

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Ashland School District 5)	
)	FINDINGS OF FACT,
)	CONCLUSIONS,
)	AND FINAL ORDER
)	Case No. 14-054-024

I. BACKGROUND

On June 12, 2014, the Oregon Department of Education (Department) received a letter of complaint from the parents (Parents) of a student (Student) residing and attending school in the Ashland School District (District). The complaint requested a special education investigation under OAR 581-015-2030. The Department provided a copy of the complaint letter to the District, by email.

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.¹ On June 17, 2014, the Department sent a *Request for Response* to the District identifying the specific IDEA allegations in the complaint to be investigated. On July 1, 2014, the District timely submitted its *Response* to the *Request for Response*, with accompanying documentation. On July 7, 2014, the Parents provided a *Reply* by email in this case. On July 8, 2014, the Parents sent a minor correction to the *Reply*, by email. The Department provided a copy of the Parent's *Reply* to the District on July 24, 2014. This order is timely.

The Department's contract complaint investigator (complaint investigator) determined that telephone interviews were necessary in this case, and on July 24, 2014, the complaint investigator interviewed by telephone the Special Education Director and an advocate working with the Parents (Parents' Advocate). On July 30, 2014, the complaint investigator also interviewed by telephone one of the Parents. The complaint investigator reviewed and considered all of the documents received 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. The complainant's allegations and the Department's conclusions are set out in the chart below. The Department based its conclusions on the Findings of Fact in Section III and the Discussion in Section IV. This complaint covers the one year period from June 13, 2013, to the filing of this complaint on June 12, 2014.²

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

² OAR 581-015-2030(5)

No.	Allegations	Conclusions
1.	<p><u>Additional Parent Participation Requirements for IEP and Placement Meetings</u></p> <p>The complaint alleges the District violated the IDEA by failing to hold an IEP meeting at a mutually agreed on time and place during June of 2014, prior to the filing of this complaint.</p> <p>Relevant Law OAR 581-015-2195 and 34 CFR.300.322, 300.500, 300.327, 300.328, 300.501(c).</p>	<p><u>Not Substantiated</u></p> <p>The Department concludes that under the circumstances of this case the District's decision to prioritize parent participation over strict deadline compliance for the annual IEP review was clearly reasonable. Additionally, the Parents, not the District, initially requested that the IEP meeting be held after the annual IEP due date. The Parents also would not agree to participate in a meeting via alternate means which were offered by District within the relevant timeframe. Thus, the Department does not find a denial of Free Appropriate Public Education (FAPE) in this case nor does the Department sustain the allegation that the District violated the IDEA by failing to hold an IEP meeting at a mutually agreed upon time and place, nor that the District violated parent participation rights merely because the District did not have availability during the one week the Parents requested the meeting.</p>
	<p><u>Review and Revision of IEPs;</u></p> <p>The complaint alleges the District did not hold the annual IEP meeting within 365 days.</p> <p>Relevant law: OAR 581-015-2255 and 34 CFR 300.324(a)(4), (a)(5), (a)(6), (b)(1)</p>	<p><u>Substantiated</u></p> <p>While the District did not comply with IDEA requirements to have the IEP meeting every 365 days, the record demonstrates that the District was constructively prevented from meeting this procedural requirement. The District continues to try to schedule the meeting with a Parent in attendance, but has not received a reply from the Parents or their Advocate.</p>
	<p><u>Proposed Corrective Action</u></p> <p>The complaint requests the following corrective action: "Schedule an IEP Meeting in June, 2014."</p>	<p>No Correction Action is ordered in this case.</p>

III. FINDINGS OF FACT

Background

1. The Student in this case is presently ten years old and has completed fourth grade at the District. The Student is presently eligible for special education under the category of Emotional Disturbance (ED). The Service Summary of the Student's current IEP, dated June 4, 2013, includes Specially Designed Instruction (SDI) in "Writing" for "120 min per wk" in the "resource room"; SDI in "Social Skills" during the "writing group time," and Related Services of "Speech/Language" for "90 min per mo" in the "resource room." Student's June 4, 2013 IEP provides a placement of "Regular education with pull-out special education services for writing and communication and social skills."

