

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Multnomah Education)
Service District)
)
)

FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 15-054-028

I. BACKGROUND

On July 20, 2015, the Oregon Department of Education (Department) received a written request for a complaint investigation from a complainant (Complainant) on behalf of Students with Disabilities (Students) receiving services from the Multnomah Education Service District (MESD). On July 28, 2015, the complaint was forwarded to the Office of Learning/Student Services Dispute Resolution Unit. A portion of the complaint contained allegations of violations of the Individuals with Disabilities Education Act (IDEA). The Complainant requested that the Department conduct a special education investigation under OAR 581-015-2030. The Department confirmed receipt of the complaint and forwarded the request to MESD by email on July 29, 2015.

On July 31, 2015, the Department sent a *Request for Response* (RFR) to the MESD identifying the specific allegation in the complaint that the Department would investigate. The MESD delivered its timely *Response* to the Department's contract complaint investigator, which was received on August 14, 2015, and mailed a copy of its narrative statement to the Complainant. In addition, the District provided 2043 numbered pages of documents including District policies and procedures in support of its *Response* and pursuant to the requests contained in the RFR to the Department's contract complaint investigator.

The Department's complaint investigator determined that on-site interviews were required. On August 24, 2015, the Department's investigator interviewed the MESD facility's Instructional Vice Principal/Administrator/Special Education Teacher, four teachers, and one Educational Assistant. On August 26, 2015, the Department's investigator continued the interview of the MESD facility's Instructional Vice Principal/Administrator/Special Education Teacher. On August 26, 2015, the Department's investigator also interviewed the MESD's Chief Program Officer of Education¹ by phone. The Department's complaint investigator reviewed and considered all of these documents, exhibits, and interviews.

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

¹ The Chief Program Officer of Education is responsible for the roles of Curriculum Instruction Director and Special Education Director.

² 34 CFR §300.151 (2010)

³ OAR 581-015-2030(12) (2010)

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under 34 CFR 300.151-153 and OAR 581-015-2030. The Complainant's allegations and the Department's conclusions are set out in the chart below. These conclusions are based on the Findings of Fact (Section III) and the Discussion (Section IV). This complaint covers the one-year period from July 29, 2014 to the filing of this complaint on July 28, 2015.⁴

	Allegations	Conclusions
	The written complaint alleges that the District violated the IDEA in the following ways:	
1.	<p>Individualized Education Program (IEP)</p> <p>A. Not including within each Students' IEP the required components for an IEP;</p> <p>B. Not providing special education and related services to a child with a disability in accordance with each Students' IEP;</p> <p>(Relevant Law and Regulations: OAR 581-015-2200 and 34 CFR § 300.320; OAR 581-015-2220; 34 CFR § 300.323; 34 CFR § 300.324;)</p>	<p>Substantiated</p> <p>The IEPs for incarcerated youth at two of the detention facilities, managed by MESD, did not report progress on annual goals. In a number of cases, Specially Designed Instruction (SDI) was not included or tied to annual goals. The goals existed in academic subjects, but there was no individualized instruction included to enable the students to advance appropriately toward those goals.</p>
1.	<p><u>Requested Corrective Action.</u></p> <p>The Complainant did not propose any specific Corrective Action except to have the MESD comply with the relevant laws.</p>	See Corrective Action Ordered

III. FINDINGS OF FACT

Background

1. The Department is responsible to provide appropriate education for children placed in a detention facility. The Superintendent of Public Instruction may contract with a school district or education service district to provide or cause to be provided appropriate education to children placed in a detention facility.⁵

