

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of Beaverton SD 48J	)	FINDINGS OF FACT,
	)	CONCLUSIONS,
	)	AND FINAL ORDER
	)	Case No. 13-054-015

**I. BACKGROUND**

On April 17, 2013, the Oregon Department of Education (Department) received a letter of complaint from the parents (Parent(s)) of a student (Student) residing in the Beaverton School District (District). The complaint requested a special education investigation under OAR 581-015-2030. The Parents provided a copy of the complaint letter to the District.

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.<sup>1</sup> On April 24, 2013, the Department sent a *Request for Response* to the District identifying the specific IDEA allegations in the complaint to be investigated. The District requested an extension due to unavailability of District staff and the Department allowed an eight (8) day extension. On May 16, 2013, the District submitted by email its *Response* to the *Request for Response*, with accompanying documentation. The District did not provide a hard copy of the documentation (651 pages) until May 22, 2013. The Parents did not submit a written *Reply* prior to the on-site interviews in this case. Due to unavailability of particular critical District staff for interviews during the investigation, the Department extended the 60-day timeline in this case by a total of 15 days. This order is timely.

The Department's contract complaint investigator (complaint investigator) determined that an on-site investigation would be necessary in this case. The complaint investigator met with the Parent on June 3, 2013, at which time the Parent provided a written *Reply* and supporting documentation to the Department. On June 6, 2013, the complaint investigator interviewed District staff, including a special education facilitator, a director of home instruction services and the District's legal counsel. The complaint investigator reviewed and considered all of the interviews and documents 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 April 18, 2012, to the filing of this complaint on April 17, 2013.<sup>2</sup>

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<sup>1</sup> OAR 581-015-2030; 34 CFR §§ 300.151-153

<sup>2</sup> OAR 581-015-2030(5)

No.	Allegations	Conclusions
1.	<p><b><u>Review and Revision of IEPs</u></b></p> <p>The complaint alleges the District violated the IDEA by failing to update the Student's IEP upon enrollment in the District at the beginning of the 2012-2013 school year, despite notification by the Parents that the Student's IEP required updating and review.</p> <p>Relevant Law: 581-015-2220 and 34 CFR 300.323; OAR 581-015-2225 and 34 CFR 300.324(a)(4), (a)(5), (a)(6), (b)(1).</p>	<p><b><u>Not Substantiated</u></b></p> <p>The District adopted, reviewed, and revised, the Student's most recent IEP upon the Student's transfer into the District. On August 30, 2012, the District convened an IEP meeting and the IEP team, including the Parents, agreed to adopt the most recent IEP in place from the Student's previous Oregon school district, with a date of May 26, 2011, and to revise that IEP in the future. The Parent advised the District that the Student had received medically required "homebound instruction" during the 2011-2012 school year at the [S]tudent's previous district, due to the [S]tudent's medically fragile state, and the IEP team determined that the "homebound instruction" of one hour each school day would continue, while working on transitioning the Student back into a special class. The District also attempted to review and revise the IEP in November 2012, but the Parent declined until after mediation. The District then mediated with the Parent in January and February 2013 regarding updates to the Student's IEP and to revise the IEP based on the Student's needs. The Department does not substantiate this allegation.</p>
2.	<p><b><u>Free Appropriate Public Education (FAPE)</u></b></p> <p>The complaint alleges the District violated the IDEA, stating that the IEP is not reasonably calculated to confer educational benefit thus resulting in a denial of FAPE and requiring the Parents to obtain private tutoring services and supplemental educational materials.</p> <p>Relevant law: OAR 581-015-2040 and 34 CFR 300.101.</p>	<p><b><u>Not Substantiated</u></b></p> <p>There is no indication that consistent delivery of home instruction for one hour each school day is not sufficient to provide FAPE to this Student, a Student whose placement is medically limited to home instruction. During the on-site, the Parent reported that a private tutor is working with the Student for FAPE, but no records of this have been provided to either the Department or to the District. The Department does not substantiate the allegation that the Student's current IEP is insufficient to provide FAPE to the Student.</p>