Review and Revision of IEPs; Additional Parent Participation Requirements for IEP and Placement Meetings

2. On May 9, 2014, the District issued a "Notice of Team Meeting" to the Parents for a meeting on May 27, 2014, for annual review of the Student's IEP. The District and Parent disagree about whether the scheduled meeting date of May 27, 2014 had been agreed upon by both the Parents and the District. The parent claimed in interviews that they never accepted the May 27, 2014 meeting date; however, the Special Education Director said during the interview that the meeting date was initially accepted by the parent and that as a result of this the meeting date on the Director's Microsoft Outlook calendar changed from "tentative" to "confirmed".
3. The Parents correctly point out in their *Reply* that the meeting notice for the May 27, 2014 IEP meeting states, "If you cannot attend this meeting, or wish to discuss a different meeting location or time, or would like to participate through alternate means, please contact [District staff] by 05/26/14". It is also clear that on May 19, 2014, the Parents sent an email to the District requesting the IEP meeting be deferred until the Student received final grades in early June and requested a meeting date during the week of June 9-13, 2014, if possible.
4. On May 20, 2014, a week before the scheduled meeting, the Parents sent another email to the District to clarify that "neither [Parent] will be available for an IEP meeting on May 27. We will be available for a meeting the week of Monday June 9 through Friday June 13 (5 days). We do want all members of the team present with no substitutes, please."
5. On May 23, 2014, at 8:30 a.m., the Parents sent another email which included a request that the District "Please respond within the hour and be sure to address the date of the IEP meeting." The District responded in an email to the Parents at 9:38 a.m. (also on May 23, 2014), stating "We don't have any common availability for the IEP meeting the week of the 9th, but I can offer you Tuesday, June 3 at 3:00 if that works for you. It is past the annual due date, however. Please let me know today if that time is preferable. If [one of the Parents] cannot attend and wishes to, we have a good conference phone." On May 27, 2014, at 9:58 a.m., the Special Education Director sent an email to the Parents which included "We have not heard back from you with respect to deferring the IEP meeting to June 3. I need agreement that we can meet after the annual meeting date if we are to meet on June 3. Both [a District staff member] and I have sent emails and [the District staff member] has left phone messages with regard to meeting time. If I don't hear from you by noon, the meeting will take place today as scheduled as we are required by law to meet at least annually and I have not had a response from you regarding the new proposed date or agreement to meet after the annual date. I would, of course, keep the June 3 time open if we don't hear from you and you wish to have an additional meeting." Less than an hour later that day, May 27, 2014, at 10:48 a.m., the Special Education Director sent an email stating "I erred – [the Student's] IEP is due June 4. Please let me know if today or the 3rd is preferable."