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

⁵ ORS 336.585

2. The Department contracted with the MESD to provide services to incarcerated youth at, among other sites, High School A and High School B operated by the Oregon Youth Authority.
3. High School A is operated on a 12 month, year round basis, with the 2015-16 school year beginning in July 2015. It serves only females ages twelve to twenty four. Funding for the 2015-16 school year is based on the previous year's average enrollment of approximately 48 students. There were 28 students on IEPs at the facility during the 2014-15 school year. On August 24, 2015, there were 58 students enrolled at the facility. The number of students enrolled varies throughout the year.
4. Staffing at High School A for the 2015-16 school year is: Science- 0.50 FTE;⁶ Math- 0.50 FTE; Language Arts/Social Studies- 1.0 FTE; PE/Health- 0.50 FTE; Special Education- 0.40 FTE; Administration- 0.60 FTE; Educational Assistant- 1.0 FTE; Secretarial- 1.0 FTE. Additional funding from other sources includes: VESYO Transition (Oregon Youth Authority (OYA) non-IDEA related) - 0.50 FTE; Math intervention and GED completion (Title 1 D) - 0.50 FTE. The Special Education and administration partial FTE allocations are combined and the Instructional Vice Principal serves in these two capacities. Other staff may combine the partial FTE allocation to have a full time position. None of the staff at High School A or at High School B has a Special Education endorsement except the Instructional Vice Principal.
5. High School A has two classrooms designed to accommodate 12 students and a larger room half of which houses the computers used for computer based instruction and the other half is used for direct instruction. Currently there is no room available for pull out, small group or one on one instruction.
6. The High School A 2014-15 school year schedule was based on four periods of 75-85 minutes each on a rotating A/B schedule. The 2015-16 school year schedule is based on four periods of 75 minutes each on a daily basis. Two periods are scheduled in the morning and two periods are in the afternoon. Grading occurs four times per year, with slight variations between the 2014-15 school year and the current 2015-16 school year. The quarterly reports generally occur at the beginning of January, end of March or early April, late June, and late September.
7. High School B is a transitional work program for males ages twelve to twenty four who are transitioning from close custody to the community. Its focus is on work experience and employment readiness. Its maximum capacity is ten youths. It offers credit accumulation toward a high school diploma as well as a General Educational Development (GED) program for youth with high school credit deficiencies. The Instructional Vice Principal represented that they visit High School B, on average, once a month.
8. In MESD's organizational structure for Special Education services, the Chief Program Officer of Education also serves as the Special Education Director. In addition, the Chief Program Officer is also identified as the Principal of High School A and High School B, although the daily functional responsibilities are delegated to the Instructional Vice Principal, who is physically located at the High School A facility.

⁶ 1.0 FTE is equivalent to one employee working full-time.

2014-15 School Year High School A

9. The MESD provided 27 special education files of Students who were eligible for Special Education services and who had current IEPs during the 2014-15 school year.⁷ Fifteen students were eligible under Emotional Disturbance (ED). Nine were eligible under Other Health Impaired (OHI). Four were eligible under Specific Learning Disability (SLD). One was eligible under Hearing Impairment (HI). One was eligible under Communication Disorder (CD). Three had dual eligibility.
10. All of the IEPs were written on Oregon Standard IEP forms and in the great majority of cases each section was completed. In most every case, there was a Transition goal and a Behavior or Social/Emotional/Behavioral goal. Fifteen of the IEPs contained academic goals in, for example, Math, Reading and/or Writing/Language Arts.
11. As an example, Student A's June 4, 2014 IEP, a student eligible as under the category of ED, had annual goals for Transition (360 minutes per year) and Social/Emotional/Behavioral (30 minutes per week) described as delivered by the General Education Teacher, school wide. No Supports for School Personnel were listed. The Statement for Nonparticipation Justification states: "The team has determined that no removal is necessary in order for the [S]tudent to receive Specially Designed Instruction, related services or supplementary aids or services." The Student's July 28, 2015 IEP⁸ has an expanded present level statement from the previous year, identified her success in addressing negative classroom behaviors and included revised Behavioral/Emotional and Transition goals. Service time remained essentially the same (30 minutes per month for each goal) as well as the provider (General Education Teacher) and the location (school wide). Modifications and Accommodations remained the same, no Supports for School Personnel were included, and the Nonparticipation Justification remained the same.
12. Another student, Student B., was eligible for Special Education as a student with an Emotional Disturbance. Her September 26, 2014 IEP, as most every student's IEP at High School A, contains the following school description:

"[She is] in a placement determined by non-educational factors. She is attending classes in the general education setting within a secure setting with separate classes, milieu staff consistently available, and up to 12 female peers. Supports in place include: 1:12 student/teacher ratio; 1:1 teacher support as needed; access to personal time-outs as needed; structured setting with clear and consistent consequences and reinforcements; varied methods of instruction (direct instruction, packet, discussion, computer-based)."

Her IEP contained two annual goals: a Social/Emotional/Behavioral goal and a Transition goal. The service summary allocated 60 minutes per month for each of the goals, to be provided by the General Education Teacher on a school wide basis. There were no

⁷ Twenty eight special education students were enrolled at High School A during the 2014-15 school year and 27 student files were provided to the Department's investigator in response to the RFR. One student's file could not be located.

⁸ Student A.H. was released from High School A prior to the IEP annual review date and reenrolled at High School A on July 2, 2015. A Prior Written Notice (PWN) dated July 16, 2015, indicated that the prior school did not conduct an annual IEP review and that the MESD would continue the 2014 IEP until such time as they could hold an IEP meeting.

Supports for School Personnel listed.⁹ The Statement for Nonparticipation Justification states: "The team has determined that no removal is necessary in order for the Student to receive specially designed instruction, related services or supplementary aids or services."

