

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of Portland School District # 1J	)	FINDINGS OF FACT, CONCLUSIONS AND FINAL ORDER Case No. 15-054-043
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**I. BACKGROUND**

On December 3, 2015, the Oregon Department of Education (Department) received a written request for a Special Education complaint investigation from the father (Father) of a student (Student) residing in the Portland School District 1J (District). The Father requested that the Department conduct a Special Education investigation under OAR 581-015-2030. The Department confirmed receipt of this Complaint and forwarded the request to the District on December 3, 2015.

Under state and federal law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue an order within sixty days of receipt of the complaint.<sup>1</sup> This timeline may be extended if the Father and the District agree to the extension in order to engage in mediation or local resolution or for exceptional circumstances related to the complaint.<sup>2</sup>

On December 7, 2015, the Department's Complaint Investigator sent a *Request for Response* to the District identifying the specific allegations in the Complaint to be investigated and establishing a *Response* due date of December 21, 2015.

On December 21, 2015, the District submitted a *Response* indicating they disputed all portions of the allegations in the Father's Complaint. In total, the District submitted the following items:

- A. Letter responding to each allegation in the Request for Response, list of documents included, list of documents requested, and list of knowledgeable staff, 12/22/2015;
- B. Notice of Team Meeting, 04/22/2015;
- C. Building Screening Committee Referral and/or Recommendations, Pre-referral worksheet; test scores, 04/22/2015;
- D. Notice and Consent for Evaluation, 04/22/2015;
- E. Meeting Notes (evaluation planning meeting), 04/22/2015;
- F. Academic assessment & observation data, 04/30/2015;
- G. Medical statement, 04/23/2015;
- H. Evaluation report, 06/16/2015;
- I. Notice of Team Meeting, 05/29/2015;
- J. Meeting notes (eligibility/IEP meeting), 06/04/2015;
- K. Written agreement, 06/04/2015;
- L. Emotional disturbance eligibility statement, 06/04/2015;
- M. Specific learning disabilities eligibility statement, 06/04/2015;
- N. Individualized Education Program & Placement, 06/04/2015;
- O. Notice & Consent for initial provision of special education services, 06/04/2015;
- P. Prior written notice re: eligibility and consultation for social-emotional services, 06/04/2015;
- Q. Releases with outside counseling service & note from private therapist;

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

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

- R. Schedule changes;
- S. Notice of team meeting, 09/01/2015, 09/02/2015;
- T. IEP Meeting minutes, 09/09/2015;
- U. Email communication, 09/14/2015—09/15/2015;
- V. Notice of Team Meeting, 09/15/2015;
- W. IEP meeting minutes & graduation worksheet, 09/11/2015;
- X. Email communication, 09/21/2015—09/28/2015;
- Y. Notice of team meeting, 10/02/2015;
- Z. Agenda and IEP meeting minutes, 10/05/2015;
- AA. IEP revision, 10/05/2015;
- BB. Prior written notice (reengagement plan and school-based counseling services), 10/19/2015;
- CC. Prior written notice—return to full day schedule, 11/17/2015;
- DD. Email communication, 10/06/2015—12/03/2015;
- EE. Attendance data.

The Father submitted materials for consideration on December 8, 2015. Included in these materials were: 1) the Request for Complaint Investigation filed in this matter, 2) a Freedom of Information Act Request related to the Office of Civil Rights (OCR) Complaint Father filed against the District, 3) OCR's Response to this Request and documents OCR was able to provide to Father, 4) an email Father sent to the District requesting a new counselor for the Student, and 5) excerpts from the Students Revised IEP. The Department's Complaint Investigator determined that on-site interviews were needed. On January 12, 2016, the Complaint Investigator interviewed the District's General Counsel, School Psychologist, IEP Case Manager, and School Counselor. Additional materials were collected during this meeting. On January 8, 2016, the Complaint Investigator interviewed the Father. 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 Father'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. This Complaint covers the one-year period from December 4, 2014 to the filing of this complaint on December 3, 2015.<sup>3</sup>

	<b><u>Allegations:</u></b>	<b><u>Conclusions:</u></b>
1	<p><b><u>Content of IEP—General:</u></b></p> <p>The Father alleges that the District did not formulate an IEP that addresses the Student's disability.</p> <p>(OAR 581-015-2200(1)(b)(A) &amp; (B))</p>	<p><b><u>Not Substantiated:</u></b></p> <p>The IEP services and accommodations are reasonably formulated to address the Student's disability. The Student's absences have impacted the provision of these services.</p>
2.	<p><b><u>IEP Team /IEP Team Considerations:</u></b></p> <p>The Father alleges that the District failed to</p>	<p><b><u>Not Substantiated:</u></b></p> <p>The Father alleges a conflict of interest for</p>

<sup>3</sup> This order does include some facts that are relevant to the case and that happened before December 3, 2014.