<p>3.</p>	<p><b><u>Content of IEP</u></b></p> <p>The complaint alleges that the District violated the IDEA by failing to include in the Student's IEP, and by failing to provide, adequate IEP services, modifications and accommodations despite specific requests for services and accommodations made by the Parents in March and April 2013, requiring the Parents to obtain private tutoring services and supplemental educational materials.</p> <p>Relevant law: OAR 581-015-2200 and 34 CFR 300.320.</p>	<p><b><u>Not Substantiated</u></b></p> <p>The Department finds that the Parent has not shown that use of the computer during delivery of home instruction is a necessary accommodation in this case. The Department defers to the District's conclusion, as suggested in the February 20, 2013 mediation agreement, that the computer is not an essential component of delivery of instruction to the Student, and the Parent has not demonstrated otherwise.</p> <p>The Department also finds that the change in the time for delivery of home instruction has not been unreasonably delayed, based upon the specific provision of the February 20, 2013 mediation agreement requiring a medical order to change the time for delivery of home instruction. Unfortunately, staffing limitations dictate that the District does not have the ability to change the time for delivery of home instruction on a moment's notice. In this case, once a medical order was received, the District promptly changed the time of instruction.</p> <p>The Department also finds that the "accommodations" requested by the Parent on April 13, 2013, along with the District's desire to work on obtaining updated data and evaluations to support appropriate IEP revisions, were indeed reasonably discussed at a facilitated IEP meeting, under the agreement of the District and the Parent. The Department concludes that the District did not fail to include accommodations demonstrated to be necessary components of the Student's IEP.</p>
<p>4.</p>	<p><b><u>When IEPs Must be in Effect</u></b></p> <p>The complaint alleges that the District violated the IDEA by failing to provide scheduled academic services to the Student on April 5, 2013.</p> <p>Relevant law: OAR 581-015-2220 and 34 CFR 300.323.</p>	<p><b><u>Not Substantiated</u></b></p> <p>The Department finds that the District reasonably construed the Parent's comment made on April 4, 2013 as a request for cancellation of delivery of home instruction the next day. The absence of an email requesting cancellation of delivery of home instruction (as specified in the mediation agreement) on April 5, 2013 is unsurprising, due to the multiple days on which the delivery of home instruction was effectively cancelled because no one answered the door at the Student's home at the time scheduled for delivery of home instruction when</p>

		<p>District staff arrived.</p> <p>Additionally, enforcement of specific provisions of mediation agreements should be pursued in Circuit Court pursuant to Oregon law. On April 5, 2013, the District issued a Prior Written Notice (PWN) which attempted to increase the consistency of delivery of home instruction by changing the time scheduled for home instruction, and the PWN states that the new time would begin on April 9, 2013. The Department does not substantiate this allegation.</p>
5.	<p><b><u>Prior Written Notice (PWN)</u></b></p> <p>The complaint alleges the District failed to provide the correct PWN after an April 3, 2013 request for supplemental educational materials, and it is alleged that the District instead sent a PWN for compensatory education which was not part of the request.</p> <p>Relevant law: OAR 581-015-2310 and 34 CFR 300.503.</p>	<p><b><u>Not substantiated</u></b></p> <p>The Department concludes that the District reasonably concluded that the Parent's request implied the provision of compensatory services, until the Parent clarified the request. Thus, the PWN issued on April 2, 2013 did not violate the applicable regulations. Additionally, upon receiving clarification of the Parent's request on April 3, 2013, the District promptly reviewed the matter and then issued a PWN allowing the Parent's request. This does not constitute a violation of the applicable regulations.</p> <p>Although the Parent now asserts that the District did not deliver the promised materials on April 15, 2013, the Department does not have sufficient evidence to so conclude. The Department does not substantiate this allegation.</p>
6.	<p><b><u>Transfer Students</u></b></p> <p>The complaint alleges that the District did not provide FAPE to the Student after the Student transferred into the District, including services comparable to those described in the IEP from the previous Oregon district, and that the District did not adopt the previous district's IEP, or develop a new IEP for the Student.</p> <p>Relevant law: OAR 581-015-2230 and 34 CFR 300.323(e).</p>	<p><b><u>Not substantiated</u></b></p> <p>As noted above, the District adopted the Student's most recent IEP upon transfer into the District. On August 30, 2012, the District convened an IEP meeting and the IEP team, including the Parents, agreed to adopt the IEP in place or the most recent IEP from the Student's previous Oregon school district, with a date of May 26, 2011, and to revise that IEP in the future. At that time, the IEP team determined to continue home based instruction based upon the needs of the Student, while working on transitioning the Student back into a special class. The Department does not substantiate this allegation.</p>

