department's conclusions are set out in the chart below. These conclusions are based on the Findings of Fact in Section III and the Discussion in Section IV.

	Allegations	Conclusions
1.	<p>Child Find</p> <p>The Parent alleges that District violated the IDEA because the District it failed to fulfill its child find obligations when it did not identify and evaluate the Student based on the Student's reading and/or auditory processing delays during the complaint period.</p> <p>(34 CFR §300.111, OAR 581-015-2080)</p>	<p>Substantiated</p> <p>The District overlooked the Student's clear signs of disability based on the failure to master the alphabet for an entire school year. The Student also failed to make sufficient progress during the Response to Intervention process and experienced regression after spring break. Finally, the District's failure to evaluate the Student for special education services was based solely on the special education teacher's unilateral determination that the Student would be found ineligible for special education services based on a lack of instruction due to relatively mild attendance issues.</p>
2.	<p>Failure to evaluate</p> <p>The Parent alleges that the District violated the IDEA because it failed to evaluate the Student after the Parent repeatedly requested a special education evaluation from the beginning of Kindergarten through the beginning of second grade.</p> <p>(34 CFR §300.300.5, OAR 581-015-2105(3))</p>	<p>Substantiated</p> <p>The District failed to evaluate the Student after the Parent requested an evaluation for the reason listed in the previous section. At no time did the District provide a Prior Written Notice to the Parent stating why the District was refusing to evaluate the child, nor did the District ever actually obtain the Parent's consent to evaluate once it belatedly recognized that an evaluation was appropriate.</p>
3.	<p>Additional Findings</p> <p>School districts are required to provide Procedural Safeguards upon request for an evaluation. School districts are also required to provide a Prior Written Notice to the Parent when refusing to evaluate a student upon request. A denial of FAPE occurs when a parent's ability to participate in the special education process or when a student suffers lost educational opportunities.</p> <p>(34 CFR §300.504, 34 CFR §300.503, 34 CFR §300.101; OAR 581-015-</p>	<p>Substantiated</p> <p>The District failed to provide Procedural Safeguards to the Parent on the occasions that the Parent requested an evaluation. The District also failed to provide Prior Written Notice when declining to evaluate the Student. These procedural violations were substantial enough to result in negatively impacting the Parent's ability to participate in the education of the Student and resulted in lost educational opportunities for the Student, constituting a denial of FAPE.</p>

2315(1), OAR 581-015-2310(2)(b), OAR 581-015-2040)	
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REQUESTED CORRECTIVE ACTION
<ol style="list-style-type: none"> 1. The District should pay for the Student’s testing at the Student’s current school. 2. The District should reimburse the Parent for the private testing the Parent paid for in 2019 when the District requested the Parent have the Student evaluated. 3. The District should make retribution to the Student for the harm the District caused to the Student’s self esteem, educational progress, and emotional wellbeing.

III. FINDINGS OF FACT

1. The Student is eight years old and has completed the second grade. The Student is an extremely likeable child but can be easily distracted and has difficulty focusing.
2. The Student began Kindergarten in the District in school year 2017-2018. The Student was absent a total of 17 times during Kindergarten and tardy a total of 33 times.
3. The Student’s grade report from Kindergarten is incomplete as there are no indicators of performance for reading for the first and second marking period and there are no indicators of “Characteristics of a successful Learner” for the third marking period. According to the Student’s Kindergarten Report Card, the Student was proficient in the English Language Arts/Kindergarten Reading and in English Language Informational Testing. The Student was developing in Reading Foundational Skills and Writing and Emergent in Language.
4. When the Student completed Kindergarten, the District requested the Parent consent to the Student repeating Kindergarten because the Student was academically unprepared to start first grade in the fall of school year 2018-2019. The Parent opted to work with the Student over the summer and have the Student retested in the fall to see if the Student was ready to start first grade. The record does not contain any test data for the Student for the beginning of school year 2018-2019.² The Student entered first grade being able to only read one word per minute.
5. The Parent requested that the Student be tested in reading or given an evaluation of some kind while the Student was in Kindergarten and again when the Student was in first grade. The District directed the Parent to have the Student tested through the Parent’s insurance. The Parent then had her medical provider begin evaluating the Student.
6. As part of the medical provider’s evaluation, a Behavior Assessment System for Children (“BASC”) questionnaire was remitted to the Student’s first grade teacher. The first-grade teacher completed the form and returned it to the medical provider. Among the areas of concern listed by the first-grade teacher were:
 - a. Almost always has a short attention span
 - b. Never listens carefully
 - c. Is never well organized

² The Student’s educational record referred to in this opinion includes the responsive documents supplied by the District and Parent as well as the Student’s cumulative file provided by the Student’s current school district which included the Student’s academic records and testing results which were not provided by the District.