	<p>take the Father's concerns into consideration regarding members of the Student's IEP Team and did not exclude a member of the team after the Father requested a change.</p> <p>(OAR 581-015-2210; 34 CFR 300.320, 300.324(a)(1) &amp; (2), (b)(2), 34 CFR 300.244, 34 CFR 300.321, 34 CFR 300.324(a)(3) &amp; (b)(3))</p>	<p>one staff member where there is none. The IDEA assigns IEP team selection duties to districts, not to parents.</p>
3.	<p><b><u>Review and Revision of IEPs</u></b></p> <p>The Father alleges that the District revised the Student's IEP based on incomplete or incorrect information related to the Student's attendance, which has resulted or will result in the Student being dropped from classes.</p> <p>(OAR 581-015-2225 &amp; 34 CFR 300.324(a)(4), (a)(5), (a)(6), and (b)(1))</p>	<p><b><u>Not Substantiated</u></b></p> <p>The Student's IEP was revised to address the Student's ongoing attendance issues. There is no evidence that this revision was based on incomplete or inaccurate information.</p>

### III. FINDINGS OF FACT

- 1) The Student in this case is 16 years old and resides in the Portland School District 1J.
- 2) The Student is eligible for Special Education services because of an Emotional Disturbance, specifically anxiety and depression, and Specific Learning Disability (reading). The Student is impacted in the areas of memory and processing information when anxious or upset. The Student's condition impacts attendance, which exacerbates academic performance difficulties.
- 3) The Student had attendance difficulties dating back to elementary school.
- 4) The Student was placed on a 504 Plan near the end of the Student's eight grade year in order to facilitate the Student's entry to high school at the beginning of the 2014-15 school year. During the second semester of the 2014-15 school year, it was determined that 504 Plan accommodations were not sufficient to meet the Student's needs.
- 5) On April 22, 2015, an IEP Meeting was held to determine the Student's eligibility for Special Education services, specifically whether the Student had an Emotional Disturbance and/or Specific Learning Disability. The Father signed a consent giving permission to the District to perform an evaluation of the Student. The Father also signed consent for the District to receive medical information related to the Student.
- 6) At the April 22, 2015 meeting the Team discussed past 504 plan accommodations. The District and the Father differed on the reason for the lack of effectiveness of 504 accommodations during the 2014-15 school year. The Father displayed concern that accommodations were not implemented. The District noted that the Student's attendance made it difficult to implement the accommodations.
- 7) During April and May of 2015, the School Psychologist conducted evaluations of the Student in a

variety of areas. The School Psychologist recommended additional supports/tutoring in Language Arts, Skill Building in organization, prioritization, and work completion, and Skill Building in emotional regulation.

- 8) On June 3, 2015, an IEP Meeting was held where the Student was found eligible for Special Education services in the category of Emotional Disturbance and also qualified for services under Specific Learning Disability in basic Reading skills. The Student was provided accommodations to address study skills and executive functioning tasks.
- 9) During the June 3, 2015 IEP Meeting, the IEP Team discussed the possibility of the District providing counseling services to the Student. The Father objected to this and the IEP Team decided to provide the Student's Community-based Therapist with a copy of the IEP goals and curricular materials and to consult with the Student's Community-based Therapist on the Student's progress and school attendance rather than providing direct counseling services to the Student.
- 10) The Student continued to struggle with attendance at the start of the 2015-16 school year.
- 11) On September 9, 2015, an IEP Meeting was held to discuss the Student's accommodations and consider other schooling options. No consensus was reached on any issues discussed.
- 12) On September 21, 2015, an IEP Meeting was held to discuss the Student's accommodations and consider other schooling options. No consensus was reached on any issues discussed.
- 13) On October 5, 2015, an IEP Meeting was held to discuss a reengagement plan for the Student after numerous absences. Both Parents were present at this IEP Meeting. The plan developed by the IEP Team reduced the Student's class schedule to half days; therefore the Student would attend the first two academic periods of the day. The plan was to increase classes as attendance improved. The plan also increased the Student's participation in study/organizational skills courses from 150 to 200 minutes per week while reducing the Student's Reading/Language Arts Specifically Designed Instruction from 150 minutes per week to 100 minutes per week. Finally, over the Father's objection, the IEP Team determined that the Student required school-based counseling services as a related service to address the social emotional goals in the Student's IEP.
- 14) On October 5, 2015, the Mother met with the School Psychologist to discuss possible counseling curricula for the Student. The Father declined to attend this meeting, as the materials for Dialectic Behavioral Therapy (DPT) had previously been provided to the Parents and the Father objected to the District providing this service. The primary counseling method discussed was DPT.
- 15) On October 8, 2015, the Father communicated via email to the District that the Student's mental health needs included DBT, which would be provided by the Student's Community-based Therapist. The Father reiterated his objection to the use of DBT by the District with the Student.
- 16) On October 16, 2015, the Father emailed the District asserting that since the start of the school year, the Student had not missed ten consecutive days of school. This email was in response to the District dropping the Student from enrollment due to the Student missing ten consecutive days of school. All of the Student's absences were excused by the Father. The Father raised concerns that the Student was inappropriately dropped from class due to the requirement that students be dropped following ten consecutive absences.
- 17) The Student was scheduled to attend half days beginning October 8, 2015. The Father was interested in expanding the school day as the Student was able, pursuant to the plan in the