7.	<p><b><u>Access to Educational Records</u></b></p> <p>The complaint alleges that the District violated the IDEA by failing to timely provide to the Parents a Student educational record, specifically a copy of the IEP meeting notes from meetings held on March 6, 2013 and March 22, 2013.</p> <p>Relevant law: OAR 581-015-230 and 34 CFR 300.613.</p>	<p><b><u>Not Substantiated</u></b></p> <p>In this case, the Department cannot confirm from the information before the Department that the Parent verbally requested meeting minutes at the March 6, 2013 and March 22, 2013 IEP meetings. However, even assuming the Parent did make a verbal request of the March 6, 2013 meeting minutes, the District promptly provided a recap of the meeting in an email on March 7, 2013, the very next day. The Department finds that no other meeting minutes were maintained by the District, and there is no requirement that the District keep meeting minutes (although that is the best practice). The Department thus does not substantiate the allegation that the District violated the IDEA by failing to provide another copy of notes related to the meeting.</p> <p>Concerning the March 22, 2013 meeting minutes, again, the Department cannot determine whether the Parent verbally requested the meeting minutes at the March 22, 2013 meeting. However, even assuming the Parent did make a verbal request of the March 22, 2013 meeting minutes, the District provided the meeting minutes on April 30, 2013, well within the 45-day limit under the IDEA. The Department does not substantiate this allegation.</p>
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	<p><b><u>Proposed Corrective Action</u></b></p> <p>The complainant requests the following corrective action:</p> <p>Compensatory services of one hour for each instruction day missed since the beginning of the school year and reimbursement to Parents for tutoring services and supplemental educational materials.</p>	
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### **III. FINDINGS OF FACT**

#### **Background**

1. The Student in this case is presently 10 years old. The Student moved to the District and in August 2012 the Parents contacted the District concerning the Student's enrollment in the District for the upcoming 2012-2013 school year. The Student is eligible for special education as a student with a Communication Disorder.

#### **Review and Revision of IEPs**

2. On August 30, 2012, the District convened an IEP meeting and the IEP team, including the Parents, agreed to adopt the IEP in place from the Student's previous Oregon school district, with a date of May 26, 2011 and to revise that IEP in the future. The Parent advised that the Student had received medically required "homebound instruction" during the 2011-2012 school year at the Student's previous district and the IEP team determined that "homebound instruction" for one hour each school day would continue, while working on transitioning the Student back into a special class.
3. On January 8, 2013 and again on February 20, 2013, the parties entered into mediation agreements. The February 20, 2013 agreement superseded the January 8, 2013 mediation agreement and provided that the Parents release any claims, including any state complaint, arising previously and through the effective date of the mediation agreement of February 20, 2013.

#### **FAPE**

4. The Student received home instruction beginning September 6, 2012, as provided in the Student's August 30, 2012 IEP. During September 2012 the Student completed 15 of 16 scheduled home instruction sessions; during October 2012 the Student completed 13 of 22 scheduled home instruction sessions; during November 2012 the Student completed 13 of 17 scheduled home instruction sessions; and during December 2012 the Student completed 0 of 10 scheduled home instruction sessions. As part of the transition of the Student back to a special classroom at the District, staff met the Student at the Student's local elementary school on September 27, 2012, October 18, 2012, and October 25, 2012. After these visits to the elementary school, on October 31, 2012 the Parent advised that the Student had several seizures this school year and that the Parent would no longer take the Student to the elementary school because of the belief it would medically endanger the Student.
5. On October 5, 2012, the IEP team revised the Student's IEP noting that the Student is doing well in home instruction and discussed transition to the provision of special education at school rather than home. Reports reveal that the Student made progress on the goals in the Student's IEPs from September 6, 2012 through November 2, 2012.
6. The District scheduled an IEP meeting for November 29, 2012 and provided a draft IEP to the Parent. However, the Parent believed the meeting would address transition and not a revised IEP. Eventually, the Parent and the District agreed to reschedule the November 29, 2012 IEP meeting to discuss revision of the IEP until after an upcoming mediation between the Parents and the District. Following a meeting on November 30, 2012 to discuss home instruction, the District issued a PWN stating home instruction would resume on December 4, 2012. The District and the Parents signed a mediation agreement, effective January 8, 2013. Home instruction continued during January 2013 but there were several cancellations by the Parent. On February 7, 2013, the

Parent provided notice that the Parent would home school the Student and that the District must suspend services to the Student.

