

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Portland School District

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FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 11-054-031

I. BACKGROUND

On November 14, 2011, the Oregon Department of Education (Department) received a letter of complaint from an attorney representing a parent of a student residing in the Portland School District (District). The attorney requested that the Department conduct a special education investigation under OAR 581-015-2030. The Department confirmed receipt of this complaint on November 16, 2011 and provided the District a copy of the complaint letter.

On November 18, 2011, the Department sent a *Request for Response* (RFR) to the District identifying the specific allegations in the complaint to be investigated and establishing a *Response* due date of December 2, 2011. The District submitted its timely *Response* to the Department and to the parent's attorney on December 2, 2011. The District's *Response* included: IEPs, IEP meeting minutes, IEP meeting notices, Prior Written Notices, the current three-year reevaluation, statewide and district-wide evaluation results, formal and informal assessment results, progress monitoring data, behavior/discipline reports, emails and other correspondence, attendance records, a list of knowledgeable personnel, and a district calendar.

The Department's complaint investigator determined that on-site interviews were required. On December 13, 2011, the Department's investigators interviewed the parent and attorney. On December 16, 2011, the Department's investigators interviewed the following District staff: special education program administrator; special education teacher; school psychologist; autism specialist (retired); occupational therapist/behavior specialist; and principal. The District's attorney was present during the interviews. The Department reviewed and considered all of these documents, interviews, and exhibits in reaching the findings of facts and conclusions of law contained in this order.

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; the timeline may be extended if the District and the parent agree to extend the timeline to participate in mediation or if exceptional circumstances require an extension.¹ 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 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. This complaint covers the one year period from November 15, 2010 to the filing of this complaint on November 14, 2011.²

¹ OAR 581-015-2030(12)

² See 34 CFR § 300.153(c) and OAR 581-015-2030(5)

	Allegations	Conclusions
<p>1. <u>Evaluation</u></p> <p>Failing to conduct a music therapy evaluation.</p> <p><u>Relevant Rules and Regulations:</u> OAR 581-015-2105 and 34 CFR § 300.303-305; OAR 581-015-2115</p>	<p><u>Not Substantiated</u></p> <p>The student apparently made some academic progress, but it was mitigated by the student's poor attendance. Also, it is not clear that the proposed music therapy evaluation is based on peer-reviewed research or is educationally relevant for the student.</p>	
<p>2. <u>Review and Revision of IEPs:</u></p> <p>Failing to review and revise the IEP because the student was not making sufficient progress.</p> <p><u>Relevant Rules and Regulations:</u> OAR 581-015-2205, and 34 CFR § 300.324(6)(b)</p>	<p><u>Not Substantiated:</u></p> <p>Sufficient progress was not possible because of the student's attendance. However, there was some evidence of academic progress which was provided by the District. Additionally, the District convened the IEP team three times to review the student's IEP.</p>	
<p>3. <u>IEP Team Considerations:</u></p> <p>The District displayed animosity to the parents during the IEP meetings and did not consider their requests objectively.</p> <p><u>Relevant Rules and Regulations:</u></p> <p>OAR 581-015-2205(1)(b), OAR 581-015-2200, and 34 CFR § 300.501(b) and 34 CFR 324(a)</p>	<p><u>Not Substantiated:</u></p> <p>The District provided sufficient opportunity for parent participation. The parent attended multiple IEP meetings and meeting notes indicate viable discussions about the evaluation request occurred.</p>	
<p>Requested Corrective Action. The parents are requesting that the District:</p> <ol style="list-style-type: none"> 1. Provide a music therapy evaluation conducted by an impartial, qualified music therapist of the District's choice who has experience in conducting such evaluations for school districts; 2. Show fair and balanced consideration of 	<p><i>See Discussion.</i></p>	

<p>the results of such an evaluation; and</p> <p>3. Review District procedures regarding responses to parent requests and information from parents.</p>	
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III. FINDINGS OF FACT