At the three year eligibility planning meeting on February 18, 2015, when the Student was over 18 years of age, the Student requested to revoke her Special Education eligibility and services, which was documented by a signed request and a Prior Written Notice. When asked whether her educational program was different before and after her revocation, staff reported that her educational program was no different after she revoked her consent for the provision of Special Education services compared to when she was eligible for Special Education services.

13. Student C's November 25, 2014 IEP, a student eligible for Special Education under Other Health Impaired (OHI), contained annual goals in Reading, Writing, Math and Transition. The only Specially Designed Instruction identified in the IEP was in "Transition Services" provided by the General Education Teacher in the general education classroom for 60 minutes per month. There was no Specially Designed Instruction in Reading, Writing or Math included in the IEP. Progress reporting on the annual goals was to be reported "During school's regular written report time". There were no Supports for School Personnel. The Nonparticipation Justification was exactly the same as the two previous IEP examples cited above. No progress reports were included in the initial production of documents pursuant to the request contained in the RFR. Progress reports were provided to the Department's investigator on August 24, 2015 for this Student and dated August 23, 2015. The Reading progress report stated that the Student "is making steady progress in using reading strategies to increase comprehension, participation in classroom has been a big help to keep her on task". The Writing progress report stated that the Student "developed and presented an independent study unit on [xxx] to the school during an assembly. She is improving in her ability to develop her writing and share it (publish) with others". The Math progress report stated the Student "is making improvement in math understanding and application. She is taking Algebra 1 as she missed many years of instruction. She is also working in math interventions to fill skill gaps". The Transition goal had two statements describing the Student: [She] "completed this goal in the YWTP" [Young Women Transition Program] and [she] will continue with Transitions goals since she returned to [High School A]. She is currently focusing on core academic completion to graduate. She completed most Transition goals in the YWTP program".
14. Staff reported that none of the students at High School A received direct instruction from the Special Education endorsed teacher. Staff reported that the Special Education endorsed staff member scheduled the annual IEP meetings and eligibility evaluations, held the IEP meetings and wrote IEPs, and other paperwork associated with student eligibility for Special Education services. Staff reported that the Special Education endorsed staff member did not provide strategy and skill instruction to the students on IEPs outside of the general education setting, and did not provide consultation support to the general education staff regarding provision of Specially Designed Instruction (SDI) as prescribed in the students' IEPs. Staff reported that the Special Education endorsed staff member did not provide remediation, pre-teaching or re-teaching outside of the general education classroom. Some staff reported that they knew where the students' IEPs were kept, but only one reported

⁹ Only one of the thirty IEPs listed any Support for School Personnel, which was a consultation with a Speech-Language Pathologist for the Student's Communication Disorder.

ever reviewing an IEP and when staff did review it, it was for ease of obtaining the statistical information off of the front page of the IEP for GED purposes. All other staff reported that they had never had access to the students' IEPs. When the IEP meeting was done and the IEP finalized, it was put away in a filing cabinet.

15. The Administrator/Special Education endorsed staff member periodically distributed a spreadsheet by email, and available to staff on a document residing on a shared drive, which listed the following information: Name, Date of Birth, Special Education Eligibility, Last Eligibility Date, Last IEP Date, State Student Identification Number, Grade Level, Type of Diploma, Goal Areas, Accommodations and Modifications, Related Services, and State Testing Issues. The most recent version was distributed August 23, 2015. The August 7, 2015 previously distributed version did not include at least one student who was on an IEP. One staff member reported the last update that they received was in February 2015. Other staff could not identify the last time it was updated. One staff member reported that they were not aware of the spreadsheet at all. While periodically updated, it was not routinely sent to staff via email when it was updated.
16. On August 23, 2015, the Administrator/Special Education endorsed staff member provided the Department's investigator with twelve students' Progress Reports on annual goals. These Progress Reports did not report progress on the annual goals when the regular education report card were distributed and were not timely, nor in compliance with the distribution date contained in the IEPs. Other student files contained no Progress Reports at all, nor were they updated on August 23, 2015. MESD administrative staff reported that they had previously identified the omission of timely Progress Reports at the end of the 2014-15 school year.
17. In reviewing the twenty seven students' IEPs with staff during the on-site interviews, staff demonstrated an intimate and personalized knowledge of the students' backgrounds and challenges.