6. On May 27, 2014, at 11:21 a.m., an Advocate for the Parents sent an email to the Special Education Director stating that one of the Parents had been sending email messages to District staff since last week trying to arrange a date and time for the upcoming IEP; and advising that if the District proceeds with the IEP meeting that day a Due Process complaint will be filed and requesting a response to the Parents' availability the week beginning June 9, 2014. Also on May 27, 2014, the Special Education Director and the Parents' Advocate discussed possible dates for a meeting, and the Special Education Director requested that the Parent sign a release of information form, so that the District may speak with the Parents' Advocate regarding confidential student information.
7. On May 27, 2014 at 11:29 a.m., the Special Education Director sent an email to the Parents' Advocate (and copied the Parents) stating that "The week of the 9th is difficult on this end. If June 3 can work for the family, we could provide a quality conference phone and or Skype."
8. On May 27, 2014, at 11:46 a.m., one of the Parents mistakenly sent an email to the Special Education Director (the email was intended for the Parents' Advocate) in which the Parent instructed the Parents' Advocate to "hold out for the week of June ninth..." Special Education Director responded in an email on May 27, 2014 at 12:03 p.m. advising of the email being sent to the Special Education Director by mistake and stating, "We do not have availability the week of June 9." On May 27, 2014, at 4:49 p.m., the Special Education Director sent an email to the Parents' Advocate providing contact information for the release of information form. Parents' Advocate provided a release to the District.
9. On May 28, 2014, at 9:30 a.m., the Parents' Advocate sent an email to the Special Education Director (copied to the Parents) and advised that the Parents were not available the week of June 3, 2014, and requested a meeting date the week of June 9, 2014. On May 28, 2014, at 10:08 a.m., the Special Education Director sent an email to the Parents' Advocate (copied to the Parents) stating "I will get back to you on the meeting date issue. What is the Parent's availability the week of June 16th?"
10. On May 29, 2014, at 3:48 p.m., the Parents' Advocate sent an email the Special Education Director requesting a phone call. On May 29, 2014, the Special Education Director telephoned the Parents' Advocate. The Special Education Director advised that not all staff would be available the week of the 16th, so it might be more productive to meet in August of 2014 when the Student's new teacher would be known and could attend the meeting. The Special Education Director understood that the Parents' Advocate agreed to a meeting in August of 2014. The Special Education Director has not heard anything further from the Parents or the Parents' Advocate concerning scheduling an IEP meeting in late August of 2014. The Special Education Director also confirmed during this conversation that the Special Education Director could not attend an IEP meeting the entire week of June 9, 2014, due to scheduling conflicts, and that at least one other District staff person also could not attend during that week.
11. During the complaint investigator's telephone interview of the Special Education Director on July 24, 2014, the Special Education Director provided details concerning these scheduling conflicts. The Special Education Director was out of town on June 9, and the calendar was full the remaining four days of the week of June 9, 2014 for both the Special Education Director and the Student's Principal. The Special Education Director also explained that the Special Education Director deemed both the Special Education Director's and Principal's attendance at the Student's IEP meeting necessary due to concerns related to potential conflicts that may arise at the meeting. As such, the Special Education Director wanted to attend the meeting as the representative of the District who is authorized to commit District resources.