Student's IEP. The District acknowledged that as the Student's attendance improved, the schedule would be expanded to accommodate the Student's capabilities.

- 18) On November 9, 2015, the Father communicated to the District the Father's interest in expanding the Student's schedule to a full day of classes. The Student's Mother and Father had ongoing differences of opinions regarding expanding the Student's schedule. Both communicated with the District regarding their opinions on changes to the Student's schedule.
- 19) On November 16, 2015, despite concerns about the Student's capability, the District increased the Student's schedule to a full day of classes.
- 20) On December 3, 2015, the Father emailed the District regarding ongoing attendance issues, and methods used by the District to record the Student's absences.
- 21) On December 3, 2015 the Father filed this Complaint.

#### **IV. DISCUSSION**

##### **1. Content of IEP—General:**

The Father alleges that the District did not formulate an IEP that addresses all of the Student's disabilities. Specifically, the Father alleges that the IEP accommodations in the Student's June 14, 2015 and October 5, 2015 IEPs do not provide accommodations necessary to address the Student's anxiety. The Father objects to the District's proposed use of Dialectical Behavior Therapy (DBT) as a means of addressing the Student's disability.

A student's IEP must include measurable annual goals, including functional goals designed to meet the student's needs that result from the student's disability enabling the student to make progress in the general education curriculum. IEPs must include measurable annual goals. The IEP must also include a statement of how the child's progress toward meeting the annual goals will be measured. That statement in the IEP must specify what services and supports will be provided. The services and services chosen, to the extent practicable, must be based on peer-reviewed research.<sup>4</sup>

In this case, one of the Student's identified disabilities, anxiety, directly affects the Student's grades and classroom performance by negatively impacting the Student's school attendance. The Student's June 3, 2015 IEP states that the Student's Community-based Therapist, in consultation with school-based providers, will provide social-emotional supports. This was revised during the October 5, 2015 IEP Team Meeting to require school-based counseling services. The IEP includes goals for the Student to specifically work on in school such as learning "to build and maintain healthy teacher and peer relationships by participating in four class periods of interpersonal effectiveness skills." The Student's IEP also includes goals such as identifying "influences that contribute to positive and negative self image by participating in four class periods on mindfulness and 'problem solving/ thinking' skills," specifically targeted toward anxiety.

The District did offer the Father the option of the Student participating in the high school's Dialectic Behavior Therapy (DBT) program on multiple occasions. The program requires student and parent participation. The District provided an orientation to the program. The Mother expressed interest in this program, but the Father did not agree to have the Student participate, preferring instead for the Student's Community-based Therapist to provide services to the Student. Therefore, the District never began DBT with the Student.

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<sup>4</sup> OAR 581-015-2200; 71 Fed. Reg. 46662 (Aug. 14, 2006)

The District is required to identify all students in need of Special Education services.<sup>5</sup> Once a student is identified as needing Special Education services and an IEP is put in place with measurable annual goals, the district is also required to review and revise the IEP upon observing any lack of expected progress toward the annual goals.<sup>6</sup> The Father has, on numerous occasions, reported that the Student continues to struggle with school attendance due to anxiety. The District has also observed that the Student is unable to maintain consistent school attendance despite receiving counseling from the Student's Community-based Therapist. While a parent may revoke consent at any time for the provision of Special Education services,<sup>7</sup> the District is required to respond to the observed needs of the Student. The Student's most recent IEP was revised to reduce SDI for Language Arts support, increase time for the Student to benefit from Study Skills, and include school-based counseling. The use of DBT is not specifically listed in the Student's IEP.

Due to the Student's absences from school, the Student has been unable to effectively take advantage of all of the supports and accommodations in the Student's IEP.

This allegation is not substantiated and no corrective action is ordered.

