

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Klamath County)
School District)
)
)

FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 14-054-002

I. BACKGROUND

On January 7, 2014, the Oregon Department of Education (Department) received a letter of complaint from the parent (Parent) of a student (Student) residing and attending school within the Klamath County School District (District) during the 2013-14 school year. The Parent requested that the Department conduct a special education investigation under OAR 581-015-2030 (2011). The Department confirmed receipt of the complaint and forwarded the request to the District by email on January 7, 2014. The Department extended the 60 day complaint timeline by fourteen days due to the Parent's unavailability, due to the Parent's work obligation out of state, which occurred during the early stages of the complaint process.

On January 27, 2014, the Department sent a *Request for Response* (RFR) to the District identifying the specific allegations in the complaint that the Department would investigate. The District mailed its *Response* to the Department's contract complaint investigator and to the Parent on February 7, 2014 along with approximately 55 pages of documents in support of its *Response* and pursuant to the request contained in the RFR. The Department's complaint investigator received the District's *Response* on February 10, 2014, however, the Parent had not receive a copy of the *Response* as of February 20, 2014.¹ The Department's complaint investigator provided an electronic copy of the narrative portion of *Response* to the Parent on February 11, 2014. The Parent submitted a *Reply* on February 17, 2014 and the District supplemented its narrative on February 18, 2014.

The Department's complaint investigator determined that on-site interviews were not required. On February 20, 2014, the Department's investigator interviewed the Parent by phone. On February 20, 2014, the Department's investigator also interviewed the District's Director of Special Services and one of the Student's teacher, no longer with the District. On March 13, 2014 the Department's investigator asked follow-up questions of the District's special education director by phone. The Department's complaint investigator reviewed and considered all of the relevant documents, exhibits, and interviews.

Under federal and state law, the Department must investigate written complaints that allege IDEA violations that occurred within the twelve months prior to the Department's receipt of the complaint and issue a final order within 60 days of receiving the complaint.² The Department may extend the timeline if the District and the parent agree to an extension to participate in local resolution, mediation, or if requisite exceptional circumstances are present.³ This order is timely.

¹ Note Districts are required to send the complainant a copy of response materials, see OAR 581-015-2030(6)(b).

² 34 CFR §300.151 (2010)

³ OAR 581-015-2030(12) (2010)

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under 34 CFR 300.151-153 and OAR 581-015-2030. 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 (Section III) and the Discussion (Section IV). This complaint covers the one-year period from January 8, 2013 to the filing of this complaint on January 7, 2014.⁴

	Allegations	Conclusions
	<p>The written complaint alleges that the District violated the IDEA in the following ways:</p>	
1.	<p><u>IEP Implementation</u></p> <p>Not implementing the Student's IEP on September 30, 2013 by:</p> <p>a. not using the accommodation of "additional time to get to class" and marking the Student absent when he was late to class;</p> <p>b. not using the Positive Behavioral Supports identified in the Present Level of Academic Achievement and Functional Performance (PLAAFP or "Present Levels") to address the Student's behavior.</p> <p>(Relevant Law and Regulations: OAR 581-015-2040 and 34 CFR 300.101; OAR 581-015-2220 and 34 CFR 300.323 and 300.324).</p>	<p>Substantiated, in Part.</p> <p>a. The record shows that, when the Student was late to class, he was marked "tardy" not absent. The student attendance report shows both excused tardies and unexcused tardies. This portion of the allegation is substantiated.</p> <p>b. The Present Levels Statement does not include references to Positive Behavioral Supports. This portion of the allegation is not substantiated.</p>
2.	<p><u>When IEPs Must Be In Effect</u></p> <p>Accessibility of IEPs: Not informing each regular education teacher, special education teacher, related service provider and other service provider who is responsible for the implementation of the Student's IEP and informing those individuals of their specific responsibilities for implementing the Student's IEP and the</p>	<p>Substantiated.</p> <p>The District did not distribute the accommodation "additional time to get to class" to the Student's teachers until October 7, 2013, nor is there any indication in the record that this information was accessible to the Student's teachers or related services providers up to October 7, 2013.</p>

⁴ See OAR 581-015-2030(5)(2008); 34 CFR § 300.153(c).

