

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Oregon Department of)
Education and Douglas Co (Roseburg))
School District 4)
)
FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 17-054-012

I. BACKGROUND

On April 24 2017, the Oregon Department of Education (Department) received a Letter of Complaint (Complaint) from Disability Rights Oregon (Complainant) on behalf of a Student residing and attending school in Douglas Co (Roseburg) School District 4 (District). The Complainant requested that the Department conduct a special education investigation under OAR 581-015-2030. A contractor with the Department [Complaint Investigator] investigated this Complaint.

On April 28, 2017, the Department sent a *Request for Response* (RFR) to the District and the Department identifying the specific allegations in the Complaint that the Department would investigate. The District and the Department sent a timely narrative *Response* and the related documents that the Investigator had requested on May 12, 2017.

In total the District submitted the following documents to the Investigator:

1. IEP and Meeting Notes 2/28/17
2. IEP and Meeting Notes 3/14/16
3. Meeting Notices
4. PWNs
5. Behavior Support Plan 3/22/16
6. Employment Documents for Behavior Specialist and para-professionals
7. Student Incident Report 10/6/16
8. IEP Progress Reports
9. Release of Information to Disability Rights Oregon
10. Emails
11. Aug/Comm Interactive Flowchart Page
12. Initial Special Education Documents – Eligibility and Consent

The Department submitted eight emails related to the allegations.

The Complainant submitted a narrative *Reply* to the District *Response* and related records on May 16, 2017.¹

The Complaint Investigator determined that on-site interviews were necessary and conducted interviews. On May 26, 2017, the Complaint Investigator interviewed two

¹ On June 15 2017, the Complainant submitted additional narrative information, including descriptions of alleged special education inadequacies affecting three children (in addition to the Student named in this Complaint) to supplement its reply to the District Response. Because the information arrived almost a month after the deadline for the Complainant's reply, and because the information was anecdotal and included no documentary support, the Department did not consider it in its finding of fact and conclusions of law for this complaint.

attorneys employed by the Complainant. On May 31, 2017, the Complaint Investigator traveled to the District and interviewed the District's Special Education Director, the School Psychologist, the Autism Spectrum Disorder Specialist, the School Principal, and one of the Student's middle school teachers. The Complaint Investigator interviewed the Student's parent by phone.

The Complaint Investigator attempted repeatedly but without success to interview a key informant, the Behavior Specialist who worked with the Student for several months in the summer and fall of 2016. The Complaint Investigator reviewed and considered all information obtained through the interviews, from the District's, the Department's, and the Complainant's narratives, documents, and from follow-up phone calls and emails. On June 2, 2017, the Complaint Investigator interviewed the Department's Assistant Superintendent for Student Services and the Special Education Legal Specialist in regard to the Complainants allegations against the Department.

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

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this Complaint under 34 CFR 300.151-153 and OAR 581-015-2030. The 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).

	Allegations	Conclusions
1.	<p>Evaluation</p> <p>The Complainant alleged that the District delayed initiation and completion of an evaluation of the Student's need for assistive technology, specifically an augmentative communication system that would address the Student's expressive communication needs.</p> <p>OAR 581-015-2105</p>	<p>Substantiated</p> <p>Although the IEP Team determined in March, 2016 that the Student needed an augmentative communication system to address the Student's expressive communication needs, the Student was not evaluated until November, 2016.</p>

<p>2.</p>	<p>IEP Content</p> <p>The Complaint alleged that the District did not develop an IEP that included specially designed instruction and related services that addressed the Student's academic, behavioral, and communication needs.</p> <p>OAR 581-015-2200, 581-015-2205, and 581-015-2055</p>	<p>Substantiated</p> <p>The District failed to amend the Student's IEP during the 2016-2017 school year despite the fact that the Student's behavioral issues prevented the Student from attending school on a consistent basis, and was unable to attend school at all after Winter Break 2016-2017.</p>
<p>3.</p>	<p>Free Appropriate Public Education (FAPE)</p> <p>The Complainant alleged that the District:</p> <p>a) did not timely assess the Student's communication needs and provide assistive technology to address those needs;</p> <p>b) did not develop an IEP reasonably calculated to enable to student to make progress appropriate in light of the Student's circumstances;</p> <p>c) provided only sporadic trained staff, specially-designed instruction, and related services to the Student during the 2016-17 school year up to the present time</p>	<p>Substantiated</p> <p>a) The District failed to assess the Student's communication needs and failed to provide assistive technology to address those needs until eight months after the IEP Team determined that this was necessary.</p> <p>b) The District failed to amend the Student's IEP even though the Student's needs prevented the Student from attending school on a consistent basis.</p> <p>c) The District failed to implement the Student's IEP consistently during the 2016-2017 school year. The Student only had access to an augmentative communication device for a brief period of time, and the Student was unable to return to school after Winter Break of the 2016-2017 school year because the District did not have staff members available to provide services to the Student.</p>
<p>4.</p>	<p>Placement</p> <p>The Complainant alleged that the District changed the Student's</p>	<p>Substantiated</p>