## **2. IEP Team/IEP Team Considerations:**

The Father alleges that the District failed to take his concerns into consideration regarding members of the Student's IEP Team by failing to exclude a member of the Team after the Father requested a change. Specifically, the Father alleges that the District's School Psychologist performed a DBT intervention without the Father's permission, that the Student was removed from the District's DBT program, and that other accommodations included in the Student's IEP were never implemented. The Father has since filed a complaint with the U.S. Department of Education, Office of Civil Rights (OCR), citing in part the conduct of the School Psychologist. The Father subsequently requested that the School Psychologist be removed from the Student's IEP Team. The District has not removed the School Psychologist from the IEP Team. The District also denies that the Student has ever received DBT services.

It is the District's responsibility to ensure the proper individuals are part of a student's IEP team. The IEP team should be composed of one or both of the child's parents, the child where appropriate, at least one regular education teacher, at least one special education teacher, a representative of the District, someone who can interpret evaluation data, and other individuals as appropriate.<sup>8</sup> The IDEA encourages parental input and involvement in all aspects of a child's educational program.<sup>9</sup> Districts must ensure that parents are included in the IEP team.<sup>10</sup> The team, as a whole, considers a variety of factors in developing the IEP, including concerns of the parent.<sup>11</sup>

The District notes that there is only one School Psychologist at the high school, and there is no available replacement for this staff person. The District has discretion in the selection of staff to implement IEP services.<sup>12</sup> No description or definition of parent concerns accompanies the statute beyond stating the district must consider "the concerns of the parent for enhancing the education of their child."<sup>13</sup>

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<sup>5</sup> OAR 581-015-2080(2)

<sup>6</sup> OAR 581-015-2225(1)(b)(A)

<sup>7</sup> OAR 581-015-2090(7)(a)(B)

<sup>8</sup> OAR 581-015-2210

<sup>9</sup> 71 Fed. Reg. 46688 (Aug. 14, 2006)

<sup>10</sup> 34 CFR 300.321(a)(1); 34 CFR 300.322(a)

<sup>11</sup> OAR 581-015-2205(1)(b); 34 CFR 300.324(a)(ii)

<sup>12</sup> *Slama v. Independent School District No. 2580*, 259 F. Supp. 2d 880 (2003); *Zasslow v. Menlo Park SD* (9<sup>th</sup> Cir. 2003) 38 IDELR 187

<sup>13</sup> 34 CFR 300.324

The Department therefore does not sustain this allegation and orders no corrective action.

### **3. Review and Revision of IEP's**

The Father alleges that the District revised the Student's IEP based on incomplete or incorrect information related to the Student's attendance, which has resulted in the Student being dropped from classes. The Father further alleges that the District has eliminated some classes required for graduation and replaced those classes with DBT.

IEPs must be reviewed annually to determine whether annual goals for the student are being achieved. IEPs must also be revised to address a lack of expected progress toward the annual goals.<sup>14</sup> Also, Students with ten consecutive absences must be withdrawn from classes. A student must be present for at least one hour of instruction in order to restart the count of consecutive days' absence.<sup>15</sup>

The District did drop the Student from classes due to excessive absences. However, this was not related to the Student's IEP. A review of the Student's attendance records for this period indicates that while the Student had extensive absences from school that negatively impacted the Student's academic performance, the Student did not miss ten consecutive days of school at any point. While the Student should not have been dropped from classes, this is not an IDEA issue. The Student was added back to the same classes without disruption of the Student's schedule. The Student once again began attending classes full-time on November 16, 2015.

The Student's ongoing absences due to the Student's disability led the IEP Team to revise the Student's IEP. That revision increased the Student's provision of study/organizational skills through the high school's Learning Center to help address the Student's ongoing academic challenges. The Student's IEP requires school-based counseling as a result of the October 5, 2015 revisions and the "Prior Notice of Special Education Action" dated October 19, 2015 (which formalized the counseling requirement discussed during the October 5, 2015 IEP Meeting). However, the District's efforts to provide this have been frustrated by the Student's lack of attendance and unwillingness to utilize the counseling services provided by the District as well as the Father's withdrawal of consent for the Student's Community-based Therapist to communicate with District personnel.

This allegation is not substantiated and the Department orders no corrective action.

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<sup>14</sup> OAR 581-015-2225(3)(a)

<sup>15</sup> OAR 581-023-0006(4)(b)

## V. CORRECTIVE ACTION<sup>16</sup>

*In the Matter of Portland Public School District #1J  
Case No. 15-054-043*

The Department orders no corrective action in this matter.

Dated: this 27th Day of January 2016

Sarah Drinkwater, Ph.D.  
Assistant Superintendent  
Office of Student Services

Mailing Date: January 27, 2016

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<sup>16</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)).