7. The Parents and District again engaged in mediation in February 2013, with the mediation agreement signed on February 20, 2013. On February 19, 2013, the Parent signed consent for an academic achievement assessment and a nursing assessment. On March 13, 2013, the Parent revoked consent for the District to exchange medical information with the Student's medical professionals. Upon revocation of this consent, the District could not complete the nursing assessment. On March 15, 2013, the District asked by email when the Student would be available for the academic achievement assessment and the Parent did not specifically respond to that inquiry.
8. On March 6, 2013 the Parent and three District staff persons met to discuss home instruction, and the District provided an email recapping the meeting. Parent advised by email that home instruction is cancelled until the District responds to "accommodations" requests made by the Parent. The District attempted to provide home instruction on March 20, 2013, March 21, 2013 and March 22, 2013 but could not get an answer at the door of the Student's home. On March 22, 2013, the District convened a "resolution" meeting, to discuss the District's refusal to change the Student's instruction time without a medical statement, as agreed upon in the February 20, 2013 mediation agreement. At this meeting the Parent stated that the evaluations to which the Parent consented on February 19, 2013 should be on hold. Additionally, the District consulted with the person who would complete the academic achievement assessment and that person advised that the assessment should wait until the Student receives two weeks of recent home instruction. The District unsuccessfully attempted to provide home instruction on April 1, 2013, April 2, 2013, April 3, 2013 and April 4, 2013, with District staff ready to provide the instruction. On May 17, 2013, after the time for timely completing evaluations for which the Parent consented on February 19, 2013, the Parent advised that "we still want the [D]istrict to complete the [academic] assessment for the [S]tudent".

#### **Content of IEP**

9. On March 6, 2013, the Parent requested the District use a computer to provide the Student's instruction. On March 13, 2013 the District issued a PWN refusing this request, based upon specific provisions of the February 20, 2013 mediation agreement concerning the use of a computer during instruction which was based on the fact that the computer had been a distraction for the Student in past tutoring sessions.
10. On March 19, 2013, the Parent requested a change in instruction time for the Student. On March 19, 2013 the District issued a PWN refusing this request based on a lack of a medical statement. Once the Parent provided a medical statement from a medical doctor stating the change of instruction time is medically necessary, the District changed the instruction time. This decision is reflected in a PWN issued by the District on April 5, 2013.
11. On April 13, 2013, the Parent requested three accommodations: (1) that the Student be allowed breaks in instruction time if needed due to medication, (2) that the Student not be penalized for absences required for medical appointments or illness related to the Student's epilepsy, and (3) that District staff ensure opportunities for the Student to sleep or rest upon experiencing a seizure. The District refused the Parent's request for an informal meeting to discuss the "accommodations" and noted that the mediation agreement required only facilitated IEP meetings. On April 16, 2013, the District issued a PWN stating that the District would not add accommodations to the Student's IEP outside of an IEP meeting. The PWN also states the District would like to convene an IEP meeting to discuss the requests and to draft a new IEP for the Student.

### **When IEPs Must be in Effect**

12. A contact report dated April 4, 2013 details the attempt to deliver home instruction to the Student on April 4, 2013, and states that the Parent stated that this is "...a waste of time because the time for home instruction needed to be changed." The District construed this statement as a request to not appear to provide instruction at the currently scheduled time. On March 19, 2013, the Parent had requested a change in instruction time for the Student. On March 19, 2013 the District had issued a PWN refusing this request based on a lack of a medical statement. Once the Parent provided a medical statement from a medical doctor stating the change of instruction time was medically necessary, the District changed the instruction time, with the new time to begin on April 9, 2013. This decision is reflected in a PWN issued by the District on April 5, 2013.
13. The mediation agreement of February 20, 2013 does provide a communication protocol stating that communication will be through email concerning absences by the Student for home instruction. There are no email communications canceling the April 5, 2013 home instruction session. On numerous occasions, the Parent did not provide prior email notice of cancellation of home instruction sessions prior to April 5, 2013.

### **Prior Written Notice (PWN)**

14. On April 1, 2013, the Parent requested by email that the District provide Student with "supplemental educational materials due to missed educational opportunity when [S]tudent misses instruction due to illness and/or medical appointments related to [the Student's] medical condition." On April 2, 2013, the District issued a PWN refusing to provide "supplemental educational materials for home instruction sessions that you cancel," based on a provision in the February 20, 2013 mediation agreement stating the District will not provide make-up services to the Student should the Parent cancel the tutoring session. On April 3, 2013, the Parent clarified that the Parent sought materials to be used by the Student such as "homework sheets" or educational materials for the Student to access during absences. On April 9, 2013, the District issued a new PWN stating the District will provide "extra work" for the Student.
15. The District asserts that on April 15, 2013 it provided the requested materials to the Parent. Specifically, District staff reported during the on-site investigation that they obtained materials addressing three goal areas, math, time and money and reading comprehension and stapled copies of the appropriate goals to the front of each workbook. The District reported that the home instructor personally delivered the materials to the Parent on April 15, 2013, after again unsuccessfully attempting to provide home instruction. The Parent asserts that the materials were not received by the Parent.