	<p>placement:</p> <p>a) without following IDEA procedures for change of placement;</p> <p>OAR 581-015-2190(1) & 581-015-2250</p> <p>b) without providing Prior Written Notice to the Student's Parents.</p> <p>OAR 581-015-2310</p>	<p>a) The Student's placement was changed numerous times during the 2016-2017 school year; however, the Student's IEP Team did not meet to review or revise the IEP prior to determining placement changes, specifically when the Student was unable to return to school after Winter Break of the 2016-2017 school year.</p> <p>b) The District did not provide Prior Written Notices of any placement changes to the Parents.</p>
<p>5.</p>	<p>State General Supervision</p> <p>The Complainant alleged that the Oregon Department of Education (ODE) violated the IDEA by:</p> <p>a) not providing resources for the District and other school districts similarly situated in rural Oregon that would enable them to provide a continuum of alternative placements</p> <p>(as required by § 300.115) and FAPE 34 CFR §300.101²</p> <p>b) not monitoring the District's compliance with the requirements of the IDEA.</p> <p>OAR 581-015-2015</p>	<p>Not Substantiated</p> <p>a) The evidence indicates that the District did attempt to provide a continuum of alternative placements to the Student. While there were numerous issues that interfered with the delivery of Special Education services to the Student, there is no evidence that these implementation issues were related to a lack of resources provided by ODE.</p> <p>b) The Department was not made aware of specific compliance issues involving this Student nor was the Department provided an opportunity to address any such issues until this Complaint was investigated. Additionally, the District conducted self-monitoring each year and provided the results of this to the Department. However, the data</p>

² The Complainant also alleged that the Department did not ensure that students similarly situated in other school districts had access to the full continuum of alternative placements and a free appropriate public education, but the Department determined that it was not possible to investigate allegations of statewide problems within the context of a complaint focused on a single student in a single school district.

		collected in this process is aggregated and does not provide evidence about specific students. The aggregated data did not indicate that the District was not in compliance with the IDEA.
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III. FINDINGS OF FACT

IDEA regulations limit complaint investigation to alleged violations occurring no more than one year before Department’s receipt of a Special Education complaint, so this complaint investigation did not consider any IDEA violations alleged to have occurred before April 25, 2016. Any facts listed below relating to circumstances or incidents earlier than that date are included solely to provide context necessary to understand the Student’s disability and special education history.

Background

1. The Student is twelve-years-old and resides within the District. The Student is eligible for Special Education as a student with Autism Spectrum Disorder.
2. The Student is non-verbal and has significant academic and behavior support needs resulting from disability. Because of the severity of the disability, the Student is eligible for services from the Children’s Intensive In-Home Services (CIIS), a state-supported program administered through the Oregon Developmental Disability Services.
3. The Student first enrolled in a District elementary school in the 2013-2014 school year. At that school, the Student was in a classroom with several other high-needs children. The Student became overwhelmed by the amount of sensory stimuli in the classroom environment. The Student’s behavior deteriorated, and the Student began acting out with aggression, risking harm to self and others in the classroom.

The Student has frequently refused to leave the car and go into school in the mornings. For a time, the Student received home tutoring, but toward the end of the 2014-2015 school year, the Student was moved to a middle school, where there was a quieter place in a larger classroom.

Facts relating to the allegations of IDEA violations by the District

4. The Student’s IEP Team met on March 14, 2016 for an IEP review and revision. The IEP completed on that date, which is the IEP that was in effect for most of the period that this Complaint covers, describes the Student’s strengths as follows:

“[The Student] has a beautiful smile and is very affectionate with adults. [The Student] needs lots of visuals to follow even 1-step instructions. [The Student] is

able to match colors, numbers, shapes, and pictures. Matches the letters of [the Student's] first name given gestural and verbal prompts, cut out a shape, glue, color for up to 10 seconds. [The Student] is able to complete a sit-down 10 minute routine in a school setting with one on one instruction, at times, with lots of prompting."