	<p>specific accommodations, modifications and supports that must be provided for or on behalf of the student in accordance with the IEP.</p> <p>(Relevant Law and Regulations: OAR 581-015-2220 and 34 CFR 300.323 & 34 CFR 300.324)</p>	<p>See Corrective Action</p>
<p>3.</p>	<p><u>Confidentiality of Student Records</u></p> <p>The District did not keep the Student's educational records, and educational records of other students eligible for special education, confidential when it provided a copy of those students' IEPs to all general education teachers.⁵</p> <p>(Relevant Law and Regulations: OAR 581-015-2300 and 34 CFR Sec. 99.7; and 34 CFR Sec. 99.31)</p>	<p>Not Substantiated.</p> <p>The District may distribute confidential student records to those staff members having a "legitimate educational interest" in the records. Providing staff members who may come into contact with students on an IEP with a copy of their IEP, at this school, does satisfy the "legitimate educational interest" standard.</p>

<p>1.</p>	<p><u>Requested Corrective Action</u></p> <p>The Parent requested that:</p> <ol style="list-style-type: none"> 1. ODE conduct an investigation to determine the extent of discrimination and lack of curriculum/instruction modification for students eligible for special education; 2. ODE determine why students with disabilities are not being supported in the general education setting; 3. Professional development for District staff in various areas; 4. Sensitivity training and training on professional communication for all 	<p>ODE identified that the issues and requests for corrective action in 1, 2, 4, 5, 6, and 7 were either outside the scope of the State's IDEA investigation process or did not allege a direct violation of IDEA as stated in the submitted allegations. ODE has notified the Parent and the District in writing of other methods of addressing these issues.</p> <p>3. See Corrective Action, page 8.</p>
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⁵ A person alleging a violation of the Family Educational Rights and Privacy Act (FERPA) may also file a complaint with the Family Policy Compliance Office (FPCO), U.S. Department of Education, 400 Maryland Ave. SW, Washington, D.C. 20202-5920. (See, OAR 581-021-0410 and 34 CFR 99.63 & 99.64). As is discussed in *Letter to Anderson* (OSEP March 7, 2008), the Department has jurisdiction to investigate an allegation of a violation of FERPA. A complaint filed with the FPCO will be held in abeyance pending a resolution of a concurrently filed complaint with the Department.

<p>District staff;</p> <p>5. Recusal of a particular school board member from any involvement relating to the Student or Parent;</p> <p>6. TSPC investigation relating to discrimination within the District;</p> <p>7. TSPC sanctions against certain District staff;</p> <p>8. Sanctions against FERPA violators.</p>	<p>8. No alleged violations of confidentiality were substantiated; therefore no corrective action is ordered.</p>
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III. FINDINGS OF FACT

Background

1. The Student is currently seventeen years old and attends eleventh grade within the District for the 2013-14 school year. The Student has received special education services since early childhood. The Student entered the District with an eligibility of Intellectual Disability with an out of state IEP.
2. The Student's high school is a ninth through twelfth grade high school with approximately 700 students, 40 teachers and 14 paraprofessionals, along with administrative support staff. All students, whether they are in a self-contained class or exclusively in general education classes, share a common class period schedule, share a common weekly schedule, and are fully integrated during passing, break, lunch, before and after school and for extra-curricular activities. All staff have the potential of interacting with all students, including students with special education eligibility.
3. On September 3, 2013, the first day of school, the District held an IEP meeting and drafted the Student's IEP for use during the school year. The Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP of Present Levels Statement) included a portion identifying "instructional techniques that appear to work for [the Student]" and listed nine bullet points as strategies to support the Student's learning. The Student's IEP modifications and accommodations included "additional time to get to class, daily in all classes, all school settings."
4. The Student's IEP, including in the Present Levels Statement, does not contain specific positive behavioral supports as would typically be incorporated into the Behavior Support Plan. It does, as mentioned above, contain suggested instructional strategies and techniques. The IEP does not make reference to a Behavior Support Plan in the Present Levels statement or in the modifications and accommodations. The IEP does contain an accommodation described as "positive reinforcements."