### **Transfer Students**

16. On August 30, 2012, the District convened an IEP meeting and the IEP team, including the Parents, agreed to adopt the IEP in place from the Student's previous Oregon school district, with a date of May 26, 2011 and to revise that IEP in the future. The Parent advised that the Student had received medically required "homebound instruction" during the 2011-2012 school year at the Student's previous district and the IEP team determined that "homebound instruction" one hour each school day would continue, while working on transitioning the Student back into a special class.

## Access to Educational Records

17. On March 6, 2013 the Parent and three District staff persons met to discuss home instruction, and the District provided an email on the next day, March 7, 2013, to the Parent recapping the meeting. District staff reported that handwritten notes were taken, but those were incorporated into the March 7, 2013 email. The Parent reports that the Parent verbally requested meeting notes of the March 6, 2013 meeting during the meeting.
18. On March 22, 2013, the District convened a "resolution" meeting, to discuss the District's refusal to change the Student's instruction time without a medical statement. The Parent reports that the Parent verbally requested meeting notes of the March 22, 2013 meeting during the meeting. District staff reported that it would make sense to have sent the meeting minutes to the Parent, but the Parent did not specifically make a request for the notes at the meeting. By reading the complaint in this case, filed on April 17, 2013, the District learned the Parent wanted the meeting minutes of the March 22, 2013 meeting, so the District emailed the meeting minutes to the Parent.

## IV. DISCUSSION

### 1. Review and Revision of IEPs & Transfer Students

The complaint alleges the District violated the IDEA by failing to update the Student's IEP upon enrollment in the District at the beginning of the 2012-2013 school year, despite notification by the Parents that the Student's IEP required updating and review. The complaint also alleges that the District did not provide FAPE to the Student after the Student transferred into the District, including services comparable to those described in the IEP from the previous Oregon school district, and that the District did not adopt the previous district's IEP, or develop a new IEP for the Student.

The District argues in its *Response* that both the allegation that the District did not update the Student's IEP upon enrollment of the Student in the District for the 2012-2013 school year, and the allegation that the District did not adopt the previous district's IEP or develop a new IEP, may not be pursued in this complaint. Specifically, the District argues that the February 20, 2013 mediation agreement releases the District from complaints arising before or through the February 20, 2013 mediation agreement. However, Oregon law holds that settlement agreements are contracts, and as such they implicate general principles of contract law, and must be enforced by the parties in the appropriate forum.<sup>3</sup> Additionally, the federal regulations for the IDEA require that ODE must carry out an investigation for alleged violations of the IDEA, if ODE determines an investigation is necessary.<sup>4</sup> In Oregon, there is no statutory, rule-based, or judicial relief from ODE's duty to investigate an IDEA complaint, and because the agreement in question is a contract between District and Parent, the District must seek judicial enforcement of this agreement in contract law, to preclude the Parent from filing a complaint with ODE. Until the complaint is rescinded or declared invalid as a matter of law, ODE maintains its duties under the IDEA and its implementing regulations. As such, these allegations will be discussed fully.

The complainant alleged that the District violated the IDEA by failing to update the Student's IEP upon enrollment in the District at the beginning of the 2012-2013 school year. Relatedly, the complaint alleged that the District did not provide FAPE to the Student after the Student

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<sup>3</sup> *Pollock v. Tri-Met, Inc.*, 144 Or App 431, 435, 927 P2d 117, (1996)

<sup>4</sup> 34 CFR 300.152(a)(1)

transferred into the District, including services comparable to those described in the IEP from the previous Oregon school district, and that the District did not adopt the previous district's IEP, or develop a new IEP for the child.

Oregon requires that at the beginning of each school year, a school district must have in effect an IEP for each child with a disability within the district's jurisdiction.<sup>5</sup> Additionally, districts must ensure that the IEP team reviews the IEP periodically, but at least once every 365 days, to determine whether the annual goals are being achieved and to revise the IEP as appropriate.<sup>6</sup> Finally, if a child with a disability transfers to a new district in Oregon, and enrolls in a new school within the same school year, the new school district (in consultation with the child's parents) must provide FAPE to the child including services comparable to those described in the IEP from the previous district until the district either: adopts the IEP from the previous district or develops, adopts, and implements a new IEP for the child.<sup>7</sup>