5. The March 14, 2016 IEP describes behaviors that interfered with the Student's learning:

"[The Student] becomes frustrated and acts out aggressively on a daily basis. This may be hitting [self], furniture, or [] volunteer respite worker that has been accompanying [the Student] to school, or staff members. [The Student] has hit other students 2 times this year when they are in [the Student's] space and ... is very elevated. [The Student] is on a behavior support plan and data is collected to continue to track ... behaviors and help [the Student] to be successful in the classroom."

6. The March 14, 2016 IEP describes repeated efforts by District staff and the Parents to get the Student back into a school setting; however, the Student was only able to tolerate the school setting for relatively brief periods of time—beginning at 45 minutes, increasing gradually to 90 minutes, and then back down to 45 minutes.

7. In the March 14, 2016 IEP, the Parent's concerns for enhancing the education of the Student included "problems with transitions" and "trying to figure out how to get [the Student] to enjoy being at school". The Parents identified communication as the "#1 frustration."

8. According to the March 14, 2016 IEP, the Student had the following "special factors" for IEP development:

Behavior that impedes his/her learning or the learning of others, specifically behavior support plan being developed by a behavior specialist from CIIS;

Communication needs, specifically picture exchange communication and Proloquo (an augmentative communication app for iPhones and iPads), and;

Assistive technology needs, specifically the use of visual schedule, visual rules, picture exchange communication, and the use of a VOD (a voice output device).

9. The March 14, 2016 IEP included the following annual goals:

Functional Skills: including letter and number recognition using an iPad, and independence in functional routines (transitioning between activities, following the steps of a calming routine, and toileting).

Social/Emotional, Behavioral: "[The Student] will be able to engage in a preferred activity in an environment with other classmates on 4 out of 5 opportunities."

Motor Skills: “[The Student] will increase ... independence in using technology and applications in a working environment on 4 out of 5 opportunities.”

Communication-Expressive Language: “[The Student] will be able to use decompression sites or activities with or without direction on 4 out of 5 opportunities as measured by observations.”

Behavioral Skills: “In a classroom [the Student] will demonstrate following classroom expectations with forewarn (verbal prompt), demonstration, practice (pre-teach), corrections on 4 out of 4 opportunities as measured by observations.”

10. The March 14, 2016 IEP provided for:

Specially designed instruction (SDI) in adaptive skills (150 min/week) and speech-language therapy (150 min/week), both provided by a special education teacher/provider;

Related services, including occupational therapy (60 min/year) provided by an occupational therapist and speech-language therapy (90 min/year) provided by a speech-language pathologist;

Supplementary Aids/Services; Modifications, Accommodations, including
Sensory diet

1:1 instructional assistant (100 min/week)

Consultation with behavior specialist (30 min/week)

Quiet work area to focus on tasks/decompression site (100 min/week)

Visual schedule daily for routines (100 min/week)

Behavior support plan daily for increasing and reinforcing appropriate behavior (100 min/week);

Supports for school personnel, the IEP states “No program modifications or supports are required for the child to advance appropriately toward attaining annual goals”;

11. The Behavior Support Plan (BSP) referenced in the March 14, 2016 IEP was completed on March 22, 2016 and then revised on March 29, 2016 and again on July 14, 2016. The BSP was highly detailed and individualized to the Student’s triggers and needs. It identified “communication” as the function of the Student’s aggressive behaviors.
12. The Special Education Placement Determination (which is dated March 8, 2016 but includes a statement that it is based on the IEP dated March 14, 2016) identifies the Student’s home school and attending school as “Roseburg Alternative Education”. The IEP Team considered two options “Less than 40% of the day in Regular Class” and “Homebound”.

The IEP Team rejected the "Homebound" option because it "limited social interaction with other peers and adults", and selected "Less than 40% of the day in Regular Class" because it offered more intensive individualized instruction and the Student would be included in all classroom activities. This description is described as follows:

"The Student would be in the DLC classroom the entire time that [the Student] is at school. [The Student] will be in the self-contained classroom receiving intensive one-on-one instruction. Will start with 30 min/day. Team will assess after 3 weeks for time increase. Assess progress monitoring. Parental transition with staff and new staff then fade so educational team is working collaboratively. Start with 2-day trial of parents bringing [the Student] at 2:30."

Central to the implementation of the March 14, 2016 IEP was the employment of skilled and qualified staff to deliver the SDI and related services to the Student. The plan was to find a one-on-one para-educator who would work under the supervision of licensed staff (Special Education Teacher and various specialists identified in the IEP). The District's Special Education Director encountered obstacle after obstacle in his effort to hire staff.