1. The student is a fifteen year old resident of the District who currently attends Pathways Community School in the Multnomah School District. During the 2010-2011 school year, the student attended Beaumont School in the Portland School District until the student was transferred to Pathways in February, 2011.
2. The student is currently eligible for special education services under the category of Autism. The student's most current annual IEP, dated April 25, 2011, states that the student will receive Specially Designed Instruction in the areas of: communication skills, behavior, and adaptive physical education. The student's related services are: transportation, occupational therapy, and speech and language therapy. Supplementary aids and services include transition procedures, mealtime guidelines, sensory support program, behavior intervention plan, safety plan, and development and updating of a sensory program. Supports for school personnel are listed as: care coordination by the occupational therapist and the speech and language therapist, consultation with the behavior specialist, and consultation for assistive technology.
3. The student's current educational placement at Pathways is a specialized setting for students identified with autism and has a teacher-to-educational assistant-to-student ratio of 1-5-7.
4. The student's placement at the time the student attended Beaumont until February, 2011 was in a special education classroom with one teacher, three educational assistants, and 13 students. Most of the student's time was spent one-on-one with the teacher and/or aide in an area of the classroom that was separate from the other students. The special education and related services listed on the September 14, 2010 IEP are in the areas of reading, math, writing, adaptive physical education, communication, social/behavioral skills, and occupational therapy.
5. On September 29, 2010, the District reconvened the IEP team and the parent requested music therapy. The team discussed the music therapy request and the parent provided the District with a report dated September 29, 2010 from the student's private music therapist. The report, IEP Recommendation Regarding Music Therapy, described how attentive the student was to music and how music could be incorporated into the student's daily school activities. Sporadic school attendance was also noted at the meeting.
6. On October 12, 2010, the parent received a Prior Written Notice (PWN) from the District stating that the parent's request for the music therapy was refused. The PWN states, "There is no data or research that indicates that music therapy as a related service is required for [student] to make progress on the IEP goals and objectives."
7. IEP progress reports dated November 4 & 5, 2010 based on the April 15, 2010 annual IEP goals are as follows:

Functional Communication: [Student] has only attended one communication session so far this year, therefore, there has not been any progress to report as of yet.

Reading Comprehension: There were 41 days in the first quarter and [student] missed 30 of those days. Gathering data has been difficult due to a lack of attendance. With visual prompts and pictures, [student] was able to identify three things that the character in the story found. [Student] reads directions but needs to be told to do it. Not able to state the 5 W's of a story.

Decoding and Word Recognition: Due to missing 75% of the first quarter, collecting data on [student] has been difficult. [Student] reads 6.5 words per minute. [Student] can read faster but is hard for [] to focus for more than 20-30 seconds straight.

Writing: Due to missing 75% of the first quarter, collecting data has been difficult. [Student] needs lots of support with writing. [Student] needs help with the order of words in a sentence. [Student] is able to write sentences from memory that [student] has seen in advertisements. [Student] is able to use capital letters and punctuation correctly.

Mathematics: Due to missing 75% of the first quarter, collecting data has been difficult. This is [student's] least favorite subject. [Student] is currently unable to carry and borrow when adding and subtracting double digit numbers. [Student] doesn't like to count coins and it is difficult to make progress with money.

Emotional Control : Out of 11 days attended the first quarter, [student] had 11 incidents that involved hitting, kicking, biting, and pinching adult and students. With verbal prompt, [student] says "Thank you" and "Please." Uses a picture schedule for transitions.

Self-Management: [Student] has bathroom breaks built into visual schedule. When [student] sees the bathroom icon, [student] says, "No bathroom." However, [student] does go to the restroom when [student] goes home.

Functional Routines: With adult supports and prompts, [student] washes the desk tops during class. Modeling the steps help [student] realize what needs to be done.

The District provided two examples of progress data collection but did not keep the IEP progress data that was kept last year.