Here, the District adopted, reviewed, and revised, the Student's IEP. On August 30, 2012, the District convened an IEP meeting and the IEP team, including the Parents, agreed to adopt the IEP in place from the Student's previous Oregon school district, with a date of May 26, 2011, and to revise that IEP in the future. The Parent advised the District that the Student had received medically required "homebound instruction" during the 2011-2012 school year at the Student's previous district, due to the Student's medically fragile state, and the IEP team determined that the "homebound instruction" of one hour each school day would continue, while working on transitioning the Student back into a special class. This shows that the District immediately began working within the legal requirements noted above to ensure that an IEP was in effect for this Student and that the Student transferring into their District from another Oregon school district received FAPE when entering the District. The District acted as soon as possible to ensure these requirements were met for the Student and to create a current IEP for the Student in the District for the 2012-2013 school year. The District cannot be faulted for the previous District's outdated annual IEP. Additionally, it should be noted the Student was transferring into the District at the beginning of a new school year, not enrolling during the same 2011 school year. During the 2012-2013 school year, the IEP team revised the IEP on October 5, 2012 to note that the Student was doing well in home instruction and to discuss transition to the provision of special education at school rather than at home. The District also attempted to revise the IEP on November 29, 2012, but agreed to reschedule the revisions with the Parent until after an upcoming mediation with the Parent. District also engaged in two mediation sessions with the Parent to review and revise the IEP. These mediation sessions were held on January 8, 2013 and February 20, 2013. Therefore, the record indicates the District adopted, reviewed, and revised the IEP for the Student during the times in question. This allegation is not substantiated.

## 2. FAPE

The complaint alleges the District violated the IDEA, stating that the IEP is not reasonably calculated to confer educational benefit, thus resulting in a denial of FAPE and requiring the Parents to obtain private tutoring services and supplemental educational materials.

The District argues in its *Response* that the IEP in place since the mediation agreement of February 20, 2013 to the date of the filing of the complaint of April 17, 2013 was reasonably calculated to provide educational benefit to the Student, and that the District has been unable to

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<sup>5</sup> OAR 581-015-2220(1)(a)

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

<sup>7</sup> OAR 581-015-2230(1)

obtain sufficient data for the academic achievement assessment and that the Student has not been available for other evaluations to determine what other needs exist. Additionally, the District responded that at the time the IEP team adopted the Student's current IEP, the IEP was reasonably calculated to provide educational benefit to the Student. That IEP included the most current information the District had about the Student's skills.

OAR 581-015-2040 provides that Districts must provide "special education and related services to all school-age children with disabilities," and defines "school age children" as "children who have not yet reached 21 years of age on or before September 1 of the current school year." Special education is defined as "specially designed instruction that is provided at no cost to parents to meet the unique needs of a child with a disability."<sup>8</sup> Additionally, FAPE is broadly defined in the 2006 Part B regulations as special education and related services that are provided at public expense, under public supervision and direction, without charge; meet the standards of the State Education Agency; include an appropriate preschool, elementary school, or secondary school education in the state involved, and are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 through 34 CFR 300.324.<sup>9</sup> The contours of an appropriate education must be decided on a case-by-case basis, in light of an individualized consideration of the unique needs of each eligible student.<sup>10</sup> The Supreme Court has developed a two part test to determine the appropriateness of an educational program: 1) the procedural requirements of the IDEA must be met; and 2) the IEP must be developed and reasonably calculated to enable the child to receive educational benefit.<sup>11</sup> The IDEA does not include a minimum number of service hours and a district satisfies its FAPE obligations so long as it offers a program that allows a student to make educational progress.<sup>12</sup> Districts are not required to maximize a student's educational performance to provide a FAPE.<sup>13</sup>

The August 2012 IEP included the most current information the District had about the Student's skills. Additionally, the record reflects the Parent participated with the adoption of this IEP in August 2012, based on the medical needs of the Student. The Department will now discuss whether FAPE has been provided by the Student's IEP since February 21, 2013, the day after the last mediation agreement with the Parent. In analyzing that question, the Department must note the difficulty experienced by the District when trying to work with the Parent, both before and after February 20, 2013, which includes the difficulties and barriers experienced by the District in the delivery of consistent home instruction to the Student on the scheduled days. The Department does not doubt the serious medical condition of the Student, but the fact remains that the District has been prevented from delivery of home instruction since February 21, 2013 such that there is not data from which the District may determine the Student's current academic abilities. The record shows that the District has had little to no meaningful access to the Student from February 21 to April 14, 2013. The record shows that services were not given to the Student 17 times during this period, primarily due to Parent's refusal to allow District staff into the home, or Student being asleep at time of instruction. The record from August 2012 to April 2013 is replete with instances where similarly the Parent would not answer the door when District staff arrived for instructional time. The District has stated it must first collect some recent student data obtained through the delivery of home instruction for at least two weeks before the academic achievement evaluator may effectively administer the academic achievement assessment. However, due to thwarted efforts for instruction, District has not been allowed to obtain this information. The

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<sup>8</sup> OAR 581-015-2000(34)

<sup>9</sup> 34 CFR 300.17

<sup>10</sup> *Board of Educ. of the Hendrick Hudson Cent. Scho. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982).