2014-15 School Year High School B

18. The MESD provided three files for students served at High School B during the 2014-15 school year. Two of the students were eligible under SLD and one under ED. Currently, there is one student eligible for Special Education who is working on his GED. He has two classes per school day when he works on his GED and for two periods he is in work experience. Staffing at High School B is one General Education Teacher- .50 FTE and one Educational Assistant- .50 FTE.
19. The IEPs completed on the students at High School B were written in a similar format and content as the IEPs written at High School A.
20. SDI was provided exclusively by the General Education Teacher without consultation support by the Special Education endorsed staff member.

IV. DISCUSSION

Under the IDEA, school districts must develop and implement an IEP for each eligible child that is designed to ensure that the child receives a free appropriate public education (FAPE).¹⁰

FAPE is defined as “special education and related services” that are: provided at public expense; meet state standards; include an appropriate preschool, elementary or secondary education; and are provided in conformity with an IEP.¹¹ Special education means specially designed instruction...to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education. Specially designed instruction means adapting as appropriate to the needs of an eligible child, the content, methodology or delivery of instruction.¹² A school district or program meets its obligation to provide FAPE for an eligible child by complying with the procedural requirements of the IDEA and implementing an IEP reasonably calculated to enable a child to receive educational benefits.¹³

A written IEP must be in effect for each eligible child at the beginning of each school year.¹⁴ School districts must implement the services, modifications and accommodations identified on each student’s IEP.¹⁵ A school district must ensure that the IEP is accessible to each educator and inform each teacher and provider of his or her specific responsibilities for implementing the child’s IEP.

Youths in correctional facilities, and their parents, are entitled to the same IDEA protections that apply to non-incarcerated youths, absent a specific exception. “Every agency at any level of government that is involved in the provision of special education and related services to students in correctional facilities must ensure the provision of FAPE, even if other agencies share that responsibility. States must have interagency agreements or other methods for ensuring interagency coordination in place so that it is clear which agency or agencies are responsible for providing or paying for services necessary to ensure FAPE for students with disabilities in correctional agencies.”¹⁶

“State Education Agencies (SEAs) must exercise general supervision over all educational programs for students with disabilities in correctional facilities...This responsibility includes monitoring public agencies that are responsible for providing FAPE...SEAs must make annual determinations on the performance of correctional facilities in their State if those facilities operate as their own LEAs.... States and their public agencies must establish and maintain qualifications to ensure that personnel providing special education and related services, including those serving students with disabilities in correctional facilities, are appropriately and adequately prepared and trained. Public school special education teachers in correctional facilities must be “highly qualified,” as defined by IDEA and its implementing regulations...SEAs must monitor to ensure that there are appropriate special education teachers in schools and educational programs within correctional facilities.”¹⁷

¹⁰ 34 CFR 300.341.

¹¹ See 20 USC § 1402(8).

¹² 34 CFR 300.39(a)(1)(2)

¹³ See *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 US 176, EHLR 553:656 (1982).

¹⁴ OAR 581- 015-2220

¹⁵ OAR 581-015-2200 (2)(b)

¹⁶ *Dear Colleague Letter*, December 5, 2014, 64 IDELR 249, 114 LRP 51903 (OSERS and OSEP 2014)

¹⁷ *Id*

These IDEA responsibilities include:¹⁸

- Child Find obligations, whether the student has ever been previously identified prior to entry into the facility including a timely evaluation even if the student will not be in the facility long enough to complete the evaluation;¹⁹
- Implementation of the IEP for an eligible student when they transfer into the facility with comparable services until the new public agency adopts or develops and implements a new IEP;
- Unless there is a specific exception, all IEP content requirements apply to students with disabilities in correctional facilities, including but not limited to a statement of: (1) the student's present levels of academic achievement and functional performance; (2) measurable annual academic and functional goals; (3) the special education and related services and supplementary aids and services that will be provided to the student to enable him or her to advance appropriately toward attaining his or her IEP goals and be involved in and make progress in the general education curriculum—that is, the same curriculum as for nondisabled students;
- The IDEA requirements related to least restrictive environment (LRE) apply to the education of students in correctional facilities. This may include, for example, having special education and general education teachers co-teach in the regular classroom;
- The IDEA requirements for secondary transition requirements to facilitate eligible students' movement from secondary education in the correctional facility to appropriate post-school activities; and
- Due process protections and disciplinary removals, including a manifestation determination.

A. Individualized Education Program (IEP)

1. IEP Design

The complaint alleges that individual IEPs for the students being served at High School A and High School B did not include the required components for an IEP. The content of an IEP and the Special Factors to be considered by the IEP team are set out in OAR 581-015-2200 and 2205. As the guidance from the Office of Special Education Programs, US Department of Education (OSEP) confirms, these same requirements apply to students in correctional facilities. At the very least, the IEPs from High School A did not report progress on annual goals. In a number of cases, Specially Designed Instruction was not included or tied to annual goals. The goals existed in academic subjects, but there was no individualized instruction included to enable the student to advance appropriately toward those goals.

