

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Portland School District 1J)
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FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 15-054-040

I. BACKGROUND

On November 17, 2015, the Oregon Department of Education (Department) received a letter of complaint from the parents (Parents) of a student (Student) residing and attending school in the Portland School District (District). The Complaint requested a Special Education investigation under OAR 581-015-2030. The Department provided a copy of the Complaint letter to the District by email on November 17, 2015.

Under federal and state law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue a final order within 60 days of receiving the complaint unless exceptional circumstances require an extension.¹ On November 23, 2015, the Department sent the correct *Request for Response* to the District identifying the specific IDEA allegations in the Complaint to be investigated. On December 4, 2015, the District mailed its *Response* to the *Request for Response*, with accompanying documentation and these were received on December 7, 2015. In total, the District provided these materials;

1. Notice of Team Meeting 10/23/14;
2. Psycho-educational Evaluation Report 10/28/14;
3. Statement of Eligibility 10/29/14;
4. IEP 10/30/14;
5. OT Assessment 10/30/14;
6. Speech & Language Evaluation; Evaluation dates: 10/14 - 10/31/14. Report date 11/3/14;
7. Notice of Transfer of Special Education Rights 1/22/15;
8. Report Card Q1-Q4 2014-2015;
9. Email threads 8/26/15 through 10/12/15;
10. Email thread 10/16/15;
11. Statement of Principal at [the] Special School, regarding staffing 12/2/15.

On December 15, 2015, the Parents provided their *Reply* by email accompanied by documentation in this case. The Parent's submission included;

1. Incident Report 4/24/15
2. Incident Report 11/21/15
3. Incident Report 12/15/15
4. Incident Report 12/19/15
5. Email 12/15/15

The Department forwarded the *Reply* email messages and documentation to the District on December 16, 2015. This order is timely.

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

The Department's contract complaint investigator (Complaint Investigator) determined an on-site investigation to be necessary in this case. On December 15, 2015, the Complaint Investigator interviewed the Parents and a private Caregiver by telephone; and the Parents provided additional information by email, also on December 15, 2015, as noted above. On December 16, 2015, the Complaint Investigator interviewed District staff (in the presence of and with participation by the District's legal counsel) including a High School Principal, and two Para-educators. The Complaint Investigator reviewed and considered all of the documents received in reaching the findings of fact and conclusions of law contained in this order.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this Complaint under OAR 581-015-2030 and 34 CFR 300.151-153. The Parents' 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 November 18, 2014, to the filing of this Complaint on November 17, 2015.²

| No. | Allegations | Conclusions |
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| 1. | <p><u>Free Appropriate Public Education (FAPE)</u></p> <p>The Complaint alleges the District violated the IDEA by denying FAPE to the Student during the "past several weeks" by failing to provide consistent and adequate staff to work with the Student and by sometimes failing to provide any staff at all to work with the Student at school.</p> <p>OAR 581-015-2040; 34 CFR 300.101.</p> | <p><u>Not Substantiated</u></p> <p>The Department finds that the District consistently provided staff to work with the Student. Absences of particular District staff on leave for medical family reasons or other permissible leave constitute circumstances beyond the control of the District. The District is well aware, and has specifically acknowledged, that providing substitute staff to work with the Student is not ideal but the District has no choice when particular staff are absent on leave. Also, the District is aware of the desirability of having staff familiar to the Student work with the Student and the District has consistently achieved this goal.</p> |
| 2. | <p><u>When IEPs Must Be in Effect (IEP Implementation)</u></p> <p>The Complaint alleges that during the "past several weeks" the District violated the IDEA by failing to implement the Student's IEP. Specifically, the Complaint alleges that the District failed to provide consistent and adequate staff to work with the Student and sometimes failed to provide any staff at all to work</p> | <p><u>Not Substantiated</u></p> <p>In the discussion above, the Department addressed, in terms of FAPE, the allegations concerning the failure to provide consistent and adequate staff, and sometimes no staff at all. Similarly, the Department also does not sustain the allegation that the District failed to implement the Student's IEP by failing to provide consistent and adequate staff, or by</p> |