- d. Almost always is easily distracted and almost always easily distracted from classwork
 - e. Sometimes listens to directions and sometimes pays attention
 - f. Sometimes loses control when angry
 - g. Almost always has reading problems and performs poorly on school assignments
 - h. Almost always has trouble keeping up in class
 - i. Almost always has spelling problems and gets failing school grades
7. The BASC results indicated the Student had significant problems with attention and study skills in the academic setting. The District did not receive a copy of the Student's BASC results because the Student's private evaluation during first grade was suspended and never completed.
8. Upon entering first grade, the Student was referred to the Special Services Team (SST) on September 25, 2018. At the time that the Student entered the first grade, the Student did not know all 26 letters of the alphabet and their sounds with 100% accuracy. The goal was then set for the Student to know all 26 letters of the alphabet and their sounds with 100% accuracy. The SST group decided the appropriate intervention to achieve this goal was daily whole group and individual instruction.
9. The reading group interventions were held twice per day, the first at 9:00 am and the second at 1:00 p.m. During the 2018-2019 school year, school began at 8:00 a.m.
10. On November 6, 2018, a follow up SST meeting was conducted. The Student had not met the initial goal but had some progress. The team conclusion was that an ESGI and/or Dibels testing was warranted. There is no evidence in the record that either of these tests were administered to the Student in the first or second grade.
11. On December 20, 2018, a follow up SST meeting was conducted. The Student had not met the initial goal of knowing all 26 letters and sounds with 100% accuracy. The Student had fallen behind others in the Title One program; again, the SST notes that Dibels and/or ESGI testing is needed. Constant repetition and boosting of confidence did help the Student but the goal of knowing the alphabet by sight and sound was still not achieved.
12. According to the Student's permanent record, from December 20, 2018 to February 6, 2019, the Student was absent a total of four times and had one early dismissal at 12:45 p.m.
13. On January 9, 2019, the District emailed the Parent stating that the Student was going to be put in a one to one reading group and then the District would assess the Student's progress after one month. The Student was also to take part in benchmark testing. There is no benchmarked testing evidence in the record provided by the District or in the Student's cumulative record received from the Student's current school district.
14. The Student did participate in a reading group that was held in the Special Education Room. The Student did receive one to one instruction until another child entered the same elementary school with the same perceived needs as the Student. Thereafter, the Student received 1:2 instruction, sharing the special education instructor with another child.
15. The Student participated in one to one intensive instruction in the Special Education room.

16. On February 1, 2019, the Student was in a car accident and was absent from school due to a medical emergency after suffering a concussion and having an open head injury which required staples. According to the District's attendance records, the Student was absent from school on February 1, 2019 for the medical emergency and was absent again on February 4, 2019.
17. On February 6, 2019, another SST follow up meeting was conducted. It is noted that a one to one intervention worked but the Student had a car accident, on or about February 1, 2019 so attendance was poor. The SST team notes that the Student was absent 6 times with 8 tardies; it is unclear to what dates the SST team refers. However, according to District attendance records, between December 20, 2018 SST meeting and the February 6, 2019 SST meeting, the Student was tardy once on December 20, 2018 and absent five (5) times including the absences due to the car accident.
18. Prior to spring break of the 2018-2019 school year, the Student had finally mastered "h" words, i.e. words with "ch", "th", "sh" and the like. However, once the Student returned from spring break, the Student no longer had mastery of "h" words and never was able to regain those words during first grade. The Student also could not retain sight words for any length of time. The first-grade teacher was unsure if the Student ever read more than one word per minute during first grade.
19. The Student did not have aggressive behaviors but was unable to stay focused on assignments. The Student would not leave the assigned seat but would find ways to become distracted from classwork or any task at hand. The Student would often turn to talk to neighboring classmates and would not stay on task for any reasonable period of time.
20. On April 22, 2019, another SST meeting was held regarding the Student. Again, there is notation that the Student still has not met the initial goal, i.e. knowing all 26 letters of the alphabet and knowing all 26 letters by sound as well. The form also states that the SPED teacher will have the Parent sign an assessment consent form. However, this never actually happened.
21. The SPED teacher did not act on the Parent's request to evaluate the Student based on the assumption that the Student would be denied an IEP due to "lack of educational instruction" due to excessive absences, and that the SPED teacher would "check the box" indicating this on the eligibility form. The SPED teacher assumed that the Student would have a Specific Learning Disability ("SLD") based on the Student's reading problems. The SPED teacher was amenable to testing the Student during the second grade, in school year 2019-2020. The record supplied by the District does not contain a Prior Written Notice ("PWN") regarding the District's failure to evaluate the Student during either the end of school year 2019-2019 or the initial portion of the 2019-2020 school year, i.e. the Complaint Period.
22. According to the Student's permanent record, the Student was absent a total of 23.5 days during the 2019-2020 school year. The Student was in school a total of 145 days during first grade. The Student had three (3) morning tardies during the first trimester of first grade, six (6) morning tardies the second trimester of first grade, and seventeen (17) morning tardies with eight afternoon tardies the last trimester of first grade. School began at 8:00 am; according to the Student's attendance record, the latest the Student ever reported to school was 8:17 a.m. during first grade.