8. The student missed 28.5 days and was late two days during the first quarter grading period, September 7, 2010 to November 4, 2010. The student received all modified A's in student's classes. The District attempted to improve the student's attendance by increasing frequency of "preferred activities." These included, but were not limited to, listening to music CDs, sensory breaks, using a scooter and a swing.

9. On December 15, 2010, the student's IEP team met to discuss the parent's new request for a music therapy evaluation. The parent also presented a list of concerns including behaviors impeding academics, restraint aftermath, sensory issues, occupational therapy progress, assistive technology, the use of the computer, music therapy at home, communication in the community, and the current placement. In the list of concerns, the parent states, "Happy with the recent progress in behavior, things seem better now for [student]. [Student's] attitude about going to school and [student] presentation when picked up are more positive now, overall." The meeting notes indicate that the following items were discussed: educational progress; tracking sheets; sensory issues; use of the computer; math; communication skills; behavior tracking; putting music on the computer; and the efficacy of music therapy. In particular, the District asked questions about how music therapy would be integrated into the student's activities.
10. The record indicates that no decisions were made at the December 15, 2010 IEP meeting.
11. On January 25, 2011, the student's IEP team met again to address the music therapy evaluation. The parent provided the District with information about why the [student] should be evaluated for music therapy, what is a music therapy evaluation and who can provide music therapy, the definition of "peer review," and an Office of Special Education Programs guidance letter stating that music therapy may be a related service for a student based on their individual needs. The information provided by the parent at the meeting regarding the music therapy evaluation was not reviewed by the IEP team. However, the meeting notes showed that there continued to be a discussion about a music therapy evaluation. Not having reached consensus, the District moved forward and denied the request for the evaluation. District staff reported that their opinion on the appropriateness of a music therapy evaluation ranged from not having any opinion because they did not know enough about music therapy to believing it was not needed by the student. Staff reported that there was little or no discussion about music therapy outside the IEP meetings and no other student receives music therapy in the District.
12. The January 25, 2011 IEP meeting also discussed changing the placement from Beaumont Middle School to the Pathways program. The District believed that the Pathways program could better address the student's complex needs. After the parent's agreement, the District placed the student at the Pathways program in February, 2011.
13. On January 27, 2011, the District provided two PWNs to the parent. The PWN pertaining to the music therapy evaluation states, "This action is proposed because: The IEP team has determined that Music Therapy is not needed for [student] to receive a Free Appropriate Public Education." The Notice also states, "This action is based on the following evaluation procedures, tests, records, or reports: [student] is making progress on IEP goals and objectives. [Student] receives Specially Designed Instruction and related services to support continual progress." "Other factors considered by the team: [student] is making progress. [Student] had 25% attendance in the first quarter of the school year." The other PWN provided to the parent pertained to the District agreeing to provide a scooter for the student.
14. The January, 2011 IEP progress reports based on the amended April 15, 2010 IEP are as follows:

Functional Communication: No update.

- Reading Comprehension: [Student] can follow one to two step directions that are written, but [student] needs prompts to carry out tasks. Pictures help [student] understand meanings. [Student] is not currently answering the 5 W's.
- Decoding and Word Recognition: [Student] can read up to 20 words per minute on good days when [student] is more focused.
- Writing: Writing sentences that describe pictures is very difficult due to [student] having problems coming up with words. Word banks help chose the correct words to put in a sentence.
- Mathematics: [Student] uses a dry erase board to do addition and subtraction problems. [Student] needs reminders to pay attention to the symbols.
- Social-Emotional Behavior: [Student] uses a picture schedule. It helps [student] transition from one activity to another. [Student] had 19 aggressive acts towards staff and students during the second quarter.
- Self-Management: [Student] has had two mishaps. Both accidents were a result of [student] falling asleep and being off schedule.
- Functional Routines: [Student] does a good job of performing functional routines. However, [student] needs lots of prompts as [student] has a hard time focusing on the multiple tasks.