² OAR 581-015-2030(5)

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| | <p>with the Student at school. The Complaint further alleges that the District has failed to implement the Student's IEP when, on some days, the Student has been "sitting alone and crying all day" according to a "para-educator" with the District. The Complaint further alleges that the District has failed to implement the Student's IEP because some of the staff use loud, angry tones to communicate with other students in the Student's classroom "and this is a known trigger for [the Student's] outbursts."</p> <p>OAR 581-015-2220; 34 CFR 300.323, 300.324.</p> | <p>failing to provide staff at all.</p> <p>On November 12, 2015, the Student's Caregiver informed a school staff member that the Student "was not having a good morning" and asked that the staff member contact the Caregiver "if [the Student] seemed to be struggling." The Student continued to struggle and the staff member contacted the Caregiver, who then picked the Student up. There is no indication that the District failed to provide staff to be in the presence of the Student and to work with the Student that day, or any other day.</p> <p>It is true that the Student's IEP mentions that triggers for behavior incidents for this Student include environmental noises. However, District staff are aware of the possible impacts on the Student and respond appropriately.</p> <p>Additionally, the District provides no less than three quiet spaces that the Student may access to assist the Student under particular circumstances. The Department concludes that occasional use of loud commands to other students in the Student's classroom does not constitute a failure to implement the Student's IEP. The Department thus does not sustain the allegation the District failed to implement the Student's IEP in this regard.</p> |
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| | <p><u>Proposed Corrective Action</u></p> <p>The Parent's proposed solution includes:</p> <p>"We would like Portland Public Schools to immediately provide someone to work with [the Student] consistently, without relying on a changing cast of substitutes, since this is a safety issue for [the Student] and for your staff."</p> | |
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III. FINDINGS OF FACT

1. The Student in this case is presently 18 years old and is in 12th grade at a District "Special School". The District reports that the "Special School" is an "intensive skills classroom for students with significant cognitive impairments/developmental delays and behavioral challenges." The Student's IEP is dated October 30, 2014. The District initially reported that an IEP developed at an IEP Meeting on October 19, 2015 was not yet finalized. Since that time, the District has provided an IEP dated December 9, 2015. There was no IEP in effect between October 29, 2015 and December 9, 2015, although the District continued to provide the services included in the October 30, 2014 IEP during this time.
2. The Student's October 30, 2014 IEP states that the Student is eligible for Special Education under the category of Autism Spectrum Disorder (ASD). The Present Levels of Academic Achievement and Functional Performance (PLAAFP) section of the IEP states that the Student is "non-verbal with major communication deficits. [The Student's] disability effects [the Student's] communication which effects [the Student's] social behavior. * * * [The Student] has been attending [the] Special School for almost 4 years. The classroom [the Student] attends has approximately 5 students with 5 trained staff and 1 Special Education Teacher. This educational placement is highly structured and offers clear academic and behavioral expectations, where [the Student] is monitored at all times."
3. The Service Summary of the Student's October 30, 2014 IEP includes Specially Designed Instruction (SDI) in: "Functional reading academics", for "225 min per week"; "Adapted Physical Education", for "120 min per month"; "Functional math academics", for "225 min per week"; "Speech & Language-Pragmatics", for "30 min/month"; "Vocational", for "100 min per week"; and "Social Emotional", for "100 min per week". The "Nonparticipation Justification" statement in the Student's October 30, 2014 IEP provides removal from participating with nondisabled students in the regular classroom "100%" of the Student's day, and explains that the Student "currently attends [] Special Schools which only has students who are on IEPs and has no non-disabled peers attending this site."
4. The Student's October 30, 2014 IEP provides a placement of "Special school self-contained classroom". The Student's October 30, 2014 IEP includes annual goals in the areas of Transition, Vocational, Functional Writing, Functional Math, Social Emotional Self-regulation, Functional Reading and Adapted Physical Education.
5. The PLAAFP section of the Student's October 30, 2014 IEP also states in part, concerning behavior: "In the past [the Student] has exhibited explosive behaviors that create safety concerns for [Self], staff, and classroom peers. These behaviors include biting, hitting, grabbing/holding onto staff and digging [the Student's] chin into them. Triggers include environmental noise, not necessarily loud noises, if someone is close to [the Student], telling [the Student] 'no' or when [the Student] doesn't get [the Student's] way. However, triggers are not always predictable or attributable. These have been long-standing concerns for [the Student] throughout [the Student's] educational history. Now that [the Student] has matured into a high school student, [the Student's] behaviors have more serious consequences due to [the Student's] increased size and physical attributes – [the Student] is athletically built." The PLAAFP section of the Student's IEP also states that "The sensory room, blocker headphones, PECs [Picture Exchange Communication System] and other visual communication systems have been utilized and are an effective means to aid [the Student] in regulating emotions during certain circumstances * * *".