23. The Student continued attending school in the District at the beginning of school year 2019-2020. There is no evidence in the record that the District remitted a Consent to Evaluate to the Parent at the beginning of the school year. There is no evidence that the District provided the Parent with Procedural Safeguards at any time after the Parent requested an evaluation.

24. On or about October 17, 2019, the Student transferred to another school district.

25. The Student currently has a diagnosed disability of ADD which is categorized as "Other Health Impairment" ("OHI") under the IDEA. However, as of this writing, the Student has not been evaluated for special education eligibility.

IV. DISCUSSION

A. Child Find

The Parent alleges that District violated the IDEA because the District failed to fulfill its child find obligations when it did not identify and evaluate the Student based on the Student's reading and/or auditory processing delays during the complaint period.

OAR 581-15-2030 provides that school districts must identify, locate and evaluate all children with disabilities for whom they are responsible, regardless of the severity of the disability, who are in need of early intervention, early childhood special education, or special education services. The standard in establishing whether a school district has failed to identify a student with a disability under Child Find is that the school district overlooked 'clear signs of disability' and was 'negligent in failing to order testing,' or 'that there was no rational justification for deciding not to evaluate.'³

The District was aware that the Student was a student suspected of having a disability. The Student entered the first grade without knowing the alphabet either by sight or phonetically. As early as November 2018, the Student's first-grade teacher, when completing the BASC form for the medical provider's evaluation, knew the Student was having problems with not only reading but with staying on task, paying attention, and completing assignments.

The Student stayed in the "red zone" for reading throughout the entire 2018-2019 school year. Moreover, notes from the SST meetings throughout the 2018-2019 school year illustrated that the Student was making no progress. As a result, the SST noted that an ESGI or Dibels test should be administered both in December 2018 and December 2019, yet these tests were never administered. As a result of the student's failure to make appropriate progress, the Parent requested that the Student be evaluated for special education eligibility.

According to her own testimony, the SPED teacher not only suspected the Student of having a disability, the SPED teacher "knew" that the Student would be found eligible for Special Education services but for what the SPED teacher characterized as an "attendance problem". However, this circumvention of the special education evaluation process does not provide a "rational justification for failing to evaluate the Student.

The Department substantiates this allegation.

B. Evaluation

³ Board of Education of Fayette County, Ky v. L.M., 478 F3d 307, 313 (6th Cir. 2007) (quotation omitted)

The Parent alleges that the District violated the IDEA because it failed to evaluate the Student after the Parent repeatedly requested a special education evaluation from the beginning of Kindergarten through the beginning of second grade

Pursuant to OAR 581-015-2105(2), a parent or public agency may initiate a request for an initial evaluation to determine if a child is a child with a disability. Further, OAR 581-015-2105 states that a school district must provide a Prior Written Notice and must obtain informed written consent from a parent before conducting an evaluation.⁴ A school district has the obligation under the IDEA to address all areas of disability related needs.⁵

In the instant case, the Parent continuously requested an evaluation of the Student beginning in the first grade and continuing through the Complaint Period up and until the Parent moved from the District in October 2019. Rather than preparing a Consent to Evaluate or issuing a PWN explaining its denial of an Evaluation, the District convened strategic planning sessions and told the Parent to have the Student evaluated through the Parent's medical provider

A District cannot relieve itself of the obligations of the IDEA by referring a family to its medical provider for an evaluation.⁶ When the Parent requested an evaluation, the District had an affirmative obligation under the IDEA to convene a team meeting, including the Parent, and to issue a PWN regarding the Parent's request for an evaluation.⁷

The District engaged in a Response to Intervention ("RTI") strategy to try to meet the needs of the Student. However, a District has an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RTI strategy; the use of an RTI strategy cannot be used to deny the provisions of a full evaluation.⁸

Finally, the District asserts that the Student had too many absences and tardies which would have disqualified the Student from receiving an IEP for SLD⁹. Effectively, the SPED Teacher predetermined the outcome of a sufficiently comprehensive evaluation without ever conducting the evaluation. A close examination of the Student's attendance record shows that the Student did not actually miss a large amount of instructional minutes. Whether or not the Student's attendance constituted a lack of appropriate instruction should have been determined by an evaluation team rather than being unilaterally determined by one individual without the information that a sufficiently comprehensive evaluation could have provided.