15. The student missed 10.5 days and was late 11 days during the second quarter grading period, November 4, 2010 to January, 28, 2011. The student continued to receive all A's in student's classes.

16. The student's March 17, 2011 IEP progress reports are as follows:

- Functional Communication
- #1 [Student] uses PECS or pointing to pictures on choice boards to request objects/activities at choice leisure/sensory times. [Student] is still learning what some of the options mean/are, so is requiring pointing assistance for those. [Student] verbally states "Stop" when [student] wants a noise to stop.
- #2 Unable to answer "wh" questions consistently without verbal models.
- #3 [Student] is able to perform this skill although it is noted that [student] often says "No" to an activity when initially asked but then will enjoy participating in it after watching.
- #4 Most of [student's] "sentences" are one word at this time.

#5 [Student] has initiated greetings independently (hi/bye) along with "I love you" to staff, but needs verbal models for other interactions listed.

#6 Not doing at this time. [sic]

Reading Comprehension:

[Student] has been in our program/classroom just over 3 weeks, [student] is just now starting to settle down into the routine of activities and following a schedule. Due to a behavioral crisis that necessitated [student's] move from [student's] previous classroom to this current one, we have started out by keeping academic demands low and are just now starting to gradually increase those demands. At this time, [student] is requiring pointing prompts from staff to use pictures to answer questions about the readings. Student has been unable answer "wh" questions about stories. [Student] is working on following written directions for [student's] schedule, vocational tasks and cooking (with picture prompts as well as words) and is requiring pointing prompts at this time.

Decoding and Word Recognition:

[Student] is currently working on reading tasks as described in previous goal and as they occur naturally within functional routines related to computer activities, choice times, etc. [Student] is not yet using a personal dictionary.

Writing:

This is a skill that is very difficult for [student] writing with a pen/pencil is not a preferred activity and using all the described grammar and content is challenging to [student]. [Student] becomes easily frustrated by these tasks and staff are needing to provide numerous pointing prompts/verbal models. At [student's] IEP in 2 weeks we will discuss whether this should remain a priority skill at this time or not. The student is very proficient in keyboarding on a computer.

Mathematics:

[Student] requires pointing and verbal prompts/models for skills listed in objectives #1-#3. [Student] matches the coins and can point to them when named but needs assistance regarding their values (pointing and verbal models).

Social/Emotional Behavior:

[Student] has been improving in [student's] ability to transition and to follow a schedule since starting here. The use of a timer and alerting [student] when there are only a few minutes left (and having [student] turn the timer off) appears to generally work well. [Student] still "balks" at times about the going to worksets but this gradually improving as staff try out different schedule activity arrangements, reinforces, etc. [Student] does still exhibit aggression towards staff/peers when upset by noise but with less intensity than when the student first arrived.

Cafeteria objective: N/A (brings own lunch, staff have school lunch on table as option for now.)

Still attempts to dart into other rooms a few times/week (looking for tapes) but unless [student] is highly agitated about lights or being re-directed, [student] keeps hands/feet to self.

Self Management:

[Student] has not yet had the need to change clothes at school. [Student] is given scheduled opportunities to use the restroom but usually says "no" until the end of the school day (has become part of this routine to go right before going to [student's] locker to go home). If staff note body signals that [student] needs to go, they direct [student] to the bathroom (verbal/picture/pointing prompt) and goes without aggressions.

Functional Routines:

[Student] is not doing the janitor/bucket job listed but [student] is rinsing out the milk cartons in the cafeteria (for recycling) and is loading/unloading the dishwasher with pointing and verbal prompts. [Student] is wiping down [student's] cafeteria table with cleaning wipes rather than disinfectant spray or mops at this time.

Adaptive Physical Education:

[Student] follows a mini-schedule (pictures paired with words) to complete laps, participate in activities in at least three stations and then participate in an activity of [student's] choice. [Student] is requiring pointing prompts (as well as verbal ones) to participate at this time. [Student] uses the scooter, scooterboard, and bike as preferred activities in "parallel play" format. Staff is gradually introducing opportunities to add an interactive component to the PE activities.