5. On September 30, 2013, the Student was late to fifth period class. The teacher marked the Student with an "unexcused tardy". The Student was not marked absent.
6. The District has used, and continues to use, an internet based secure document storage system to list information related to students eligible for special education.⁶ Information listed in this spreadsheet type document includes the student's name, case manager, diploma track and their modifications and accommodations. The intent of this centralized, secure system is to disseminate to all teachers, related service providers and other service providers each students' modifications and accommodations. District staff has been informed of this system and their obligation to review the information. The Student's modifications and accommodations information was added to this document base on October 7, 2013 at 1:27 pm by the Student's case manager. This information was not available to other staff members accessing this system prior to its entry into the internet based document storage system.
7. On October 13, 2013, the Student's District eligibility team determined the Student's continuing eligibility under Intellectual Disability.
8. On October 30, 2013, twelve exemplar binders, one for each of twelve teachers, were distributed to a portion of the school's general education teachers. The binders contained specific portions of students' IEPs, including, where appropriate, the present level statement, transition plan (if applicable), annual goals and objectives, and the service summary page including modifications and accommodations. Teacher's receiving the binders expressed support that the binders should be provided to all teachers at the school, since the binders provide more information than is provided by the internet based secure document program. The binders have been returned to the District's Director of Special Services. The District intends to, but has not yet, distributed those binders to all teachers at the school.

IV. DISCUSSION

A. IEP Implementation.

The Parent alleges that the District failed to implement the Student's IEP. Specifically, the Parent alleges that on September 30, 2013, when the Student was late to one class, the IEP accommodation of "additional time to get to class" was not implemented. As a result, the Student was marked absent. On the same occasion, the staff member is alleged to have not used the positive behavioral supports contained in the Present Levels statement of the IEP.

School districts must provide special education and related services to a child with a disability in accordance with the Student's IEP.⁷

District attendance records for September 30, 2013 document that the Student was marked "unexcused tardy", not "absent." While the "tardy" is not the same as being marked "absent" for attendance purposes, the District clearly did not implement the accommodation of "additional

⁶ The District identifies this system as "Google Docs". It requires a password to access this information. Only teachers within the District have access to this information.

⁷ OAR 581-015-2220

time to get to class” and therefore did not implement the IEP with fidelity. There is another instance on the Student’s attendance report which also notes the Student received an “unexcused tardy” on December 6, 2013. The District admits that the Student’s modifications and accommodations were not made available to teachers through the internet based document system until October 7, 2013. As a result, teachers did not have available the Student’s modifications and accommodations, so could not implement something they were not informed about. This allegation is substantiated, as the Student was given “unexcused tardies” and the modification of extra time to get to class was not followed by all staff members. However, the Student was not marked “absent,” as alleged, but was instead given an “unexcused tardy.”

Likewise, the teachers did not have available the Student’s Present Levels statement until October 2013. However, the IEP does not contain a reference to a Behavior Support Plan, except an accommodation of “positive reinforcements” which is noted, although the Present Levels Statement does contain suggested instructional strategies. Since the Student’s IEP does not clearly identify what Positive Behavioral Supports would have been used in this situation, the Department does not substantiate this allegation. The Department does not address whether the Student needs a Behavior Support Plan or a Functional Behavioral Assessment.