1. Free Appropriate Public Education (FAPE)

6. During both the 2014-2015 and 2015-2016 school years, the District agreed that the District would not change the classroom staff members who had previously worked with the Student. This is a deviation from the District's usual quarterly rotation of classroom staff to discourage over reliance on an individual staff person and to encourage generalization of skills.
7. The classroom attended by the Student during the current (2015-2016) school year is an intensive classroom focusing on functional skills and has consisted of five to eight students, one Special Education Teacher and from six to seven para-educators. The special school attended by the Student always provides an adult (usually a teacher or a para-educator) and an adult must be present wherever any student goes in the school building for purposes of student supervision. For example, when the Student requests to go to a quiet space, such as the sensory room, the library or the computer lab, an adult is always nearby. Districts staff report that the District has always had staff (although sometimes substitute staff) available to support the Student and has arranged for familiar staff to support the Student whenever possible. Sometimes the District provides para-educators who previously worked with the Student but are assigned to another classroom at the Student's school.
8. In its *Response* in this case, the District acknowledges that "having substitute staff is not ideal, but the school has made every effort to have familiar staff always available to [the Student], even if it means using staff from another classroom." The District did experience absences by a para-educator who had been designated as the Student's point person beginning in October of 2015. These absences were characterized by the District as being for "medical and family reasons". In mid-October of 2015, the Special Education Teacher became the Student's point person with another para-educator as back up. When the Student's Special Education Teacher left on leave on November 3, 2015, the District assigned another para-educator as the Student's point person. This para-educator works daily with the Student, along with another para-educator. Both are assigned to the Student's classroom.
9. On November 4, 2015, five of six regular staff in the Student's classroom were out sick. That morning, the Principal of the Student's school called one of the Parents of the Student and advised that there would only be one familiar staff person when the Student arrived but substitutes had been assigned. When the Parent asked if they should keep the Student home that day, the Principal stated he was not asking that, but wanted the Parent to know what the classroom staffing would be when the Student arrived. A Para-educator who consistently works with the Student had arrived by the time the Student got to school that day. District staff reports that the Student's Caregiver remained at school with the Student that day for around two hours and then the Caregiver decided to take the Student to engage in activities in the community. During a telephone interview between the Complaint Investigator and the Student's private Caregiver, the Caregiver could not recall this particular day.

2. When IEPs Must Be in Effect (IEP Implementation)

10. As stated in paragraphs #4 and #5 above, the Student is placed in a self-contained classroom due to behavioral and safety concerns. The Parents allege that that the District failed to provide consistent and adequate staff to work with the Student and that the District sometimes failed to provide any staff at all to work with the Student at school.
11. The Department finds that on November 12, 2015, when dropping the Student off at school, the Student's Caregiver alerted a Para-educator that the Student was "not having a good morning" and requested that the Para-educator call the Caregiver so that the Caregiver could pick the Student up if the Student continued to struggle. Per the Caregiver's request, the Para-educator