17. In March of 2011, the District conducted a reevaluation of the student.
18. On April 25, 2011, the District conducted an annual review of the student's April 15, 2010 IEP. The student's IEP progress reports dated April 13, 2011 noted that the student continued to perform same levels reported in the March 17, 2011 IEP progress reports. From February 14, 2011 to April 13, 2011, the student attended Pathways School 34 days out of total of 46 days.
19. The IEP team subsequently met later on May 6 & June 10, 2011 to amend the April 25, 2011 IEP.
20. The District reported that they provide no students with music therapy.

IV. DISCUSSION

1. The Complaint states that the District violated IDEA by failing to properly consider the parent's request for a music therapy evaluation. The Complaint alleges that the District's reasons for denying the evaluation were without basis, because music therapy is supported by peer-reviewed research³ and they further alleged that the student was not making progress in the student's program while attending Beaumont Middle School.

A school district must ensure that a reevaluation of an eligible child is conducted if the school district determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrants a reevaluation or if the child's parent or teacher requests a reevaluation.⁴ In addition, the District is required to provide PWN to the parent if the District refuses an evaluation that is requested by the parent. The required content of PWN is as follows:

- A description of the action proposed or refused by the district.
- An explanation of why the district proposes or refuses by the school district.
- A description of any other options that the IEP team considered and reasons why those options were rejected.
- A description of any other factors that are relevant to the school district's proposal or refusal.
- A statement that the parents of a child with a disability have procedural safeguards, and if it is not an initial referral for evaluation, the means by which a copy of the Notice of Procedural Safeguards may be obtained.
- Sources for parents to contact to obtain assistance in understanding their procedural safeguards.⁵

In this case, the District states that the reason for their refusal to provide a music therapy evaluation was based on the student's satisfactory existing levels of progress, music therapy not being educationally relevant, and the student's lack of attendance as the core issue underlying student performance. The refusal was not based on a single discussion or piece of evidence, but a series of IEP meetings culminating in the January 25, 2011 decision. In order to address the sufficiency of the District's decision⁶, progress must be addressed over a period of time. The relatively short period of time the student attended Beaumont Middle School during the 2010-2011 school year makes verifying progress very difficult. The student's infrequent attendance also compounds the difficulty to accurately assess progress as well as the lack of progress reporting data for the IEP progress reports. Nevertheless, the opinions of both the District and the parent themselves, along with improvement of the student's attendance, point to progress. Furthermore, the student continued to make progress at Pathways.

On December 15, 2010, the student's IEP team, including the parent, discussed whether music therapy is based on peer-reviewed research.⁷ The District also refused to conduct a music therapy

³ OAR 581-015-2200(d)

⁴ OAR 581-015-2105

⁵ OAR 581-015-2310

⁶ The standard by which the District's decision is judged is whether the public agency has reached a decision that is consistent with the requirements of Part B of IDEA in light of the individual child's needs and abilities. [34 CFR § 300 Analysis and Comments, p. 46601].

⁷ OAR 581-015-2200 and 34 CFR 300.320(a)(4) require that special education and related services and supplementary aids and services be based on peer-reviewed research to the extent practicable, given the availability of peer reviewed research.

evaluation because the team could not ascertain how music therapy was educationally relevant to the student based on the information and reports provided by the parent. The District's decision to deny the music therapy evaluation was individualized and based on the student's current functioning as demonstrated by the discussions which occurred during the December and January IEP meetings.

The District also listed attendance as a factor in its decision. No conclusive evidence was provided in the record to link music therapy or music therapy evaluations to improved school attendance. The parent also acknowledged their role in keeping the student at home. The Department therefore finds the District's reasons for denying the evaluation sufficient to justify its decision.