B. When IEPs Must Be In Effect

The Parent alleges that the District failed to inform staff responsible for the implementation of the Student’s IEP. Districts are responsible to ensure that the IEP is accessible to the providers of instruction or services as well as for informing the providers of their specific responsibilities for implementing a student’s IEP and the specific modifications and accommodations contained in the IEP.⁸

The District has admitted that it did not disseminate any IEP information to the Student’s providers until October 7, 2013, and then only distributed the modifications and accommodations. The Student’s case manager and the Student’s anticipated diploma type were also included in the internet based data system. This procedure does not comply with the District’s obligation under the regulation. The District must make the IEP accessible to providers of instruction and service and inform any providers of their specific responsibilities for implementing an IEP. The Department substantiates this allegation.

C. Confidentiality of Student Records

The Parent alleges that the District did not keep the Student’s educational records, and educational records of other students eligible for special education, confidential when it provided a copy of those students’ IEPs to all general education teachers.⁹ The issue here is whether the District has a “legitimate educational interests” 1) in allowing staff members to see the data maintained in the internet based document system; and 2) providing IEPs of all students eligible for special education to the twelve teachers, whether or not those teachers were actually service providers for those individual students.

⁸ OAR 581-015-2220 (3)

⁹ A person alleging a violation of the Family Educational Rights and Privacy Act (FERPA) may also file a complaint with the Family Policy Compliance Office (FPCO), U.S. Department of Education, 400 Maryland Ave. SW, Washington, D.C. 20202-5920. (See, OAR 581-021-0410 and 34 CFR 99.63 & 99.64). As is discussed in *Letter to Anderson* (OSEP March 7, 2008), the Department has jurisdiction to investigate an allegation of a violation of FERPA. A complaint filed with the FPCO will be held in abeyance pending a resolution of a concurrently filed complaint with the Department.

Each school district must keep confidential any record maintained on a child with a disability and must protect the confidentiality of personally identifiable information at all stages of collection, storage, disclosure, and destruction.¹⁰ In Oregon, the requirements for access to student records for IDEA purposes are described in OAR 581-015-2300. This rule affords the protections of both the Federal Educational Rights and Privacy Act (FERPA) and the IDEA to ensure that the safeguards of educational records for students with disabilities are met. Additionally, state rules note that each school district shall keep confidential any record maintained on a child with a disability in conformance with OAR 581-021-0220 through 581-021-0440.¹¹ School districts may disclose information to school officials and teachers for a legitimate educational purpose without parental consent.¹² Additionally, school districts must adopt a policy regarding student education records, which should include a statement indicating whether the educational agency or institution has a policy of disclosing personally identifiable information, and if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest.¹³ If a district has a policy of disclosing education records, the school district must include in its annual notification to parents, a specific criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.¹⁴

This District's Education Records Policy states that the District will annually send notice to parents with information for the criteria used in determining "legitimate educational interest" and the criteria for determining which school officials have legitimate educational interests for records disclosure purposes. This District policy further notes that school officials may include a volunteer or contractor who performs an institutional service on behalf of the school.¹⁵ The District's policies for Education Records for Students with Disabilities further state that personally identifiable information shall not be released without prior written consent of the eligible student or parent except for some limited cases including, the disclosure to school officials, including teachers, within the district, who have a legitimate educational interest.¹⁶ This document defines a "legitimate educational interest" as a district official employed by the district such as an administrator, supervisor, instructor, or staff support member who needs to review an educational record in order to fulfill his or her professional responsibilities as delineated by their job description, contract, or conditions of employment."¹⁷

In this case, the District shared confidential records with its staff in two ways: first with the internet based, secure document system available only to staff within the District; and secondly, by the October 30, 2013 distribution of the binders containing all the IEPs of students eligible for special education to no more than twelve selected teachers. Typically, disclosure of student records is allowed if the parent consents.¹⁸ As noted above, exceptions to consent include disclosure to school officials and teachers within the educational agency whom the agency or institution has determined to have legitimate educational interests.¹⁹ Likewise, there is no record keeping requirement imposed on a school district when confidential records are shared with a school official under OAR 581-021-0340(1) (the OAR allowing disclosure without prior consent).