The Department substantiates this allegation.

C. Additional Findings: Failure to Provide Procedural Safeguards; Failure to Provide Prior Written Notice; Failure to Provide FAPE

During the course of this investigation, the evidence revealed that the District did not produce

⁴ A student is entitled to the full protections of the IDEA once a district or parent suspects the student may have a disability. At that juncture, the IDEA's procedural rights apply. Pastatiempo v. Aizawa et al, 201 F.3d 796, 25 IDELR 64 (9th Cir. 2008)

⁵ Letter to Wentzell, 69 IDELR, 79 (2016). See also, Timothy O. v. Paso Robles Unified School District, 822 F.3d 1105, 67 IDELR 227 9th Cir. 2017)

⁶ N.B. v Hellgate Elementary School District, 541 F3d. 1202, 50 IDELR 241 (9th Cir. 2008)

⁷ OAR 581-015-2105, OAR 581-015-2110

⁸ Memorandum to State Directors of Special Education, 56 IDELR 50 (2011) See also, Artichoker v. Todd County School District, 69 IDELR 58 (2016).

⁹ It should be noted that the District focused solely on a single area of disability. This tunnel vision is not supported by the law. [T]he IDEA concerns itself not with labels, but with whether a student is receiving a FAPE. E.M. ex re. E.M. v. Pajaro Valley Unified Sch. Dist., 758 F.3d 1162, 1173 (9th Cir. 2014) (quoting Heather S. v. Wisconsin, 125 F.3d 1045, 1044 (7th Cir. 1997)

any documentation that is required by the IDEA. The District not only failed to produce a PWN which is required when a District either implements or refuses to implement a change to a student's educational program, but the District also failed to remit Procedural Safeguards to the Parent at any time when the Parent requested the Student be evaluated for Special Education.

Pursuant to OAR 581-015-2315(1), school districts must give parents a copy of the Notice of Procedural Safeguards upon initial parent request for evaluation. Further, Prior Written Notice must be given to the parent of a child when the district refuses to evaluate the child under OAR 581-015-2310(2)(b).

These were not “no harm, no foul” procedural violations that did not negatively impact the Student; these were significant procedural violations that ultimately resulted in a denial of FAPE under existing case law. “Procedural flaws do not automatically require a finding that a school district has failure to provide a FAPE.”¹⁰ “However, procedural inadequacies that result in the loss of educational opportunity – or seriously infringe the parents’ opportunity to participate in the IEP formulation process. . . clearly result in the denial of a FAPE.”¹¹ In this case, not only was the Parent’s opportunity to participate in the educational decision-making for her student compromised, the District’s failure to conduct a sufficiently comprehensive evaluation to better understand the Student’s needs resulted in a loss of educational opportunity for the Student.

V. CORRECTIVE ACTION¹²

In the Matter of Sweet Home School District
Case No.20-054-006

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

	Action Required	Submissions ¹³	Due Date
1.	<p>Procedure revision and Professional Development In consultation with ODE, draft a referral procedure that addresses the timely consideration of referrals for children participating in an RTI process as described in: https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf</p> <p>This draft should also address child find responsibilities and how to appropriately respond to parental requests for evaluation.</p>	Submit draft procedures for ODE for review.	November 15, 2020
2.	Following ODE approval of the draft,	Provide evidence of completed	April 7, 2021

¹⁰ *W.G. v. Board of Trustees of Target Range School Dist. No 23*, 260 F.2d 1479, 1984 (9th Cir. 1992_

¹¹ *Id.*, at 1984 citing *Roland M. v. Concord Sch. Comm.* 910 F.2d 983, 994 (1st Cir. 1990) cert denied, 499 U.S. 912, 111 S.Ct.,1122 (1991)

¹² The Department’s order includes corrective action. The order includes documentation to be supplied to ensure the corrective action has occurred. (OAR 581-015-2030(13).) The Department requires timely completion. (OAR 581-015-2030(15).) The Department may initiate remedies against a party who refuses to voluntarily comply with a plan of correction. (OAR 581-015-2030(17)-(18).)

¹³ Corrective action submissions and related documentation as well as any questions about this corrective action should be directed to Mike Franklin, Oregon Department of Education, 255 Capitol St. NE, Salem, Oregon 97310-0203; telephone – (503) 947-5634; e-mail: mike.franklin@ode.state.or.us fax number (503) 378-5156.

	provide training and information on all issues noted above to district staff involved in responding to requests for evaluation.	training.	
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Dated the 3rd Day of August, 2020

Candace Pelt, Ed. D

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

Mailing Date: August 3, 2020

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).)