called the Caregiver and reported that the Student had been continuing to have a rough day and the female Para-educator was having difficulty dealing with the Student, who was getting loud and shaking [the Student's] fist. The Caregiver returned and picked up the Student. The Para-educator, and other District staff, reported during the on-site interviews that the Student is not responsive to re-direction by female staff, other than a particular female Para-educator who, although present in the classroom that day, could not focus on the Student due to the demands of other students in the classroom. The Para-educator also reported that staff safety is an issue with the Student, who is 18 years of age and is athletically built. The Parents alleged in this Complaint that the Para-educator had told the Caregiver that the Student was sitting alone in the room and crying all day, but the Caregiver could not recall precisely what the Para-educator said when the Para-educator called to have the Caregiver return to get the Student.

12. The Parents report that when in the Student's classroom, one of the Parents has observed District staff using "loud, angry tones to communicate with other students" and this triggers the Student's outbursts. District staff reports that only occasional loud re-directs do occur in the classroom; for example, when necessary to prevent a student from leaving the classroom without permission. District staff in the classroom understand that the Student cannot appear to differentiate to whom louder commands are being directed and that the Student physically reacts to the commands, but District staff are aware of this and the Para-educator working as the Student's point person assists the Student when this occurs. District staff report that this is not a frequent occurrence. Additionally, the Student is able and allowed to request, by using assistive technology, to go to one of the Student's quiet spaces: the "sensory room", the library or the computer lab.
13. During the course of this Investigation, it was discovered that the Student's IEP expired on October 29, 2015. There was a meeting with the Mother, the Principal, and the Student's Special Education Teacher on October 19, 2015, but the IEP was not finalized at that time. The District provided a document which it called a "Placeholder IEP," but it appears to be the October 30, 2014 IEP with Special Education Placement Determination and Educational Placement Discussion and Decisions forms attached to the end of it, which are dated October 30, 2015. There is no documentation of a meeting invitation, nor is there any evidence that a general education teacher was invited or in attendance. There is also no record of a Prior Written Notice being provided to the Parents after this meeting.

IV. DISCUSSION

1. Free Appropriate Public Education FAPE

The Complaint alleges that the District violated the IDEA by denying FAPE to the Student during the "past several weeks" by failing to provide consistent and adequate staff to work with the Student and by sometimes failing to provide any staff at all to work with the Student at school. OAR 581-015-2040 provides that a District must provide "Special Education and related services to all school-age children with disabilities". FAPE requires that a school district meet the procedural requirements of the IDEA and that a student's IEP must be developed and reasonably calculated to enable the student to receive educational benefit.³

The Department finds that the District consistently provided staff to work with the Student. Absences of particular District staff on leave for medical and family reasons or other permissible leave constitute circumstances beyond the control of the District. The District is well aware and has specifically acknowledged that providing substitute staff to work with the Student is not ideal

³ *Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982)

but the District has no choice when particular staff are absent on leave. The District is also aware of the desirability of having staff familiar to the Student work with the Student and the District has consistently achieved this goal. The fact that District staff advised the Parents that it was likely no familiar staff would be available to work with Student due to staff illnesses on a particular day, November 4, 2015, does not mean that the District is somehow deficient in its attempts to provide consistent, familiar staff to work with the Student.

The District did provide the Para-educator with whom the Student was familiar to work with the Student on November 4, 2015. However, the Student's Caregiver made the decision to remove the Student from school after two hours in the classroom. On November 12, 2015, the Caregiver, upon dropping the Student off at school, informed the Para-educator that Student had been "struggling" that morning and specifically requested that the Para-educator call the Caregiver should the Student continue to struggle. The Para-educator called the Caregiver shortly before lunch to inform the Caregiver that the Student was still struggling. As a result, the Caregiver decided to pick up the Student from school. This does not mean that the District did not have staff available to work with the Student.

This allegation is not substantiated.