¹⁰ ODE Final Order 08-054-004, Citing OAR 581-021-0265

¹¹ OAR 581-021-0265 and 34 CFR 99.7

¹² 34 CFR 99.7

¹³ See ODE Final Order 08-054-004

¹⁴ OAR 581-021-0260(3)(c) and 34 CFR 99.7

¹⁵ District Policy Code JO/IGBAB

¹⁶ District Policy JO/IGBAB-AR

¹⁷ Id.

¹⁸ 34 CFR 99.3 and 34 CFR 300.622

¹⁹ OAR 581-021-0340 (1) and 34 CFR 99.31

This District utilizes a secure web-based document data system. In order to access the system, staff members must first log into the District email system with their user name and password, thereby gaining access to the District-wide email system. Next, in order to access the specific document at issue in this complaint, which is associated with students at the high school, another password is required. Furthermore, one individual at the high school maintains control of who has access to the document system. That individual is the only individual who can add or drop staff members who can access the system. All teachers and administrators at the school have "view access" to the system. Since the internet based document program is accessed only through a secured system, by District staff that need the materials for their professional responsibilities, there is no disclosure outside of school staff with legitimate educational interests. For the allegation involving binders, at a maximum, twelve school staff were the recipients of the binders. The District responded that these staff were part of two site based classrooms and providing these IEP elements in the binders would allow the teachers who have contact with the students at breaks, lunch, and extra-curricular activities the information that is necessary to ensure students receive accommodations and modifications in all settings. As such, these staff members also appear also appear to be using the binders with student information within the scope of their employment, which is aligned with state law and the District policy.

In this case, the District asserts that because of the integrated nature of the school, allowing access to the internet based data, or distributing the binders to teachers who may come in contact with special education students during breaks, lunch, or other times during the day where students are in the general student population, satisfies the "legitimate educational interest" component of the regulation. While the same argument may not apply to a high school with two thousand students, the Department is not in a position to second guess the interconnections at the Student's school where there are only forty teachers serving less than seven hundred students and how frequently those teachers may have contact with those students. On that basis, and based on the policies of the District, the Department does not substantiate this allegation.

CORRECTIVE ACTION²⁰

In the Matter of Klamath County School District
Case No. 14-054-002

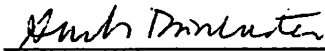
Actions	Submissions²¹	Due By
Training Using the attached information, provide training to	Submit evidence of completed training for each individual specified in the description of training (1) and	April 28, 2014

²⁰ 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)).

²¹ Corrective action submissions 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; fax number (503) 378-5156.

<p>1. All regular education teachers, special education teachers, related services providers, paraeducators, and any other service providers (including those affiliated with the ESD or contracted by the district) who are, or may be responsible for implementing any part of a child's IEP</p> <p>2. All administrators, coordinators, case managers or others who are, or may be, responsible for</p> <ul style="list-style-type: none"> • ensuring that each child's IEP is accessible to staff members, • informing those staff members of their specific responsibilities • monitoring and ensuring that IEPs are implemented as written. 	<p>(2), including agenda(s), and a sign-in sheet for each training session that includes agenda, and a signed and dated list of participants and their positions, Separately, submit the name, position, and contact information for the individual(s) designated to inform individuals at each school or classroom location of their specific responsibilities.</p>	
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Dated: this 21st day of March 2014



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

Mailing Date: March 21, 2014

Responsibility for Implementing IEPs

34 CFR § 300.323 and OAR 581-015-2220 When IEPs Must Be In Effect

(a) General. At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in Sec. 300.320.

(b)....

(c)....

(d) Accessibility of child's IEP to teachers and others. Each public agency must ensure that

(1) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and

(2) Each teacher and provider described in paragraph (d)(1) of this section is informed of--

(i) His or her specific responsibilities related to implementing the child's IEP; and

(ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.