12. The Parents' Advocate stated to the complaint investigator in this case during a telephone interview, that based on the telephone call with the Special Education Director on May 29, 2014, the Advocate understood both that the Special Education Director was not available to attend an IEP meeting the week of June 9, 2014, and that although the Parents were available on June 16, 2014, because many of the District Staff on the Student's IEP team would not be available then because they were not on contract that day, it would be "pointless" to hold a meeting on that day without staff necessary to convene an IEP meeting. The Parents' Advocate understood that the week prior to the next school year, in late August of 2014, would be available for a meeting. The Parents' Advocate also stated in an interview that although he agreed that holding the IEP meeting in late August of 2014 was now the best time for a meeting due to the inclusion of the new 5th grade teacher, the Advocate would not have agreed for the Parents to meet in late August of 2014 without first consulting the Parents. The Parents' Advocate communicated the latest meeting scheduling information to the Parents immediately after the conversation with the Special Education Director on May 29, 2014. The Advocate stated the idea of an August, 2014 IEP meeting "did not sit well with the Parents." The Advocate also stated that the IEP meeting date took a back seat to other issues at that point, primarily the District's staffing of field trips the last week of the 2013-2014 school year. The Advocate stated he has not contacted the District concerning the IEP meeting date since the telephone call on May 29, 2014.
13. On May 30, 2014, at 10:34 a.m., the Special Education Director sent an email to the Parents (copied to the Parents' Advocate and three District staff members) that discussed resolution of the issue concerning the field trips and stated "With regard to additional IEP dates, it appears that we have exhausted mutually workable options for this year. I can offer August 26 or 27 at 3:30 PM. Please let me know if you have a preference." On June 5, 2014, at 4:30 p.m, the Special Education Director sent an email to one of the Parents and the Parent's Advocate (copied to the other Parent and three District staff members), discussing staffing for a field trip for the Student scheduled for the next day. On June 5, 2014, at 4:25 p.m., the Parents' Advocate sent an email to the Special Education Director concerning the field trip and thanking the Special Education Director "for your attention to this whole matter."
14. During the complaint investigator's telephone interview of one of the Parents, the Parent clarified that the email messages that the Advocate referred to in the Advocate's May 27, 2014 email messages (email messages the Advocate said that the Parent "...had been sending to District staff..") were only the May 19, 2014 email from one of the Parents to a District staff member (the Student's special education teacher) and the May 20, 2014 email sent from one Parent to the other Parent, which was also copied to five District staff members, concerning the unavailability of the Parents for the IEP meeting scheduled on May 27, 2014. The Parent interviewed by the complaint investigator also understood that the District could not schedule the Student's IEP meeting the week of June 9, 2014 and on June 16, 2014 due to the unavailability of the Special Education Director. The Parent also stated that that there was unavailability of required District staff for an IEP meeting on June 16, 2014, because those staff members were not on contract that day, and that this was not communicated to the Parent. The Parent also confirmed that the Parents have not yet responded to the District's request to schedule the IEP meeting on August 26, 2014 or August 27, 2014. The Parent believes the meeting could have been held in June, either June 4 through 6, 2014, or on June 16, 2014. The Parent acknowledges that the District's proposed dates of June 4 through 6, 2014 were not discussed with the District. The Parent also believes that the meeting on June 16, 2014 could have occurred without the Special Education Director. The Parent also expressed frustration with the District's communication concerning decisions made by the District and believes that the District should better communicate their decisions to families, that they should relay the basis for the decision and the process that was used to make the decision, if the Parents wish to challenge the decision.

15. The Student attended school five days after the annual IEP review date of June 4, 2014 through June 10, 2014. June 10th was the last day of school for students in the District for the 2013-2014 school year. The District continued to implement the Student's June 4, 2013 IEP during these five days.

IV. DISCUSSION

I. Parent Participation Requirements for IEP and Placement Meetings

The complaint alleges the District violated the IDEA by failing to hold an IEP meeting at a mutually agreed upon time and place during June of 2014, prior to the filing of the complaint.

OAR 581-015-2195 provides:

(1) Parent Participation: School districts must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP or placement meeting or are afforded the opportunity to participate, including:

- (a) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (b) Scheduling the meeting at a mutually agreed on time and place.

(2) Other Methods to Ensure Parent Participation: If neither parent can attend, the school district must use other methods to ensure parent participation, including, but not limited to, individual or conference phone calls or home visits.

(3) Conducting an IEP/Placement Meeting Without a Parent in Attendance: An IEP or placement meeting may be conducted without a parent in attendance if the school district is unable to convince the parents that they should attend.

(a) If the school district proceeds with an IEP meeting without a parent, the district must have a record of the attempts to arrange a mutually agreed on time and place such as:

- (A) Detailed records of telephone calls made or attempted and the results of those calls;
- (B) Copies of correspondence sent to the parents and any responses received; and
- (C) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(b) The Department considers school district attempts to convince parents to attend sufficient if the school district:

- (A) Communicates directly with the parent and arranges a mutually agreeable time and place, and sends written notice required under OAR 581-015-2190(2) proposing a time and place for the meeting and states in the notice that the parent may request a different time and place, and confirms that the parent received the notice.

(c) "Sufficient attempts" may all occur before the scheduled IEP or placement meeting, and do not require the scheduling of multiple agreed-upon meetings unless the team believes this would be in the best interest of the child.