The Department substantiates this allegation.

¹⁸ *Id*

¹⁹ See, *G.F. v. Contra Costa County*, 115 LRP 34822 (N.D. Cal. 2015). A class action settlement agreement that called for a county ED to evaluate all students in juvenile hall suspected of having disabilities, coordinate with probation and mental health agencies, and ensure that eligible students received FAPE. The settlement allowed students the opportunity to seek compensatory education services in appropriate cases.

2. IEP Implementation

The complaint alleges that the students' IEPs were not implemented as written and the Special Education and related services were not providing to the students. OAR 581-015-2220 requires that IEPs must be in effect at the beginning of each school year and that the provision of Special Education and related services must be in accordance with the IEP. Each IEP had some Specially Designed Instruction (SDI). SDI is defined as "adapting, as appropriate to the needs of the eligible child... the content, methodology or delivery of instruction."²⁰

Every IEP provided by MESD contains SDI, typically in behavior and transition. More than half also contain SDI in academic areas. The MESD, in a letter by the Superintendent, describes these schools as following "a full inclusion model for special education...As an inclusive model, general education teachers are expected to provide accommodations and modifications in the classroom... As an incarcerated youth facility behavior instruction is embedded in the facility." "Instruction is differentiated throughout the school to meet the unique leaning needs of incarcerated youth. The Special Education Teacher/Case Manager is available to meet with content area teachers at any time to discuss accommodations, modifications or instructional strategies." However, this offer of availability does not meet the requirement to develop and monitor the implementation of IEPs as well as documentation of student progress.

MESD staff was not able to provide any type of log, schedule, or verification of the amount of SDI included in each student's IEP that was actually delivered to the student, although MESD asserts that all SDI was delivered by the general education teachers. Without such records, MESD is unable to verify or document that students actually received Special Education services in accordance with their IEPs. In addition, the exclusive use of one transition assessment to assess all students' preferences, interests, needs, and strengths does not meet the individualized requirement for IEP development.

The Department substantiates this allegation.

²⁰ OAR 581-015-2000 (34)

CORRECTIVE ACTION²¹

In the Matter of Multnomah Education Service District
Case No. 15-054-028

No.	Action Required	Submissions ²²	Due Date
1.	Develop a compensatory education services plan for each student, (based on the Student's IEP for the 2014-2015 school year) included in this complaint investigation who is also still enrolled at either High School A or High School B. Services must be determined by each student's IEP team and be related to the annual goals and transition services sections of the students' IEPs in effect for the 2015-2016 school year.	<p>MESD will provide the Department, the parent or adult student, and the school Special Education Services administrator:</p> <ul style="list-style-type: none"> • A copy of the compensatory education services plan for each student. • Regular updates of the progress toward completing the compensatory education services plan. 	<p>December 1, 2015</p> <p>March 1, 2016 May 1, 2016 July 1, 2016</p>
2.	Develop a master schedule of planned progress reporting that includes each student in the complaint still enrolled in the school for the 2015-2016 school year.	<ul style="list-style-type: none"> • Submit a copy of the progress report master schedule to ODE with reporting periods for the 2015-2016 school year. • Submit copies of the actual student progress reports to ODE. 	<p>November 15, 2015</p> <p>Per the reporting period schedule</p>
3.	MESD will convene a technical assistance meeting that includes MESD, high school staff, and ODE, to review the requirements of providing Special Education in a youth corrections facility.	Schedule a mutually convenient date for this review with Sam Ko, Education Specialist and Mitch Kruska, Director. Additional ODE staff who will participate will be determined at this time.	October 15, 2015

²¹ 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)).

²² Corrective action submissions and related documentation as well as any questions about this corrective action should be directed to Rae Ann Ray, Oregon Department of Education, 255 Capitol St. NE, Salem, Oregon 97310-0203; telephone — (503) 947-5722; e-mail: raeann.ray@state.or.us; fax number (503) 378-5156.

	<ul style="list-style-type: none"> • Requirements for implementing the IEP as written and documenting the provision of special education and related services. • Requirements for developing the IEP content for secondary transition. <p>Convene and complete the meeting and submit evidence of completion.</p>	<p><u>Sam.ko@state.or.us</u> <u>Mitch.kruska@state.or.us</u></p> <p>Materials to be submitted to ODE include: agenda, sign-in sheet, and training materials.</p>	<p>November 25, 2015.</p>
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Dated: this 25th Day of September, 2015



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

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.

Mailing Date: September 25, 2015