2. The Complaint states that the District failed to reconvene the IEP team to revise the student's IEP because of the lack of progress. The Complaint referred to the non-specific IEP progress reports and change of schools as evidence of the student's lack of progress. The Complaint refers to the period of time the student attended Beaumont Middle School during the 2010-2011 school year. This period of time starts on November 15, 2010, which was the beginning of the complaint timeline, to February 14, 2011, the date the student began attending Pathways Community School.

OAR 581-015-2225(1)(b)(A) specifies that a district will review a student's IEP at least annually but also when there is a lack of expected progress toward the annual goals in the IEP. The District reports that the student was making progress while at Beaumont but was unable to produce IEP progress reporting data other than a sample. The District also points out that the January 27, 2011 PWN states "progress," not necessarily *sufficient* progress to meet the annual goals. The IEP progress reports did not address whether that progress was sufficient to meet the student's goals and objectives. The normal significance between the progress and sufficient progress, however, is diminished because the District had reconvened the IEP team on September 14, December 15, 2010 and January 25, 2011 to address the student's progress.

The parent also claims the student's change to Pathways was evidence that there was no progress. Pathways is a more specialized placement and it also affords the student more opportunities to interact with classmates. At Beaumont, the student was mostly segregated from classmates, but while at Pathways, the student is not. Thus, one cannot conclude that the change was because of a lack of progress. The change had more to do with having all the supports in place to increase the opportunities for interaction with the student's classmates.

As stated above, progress needs to be viewed over a period of time, especially when attendance has been sporadic, so it is important to note that Pathways also reports some progress. Sufficient progress at Beaumont was unreasonable to expect because of attendance, yet the District convened the student's IEP team three times to address progress, among other issues. Because the District reconvened the IEP team three times to address the student's progress, the Department does not substantiate the allegation.

3. The Complaint alleges that District staff showed animosity towards the parent and did not consider the parent's request objectively. The Complaint alleges specific incidents in which complainants perceived District staff to be hostile, disagreeable, agitated, and frustrated. The Complaint also alleges that the District disregarded information provided by the parent at the January 25, 2011 IEP meeting regarding music therapy.

School districts must provide parents with opportunities to participate in meetings and provide input with respect to the identification, evaluation, IEP, and educational placement.⁸ Parents are considered equal partners in the process, not merely passive participants. Procedurally, the District provided all necessary notices related to parent participation.⁹ Substantively, the parent attended all the IEP meetings, and the IEP notes reflect active participation by all parties and commentary provided on the part of the parent. As part of the IEP review and revision, IEP teams are to review information about the child provided by the parents. Further in conducting a review of the student's IEP, the IEP team must consider special factors that include, but are not limited to, the strengths of the child and concerns of the parents for enhancing the education of the child.¹⁰ These reviews must occur periodically, but not less than annually. Here, the District acknowledges that information presented by the parent at the January 25, 2011 IEP was set aside and not addressed, because the issue regarding music therapy had been discussed at previous IEP meetings and the District needed to move forward and make a decision regarding the music therapy evaluation.

Based on the information provided in the record, the Department finds that the parent provided input into the District's decision regarding the music therapy evaluation. Therefore, these issues regarding allegations two and three are unsubstantiated. The Department does not order Corrective Action due to the unsubstantiated allegations.

V. CORRECTIVE ACTION

In the Matter of Portland School District 1J
Case No. 011-054-031

No corrective action is ordered in this case.

Dated: January 12, 2012



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

Mailing Date: January 12, 2012

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

Additionally, the Department of Education will not reconsider complaints after the Final Order has been issued pursuant to OAR 581-015-2030(14)(b).

⁸ OAR 581-015-2190

⁹ Meeting notice (OAR 581-015-2195); Prior Written Notice (OAR 581-015-2310); and Procedural Safeguards Notice (OAR 581-015-2300)

¹⁰ OAR 581-015-2225, 581-015-2205, and 34 CFR 300.320