<sup>11</sup> *Id.*

<sup>12</sup> *M.N. and H.N. ex rel. J.N. v. New York City Dep't of Educ., Region 9* (Dist. 2), 110 LRP 20287 (S.D.N.Y. 3/25/10).

<sup>13</sup> *J.L. v. Mercer Island School District*, 55 IDELR 164 \*W.D. Wash. 2010).

District has also asked the Parent when the Student will be available for academic testing. On March 22 the Parent put the evaluation "on hold" because "the home instruction piece was the primary concern." Additionally, the District has been stymied in its attempts to complete the agreed-upon nursing assessment because the Parent has revoked the consent which would have allowed the District to obtain the medical information essential to complete the nursing assessment. The Parent revoked consent for District to speak with Student's physicians on March 15, 2013.

There is no indication that consistent delivery of home instruction for one hour each school day is insufficient to provide FAPE to this Student, a student whose placement is medically limited to home instruction. Nor is the District able to collect information reflecting the Student's current educational needs. During the on-site, the Parent reported that a private tutor is working with the Student to deliver FAPE, but no records of this work have been provided to either the Department or to the District. The Department does not substantiate the allegation that the Student's current IEP is insufficient to provide FAPE to the Student.

### **3. Content of IEP**

The complaint alleges that the District violated the IDEA by failing to include in the Student's IEP, and by failing to provide adequate IEP services, modifications, and accommodations in the Student's IEP, despite specific requests for services and accommodations made by the Parents in March and April 2013, requiring the Parents to obtain private tutoring services and supplemental educational materials.

In general for non-transition aged students, an IEP must include: a statement of the child's present level of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; a statement of measurable annual goals, including functional and academic goals; a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress will be provided; a statement of the specific special education and related services and supplementary aids and services, based upon peer reviewed research to the extent practicable, to be provided to a child and a statement of the program modifications or supports school personnel will provide to the child; the projected dates for initiation of services and modifications and the anticipated frequency, duration, amount and location of the services; an explanation of the extent (if any) to which the child will not participate with children without disabilities in the regular class and activities; a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on any needed State and District wide assessments.<sup>14</sup> The IDEA does not define an "accommodation" in a general sense like federal civil rights laws. Rather, the IDEA looks to specific areas on an IEP to determine the needs of a student.

The District's August 2012 IEP includes each of the enumerated IEP content items which are listed above. The District used the Oregon Standard IEP for students aged 15 and younger at the August 30, 2012 IEP meeting. Additionally, the Department finds that the Parent has not shown that use of the computer during delivery of home instruction is a necessity as an addition to the IEP in this case. The Department defers to the District's conclusion, as suggested in the February 20, 2013 mediation agreement, that the computer is not an essential component of delivery of instruction to the Student, and the Parent has not demonstrated otherwise.

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<sup>14</sup> OAR 581-015-2200 (1)

The Department also finds that the change in the time for delivery of home instruction has not been unreasonably delayed, based upon the specific provision of the February 20, 2013 mediation agreement requiring a medical order to change the time for delivery of home instruction. Unfortunately, staffing limitations dictate that the District does not have the ability to change the time for delivery of home instruction on a moment's notice. In this case, once a medical order was received, the District promptly changed the time of instruction accordingly.

The Department also finds that the "accommodations" requested by the Parent on April 13, 2013, along with the District's desire to work on obtaining updated data and evaluations to support appropriate IEP revisions, were indeed reasonably discussed at a facilitated IEP meeting, under the existing agreement of the District and the Parent. The Department concludes that the District did not fail to include "accommodations" demonstrated to be necessary components of the Student's IEP.

Based on the foregoing, the Department does not substantiate the allegation that the District failed to provide adequate IEP services, modifications and accommodations in the Student's IEP.

#### **4. When IEPs Must be in Effect**

The complaint alleges that the District violated the IDEA by failing to provide scheduled academic services to the Student on April 5, 2013.