In this case, the District argues in its *Response*:

"The District did not violate the IDEA because it attempted on multiple occasions to timely schedule an IEP meeting, and agreed to schedule a meeting after the annual review date only when the Parents indicated that they were unable and/or unwilling to meet on any date prior to the annual review date. Further, even if this constituted a procedural violation (which it does not), under Target Range, no remedy is appropriate because (a) the Student's receipt of FAPE was not affected by having the 'old' IEP implemented for five school days; and (b) the Parents' right to participate has not been affected – in fact, the opposite has occurred as the District has worked hard to ensure that they can and will attend the IEP meeting. Further, the remedy they have requested (a June IEP meeting) is moot, and the District is already in the process of attempting to schedule an August IEP meeting prior to the start of the school year."

The Parents continue to allege that the IEP meeting could have been held in June of 2014.

This case involves two competing procedural requirements, namely, the requirement of annual review of IEPs and the requirement of parent participation in the IEP meetings. These two competing procedural requirements are set forth in the OARs quoted in the preceding paragraphs, OAR 581-015-2195 and OAR 581-015-225.

In this case, the Department finds that the District clearly attempted to schedule an IEP meeting at a mutually agreed on time and place. The District sent the initial meeting notice to Parents on May 9, 18 days prior to the suggested meeting date, and the Parents responded to the request 10 days later. The District made many attempts to ensure parent participation once the District learned that the Parents could not attend the IEP meeting scheduled for May 27, 2014. The District attempted to include the Parents in the annual IEP meeting, as the record illustrates the District made many attempts to ensure parent participation at the IEP meeting prior to the pending annual deadline. Additionally, there was an express threat to the District with filing a Due Process complaint against the District, if the District held the IEP meeting on May 27, 2014, as originally scheduled.³ Despite the efforts of both the District and the Parents to mutually agree on an IEP meeting date by the annual review deadline of June 4, 2014, the documentation reveals that a mutually agreeable IEP meeting date was simply not available before June 4, 2014. The Parent reported they were not available for a meeting on June 3, 2014 due to an appointment, and requested a meeting date the week of June 9, 2014, a week beyond the annual IEP review date.

³ Note that Due Process hearings may only be filed if a parent does not agree with the identification, evaluation, educational placement of a child, or the provision of a free appropriate public education to a child. Oregon law does not permit advocates to file Due Process hearing requests on behalf of a child or parent; nor does the law allow for Due Process hearings to be filed merely because an IEP meeting is held without a parent in attendance. Due Process hearings should not be used as a threat or a means of extortion against school districts, but rather as a good faith procedural safeguard to protect parental rights. Additionally, the parties should note that attorney fees may be available to local education agencies and paid by parents, if a District prevails in an IDEA action that the court determines is frivolous, unreasonable, or without foundation. See 34 CFR 300.517(a)(1)(ii).

Here, the Parents were the party who initially suggested an IEP meeting date beyond the annual IEP review date of June 4, 2014. The documentation reveals that neither the Parents nor the District discussed the possibility of meeting on Wednesday, June 4, 2014; Thursday, June 5, 2014; or Friday, June 6, 2014. The record does not show that Parents ever proposed any of these dates to District, yet they contend the District refused to meet on these days. Additionally, the documentation reveals that the District was genuinely not available the week of June 9, 2014 (Monday, June 9, 2014 through Friday, June 13, 2014) due to numerous scheduling conflicts.⁴ Beginning on June 16, 2014, the District no longer had on contract the required District staff to convene a full IEP team meeting for the Student. The District then reasonably agreed with the Parents' Advocate that it was futile and impractical to hold an IEP meeting during the summer and before District staff availability in late August of 2014. As a result, the District has already suggested to the Parents by email the dates of August 26, 2014 or August 27, 2014 for the Student's next IEP meeting. Neither the Parents nor the Parents' Advocate have responded to the District concerning the availability of the Parents on those dates.

The Ninth Circuit Court of Appeals has stated:

When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. In reviewing an agency's action in such a scenario, we will allow the agency reasonable latitude in making that determination.”