2. When IEPs Must Be in Effect (IEP Implementation)

The Complaint alleges that during the "past several weeks" the District violated the IDEA by failing to implement the Student's IEP. Specifically, the Complaint alleges that the District failed to provide consistent and adequate staff to work with the Student and sometimes failed to provide any staff at all to work with the Student at school. The Complaint further alleges that the District has failed to implement the Student's IEP when, on some days, the Student has been "sitting alone and crying all day" according to a "para-educator" with the District. The Complaint further alleges that the District has failed to implement the Student's IEP because some of the staff use loud, angry tones to communicate with other students in the Student's classroom "and this is a known trigger for [the Student's] outbursts."

OAR 581-015-2220(1)(b) provides that school districts must provide Special Education and related services to a child with a disability in accordance with an IEP.

In the discussion above, the Department addressed, in terms of FAPE, the allegations concerning the failure to provide consistent and adequate staff, and sometimes no staff at all. Similarly, the Department does not sustain the allegation that the District failed to implement the Student's IEP by failing to provide consistent and adequate staff, or by failing to provide staff at all at times.

The Department also finds no evidence that the District allowed the Student to spend time "sitting alone and crying all day." The Student's IEP provides Specifically Designed Instruction (SDI) and various services to the Student, and leaving the Student alone all day would constitute a failure to implement the Student's IEP. Although the Student did experience a difficult day on November 12, 2015, there is no indication that the District failed to provide staff to be in the presence of the Student and to work with the Student that day, or any other day.

The Department does not sustain this allegation.

It is true that the Student's IEP mentions that triggers for behavior incidents for this Student include environmental noises, and there is no doubt that there were loud environmental noises on occasion in the Student's classroom. However, the Student's IEP does not provide that the Student will be educated in a classroom with no other students to limit environmental noises. The District acknowledges that on occasion loud commands must be used to re-direct another student

for the safety of that student. However, District staff are aware of the possible impacts on the Student and respond appropriately. Additionally, the District provides no less than three quiet spaces the Student may access to assist the Student under particular circumstances. The Department concludes that occasional use of loud commands to other students in the Student's classroom does not constitute a failure to implement the Student's IEP.

The Department does not sustain this allegation.

3. Additional Findings

The Department finds that the Student's IEP expired on October 29, 2015. A meeting with the Mother, the Student's Special Education Teacher and the Principal took place on October 19, 2015, however the IEP was not finalized at that time. Shortly afterwards, the Special Education Teacher went on leave. The District states that the Principal believed that the Special Education Teacher completed the IEP prior to going on leave. Once the Principal became aware that the IEP had not been completed, he assigned another teacher to complete the IEP. This teacher met with the Mother on December 9, 2015, and an IEP meeting was held. However, there is no record of an invitation to this meeting, no evidence that this meeting included a general education teacher (although the IEP indicates that a general education teacher was consulted), no evidence of participation by a District Representative, and no evidence that Prior Written Notice was provided.

CORRECTIVE ACTION⁴
In the Matter of Portland School District
 Case No. 15-054-040

| No. | Action Required | Submissions ⁵ | Due Date |
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| 1. | Provide training to staff and administrators of the Student's school who may be involved in ensuring that student IEPs are current and timely, including, but not limited to: <ul style="list-style-type: none"> • Monitoring IEP annual dates to ensure the IEP in effect is current; • IEP meeting notices; • Required participants; • Prior Written Notices associated with an IEP; • Copy of IEP to parent(s) • Process for changing an IEP after an annual review. | Submit proposed training materials to ODE for approval prior to training date. Submit evidence of completed training including agenda, training materials, and signed/dated roster of participants. | February 4, 2016 April 1, 2016 |

⁴ 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)).

⁵ 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.

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| 2. | Hold an IEP meeting for the Student with appropriate invitation, all required participants, and Prior Written Notice. | Submit copies of invitation, IEP, verification of IEP meeting participants, and the Prior Written Notice to ODE. | February 16, 2016 |
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Dated this 15th day of January, 2016



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

Mailing Date: January 15, 2016