Although the District in its *Response* states that the "District believes the Parent canceled the instruction on April 5, 2013 but is willing to give the Student one hour of compensatory services," the Department does not substantiate this allegation. The Department finds that the District reasonably construed the Parent's comment that, "... [the offered home instruction] is a waste of time because the time for home instruction needed to be changed," that the Parent made on April 4, 2013 as a request for cancellation of delivery of home instruction the next day. The absence of an email requesting cancellation of delivery of home instruction on April 5, 2013 should be unsurprising to the Parent, due to the statement made the day prior in addition to the multiple days on which the delivery of home instruction was effectively cancelled because no one answered the door at the Student's home when District staff arrived at the time scheduled for delivery of home instruction. Additionally, as noted above, if a party seeks to enforce a specific provision of a mediation agreement, it must be enforced in any state court of competent jurisdiction or in a United States District court.<sup>15</sup> Therefore, if the mediation agreement states an email must be sent and that is what is at issue, this particular item may not be enforced via an IDEA complaint. Finally, on April 5, 2013, the District issued a PWN which attempted to increase the consistency of delivery of home instruction by changing the time scheduled for home instruction, and the PWN states that the new time would begin on April 9, 2013. The Department does not substantiate this allegation.

#### **5. Prior Written Notice (PWN)**

The complaint alleges the District failed to provide the correct PWN after an April 3, 2013 request for supplemental educational materials, and it is alleged that the District instead sent a PWN for compensatory education which was not part of the request.

A Prior Written Notice must be given to a parent of a child within a reasonable period of time before a school district proposes to initiate or change or refuses to initiate or change the

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<sup>15</sup> OAR 581-015-2335(6)

identification, evaluation, of educational placement of a child or the provision of a free appropriate public education of a child.<sup>16</sup> OAR 581-015-2310(3) provides that a PWN must include a description of the action proposed or refused by the school district and an explanation of why the district proposes or refuses to take the action. Additionally, 34 CFR 300.503(b) specifies that a PWN must state why a refusal was made.

The Department concludes that the District reasonably concluded that the Parent's request implied the provision of compensatory services, based on the recent event between Parent and District regarding missed home instruction, until the Parent clarified the request. Thus, the PWN issued on April 2, 2013 did not violate the applicable regulations simply because it stated "compensatory education" rather than "supplemental educational materials." Additionally, upon receiving clarification of the Parent's request on April 3, 2013, the District promptly reviewed the matter and issued a PWN allowing the Parent's request. This does not constitute a violation of the applicable regulations. Furthermore, the request for "extra work" does not necessarily speak to the provision of FAPE to the Student as established by the current IEP, so it would not be covered by the regulations governing Prior Written Notice and therefore would not require a PWN after such a request was made.

Although the Parent now asserts that the District did not deliver the promised materials on April 15, 2013, the Department does not have sufficient evidence to so conclude. The Department does not substantiate this allegation.

## **6. Access to Educational Records**

The complaint alleges that the District violated the IDEA by failing to timely provide to the Parents a student educational record, specifically of copy of the IEP meeting notes of meetings held on March 6, 2013 and March 22, 2013.

The Family Educational Rights and Privacy Act (FERPA) defines an education record as a record that is directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution.<sup>17</sup> Under FERPA, a school must provide a parent with an opportunity to inspect and review his or her child's education records within 45 days following its receipt of a request.<sup>18</sup> IDEA adds the additional requirements that education records be provided without unnecessary delay and before any IEP meeting or any Due Process Hearing or Resolution Session.<sup>19</sup>

In this case, the Department cannot determine from the information before the Department whether the Parent verbally requested meeting minutes at the March 6, 2013 and March 22, 2013 IEP meetings. However, even assuming the Parent did make a verbal request of the March 6, 2013 meeting minutes, the District did not maintain such minutes as an educational record. The District promptly provided a recap of the meeting in an email to the Parent on March 7, 2013, the very next day. The Department finds that no other meeting minutes were maintained by the District, and there is no legal requirement that the District keep meeting minutes (although that is the best practice). The Department thus does not substantiate the allegation that the District violated the IDEA by failing to provide another copy of notes related to the meeting.

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<sup>16</sup> OAR 581-015-2310(1)

<sup>17</sup> 34 CFR § 99.3

<sup>18</sup> *Id.*

<sup>19</sup> 34CFR 300.613(a)

Concerning the March 22, 2013 meeting minutes, again, the Department cannot determine whether the Parent verbally requested the meeting minutes at the March 22, 2013 meeting. However, even assuming the Parent did make a verbal request of the March 22, 2013 meeting minutes, the District provided the meeting minutes on April 30, 2013, well within the 45-day limit under the IDEA. The Department does not substantiate this allegation.

**CORRECTIVE ACTION<sup>20</sup>**  
*In the Matter of Beaverton School District*  
Case No. 13-054-015

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

Dated this 28th Day of June 2013

  
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Sarah Drinkwater, Ph.D.  
Assistant Superintendent  
Office of Student Learning & Partnerships

Mailing Date: June 28, 2013

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<sup>20</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)).