* * *

* * * [T]he Supreme Court and this court have both repeatedly stressed the vital importance of parent participation in the IEP creation process. We have further held that delays in meeting IEP deadlines do not deny a student FAPE where they do not deprive a student of any educational benefit.⁵

The Department therefore concludes that under the circumstances of this case the District's decision to prioritize parent participation over strict deadline compliance for the annual IEP review was clearly reasonable. The record is replete with instances of the District attempting to schedule the meeting in a mutually agreed upon time and place with the Parent, and instances of the District taking steps to ensure that one or both of the Parents are present at the IEP meeting. The District also sent sufficient written notice to Parents well in advance of the meeting to confirm the time and place.

Note that the law clearly states that “sufficient attempts” to engage parent participation may all occur before the IEP meeting, and do not require the scheduling of multiple agreed-upon meetings unless the team believes this would be in the best interest of the child.⁶ Additionally, when conducting an IEP team meeting the parent of a child may participate via alternate means such as video conference or phone calls.⁷ It is also important to note that the law also states that Districts may hold IEP meetings without a parent in attendance if the school is unable to convince the parent they should attend.⁸

⁴ Note that June 10, 2014 was the last week of school for elementary schools in the District.

⁵ *Doug C. v. Hawaii Dept. of Educ.*, 720 F.3d 1038, 1046 (9th Cir. 2013)

⁶ See OAR 581-015-21095(1)(c)

⁷ See OAR 581-015-2195(6)

⁸ OAR 581-015-2195(3)

Here, the District communicated directly with the Parent to arrange a mutually agreeable time and place for a meeting. District also proposed to gain parent participation via Skype and conference call and the Parents rejected these offers of participation as well. However, the Parents constructively denied the District's ability to schedule a meeting with parental attendance by refusing every date except for those the Parents initially proposed during the last week of school, when there was no District availability for a meeting. As noted above, the Parents' Advocate even threatened the District with filing a Due Process complaint if the District had the meeting without a Parent at one of the dates that would work for the District. As such, the complainant not District violated the good faith provisions of the parent participation rules.

Additionally, the Student continued to receive educational services under the June 4, 2013 IEP during the five school days from June 4, 2014 to the last day of school for the Student in the 2013-2014 school year, June 10, 2014. Thus, the Department does not find a denial of FAPE in this case. The Department does not sustain the allegation that the District violated the IDEA by failing to include a Parent in an IEP meeting during May and June of 2014.

II. Review and Revision of IEPs

Each school district must ensure that the IEP Team reviews a child's IEP periodically, but at least once every 365 days to: determine whether the annual goals for the child are being achieved; and revise the IEP as appropriate to address any lack of expected progress toward the annual goals and in general education curriculum if appropriate.⁹

Unfortunately, this procedural compliance requirement requires strict adherence to the 365 days, and it does not account for matters out of the control of the parties, such as one side's unavailability, or lack of cooperation, as in this case. The record does show that the District did not hold the meeting within 365 days. However, as noted above, the District was threatened with litigation for doing so, and the Parents not the district, originally requested the meeting to be held outside of the 365 day deadline. Interestingly, the Parent then filed a state complaint related to this very matter that they initially proposed and pursued with the District.

While this is a procedural error, the Department does not find any lingering noncompliance on the part of the District as they have continued to make efforts to schedule the annual IEP meeting, but the Parent and their Advocate have not replied to these requests. As the District has shown they are currently trying to schedule an annual meeting at this time, no corrective action is necessary at this time.

The Department substantiates this allegation only in that the IEP meeting was not held during the 365 day period, but notes the surrounding facts as to why the District did not hold the meeting during this time frame along with the fact that District is currently attempting to schedule the annual IEP meeting.

⁹ See OAR 581-015-2225(1)

CORRECTIVE ACTION¹⁰
In the Matter of Ashland School District
Case No. 14-054-024

The Department does not order Corrective Action resulting from this investigation.

Dated this 8th Day of August 2014



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

Mailing Date: August 8, 2014

¹⁰ 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)).