The Special Education Director has advertised continuously for staff who are qualified and willing to work with the Student. On several occasions, the District offered para-educator positions to applicants, but most of the employment arrangements fell through for a variety of reasons: Two were unable to pass drug tests required by District policy. One who was hired June 15, 2016, resigned on August 25, 2016. Another refused the offered position after learning more about the Student's aggression.

13. The District hired an Autism Specialist to provide consulting services related to the Student and other students with similar Special Education needs. The Autism Specialist designed and outfitted a specialized classroom for the Student. She set up numerous activity stations designed specifically for the Student.
14. The classroom includes a variety of safety features, equipment and materials that the Student could destroy or hit people with are secured to tables. The bottom half of all classroom windows were covered with boards for safety after the Student "head-butted" a window and broke it. Work stations are arranged to permit staff working with the Student to escape quickly to avoid injury when the Student becomes aggressive.
15. The Student was only able to attend school in the specialized classroom intermittently during the fall of 2016. The School Psychologist observed the Student several times and noted the Student's engagement with classroom activities.
16. A CIIS Behavior Specialist worked extensively with the Student and family in their home through the summer of 2016. In September, 2016, the CIIS Behavior Specialist agreed to work for the District as a contractor to provide behavior

coaching to the Student when at school and to train the Student's instructional team, including a 1:1 aide if the District was able to fill that position.

17. Although the IEP Team determined on March 14, 2016 that the Student needed an augmentative communication device, the District did not immediately seek consent for or initiate an evaluation to determine what the Student's specific needs. After considerable pressure and repeated inquiries from the Complainant's staff attorney (Attorney), beginning August 26, 2016, the District sought assistance in obtaining the necessary evaluation from a variety of sources. The District suggested an evaluation at OHSU, but after the Parent said it would be impossible to transport the Student to Portland, the Special Education Director limited his search for a qualified evaluator to the local area. There is no evidence that the District ever obtained written consent from the Parent to evaluate the Student.
18. On November 19, 2016, a contractor from the Education Services District selected an augmentative communication device and began teaching the Student, the Parents, and staff members to use the device. The trial period was not successful, as the Student rejected the device, although District staff believe it could have been successful, given more time. The District's *Response* identifies this device as a Chat 40. The District has made no further effort to provide an augmentative communication device to the Student, although the Special Education Director said he was willing to acquire a device, and the Student could use it at home.
19. Throughout the fall of 2016, the Student attended school intermittently, sometimes staying for a few hours, sometimes for less, but many times unwilling to go to school at all. The staff developed a plan to enable the Student to attend school, which called for one or more staff members to go to the family home in the morning to help the Student develop a positive mental state about school. They would then transport the Student to school and work with the Student in the Student's classroom, then return home to help the Student transition back into the home environment. This system was never implemented because the District was never able to hire a 1:1 para-educator to work with the Student.
20. The Behavior Specialist commuted from Eugene to work with the Student, and she became frustrated when, after driving for more than an hour to get to the District, she found that the Student would not be at school on that day. In order to keep her from resigning, the District doubled her rate of pay. In addition, she reported that she and the Parents had some disagreements about her work with the Student. She also was unable to perform her contractual responsibility to train para-educators to work with the Student because the District had been unable to hire anyone for that position. The Behavior Specialist resigned from her CIIS position and terminated her contract with the District during Winter Break 2016.
21. The Student did not return to school after Winter Break 2016 because no staff was available to provide the SDI and necessary behavior and communication support. As of the date of this Order, the Student still does not have an augmentative communication device and has received no Special Education and related services

since January 3, 2017. The Parents received no IEP progress reports related to the March 14, 2016 IEP. The last IEP progress reports the Parents received were dated November 4, 2015 and related to an earlier IEP.

22. On February 28, 2017, the IEP Team convened to review and revise the Student's IEP.

The Present Levels Statement discusses the system in place in the fall of 2016 in the specialized classroom but provides no clear assessment of how much, if any, the Student's present levels exceed those in the previous IEP. The Special Factors note the same needs. The February 28, 2017 IEP includes more specific annual goals and short-term objectives, including a goal for developing proficiency in the use of an augmentative communication device. It added 180 min/year of Speech-Language Therapy to be provided by a Speech Language Therapist and eliminated Occupational Therapy (OT) services, and it added 60 min/day of augmentative communication service to be provided by a Special Education Teacher/provider.

23. The Parents requested that the District hire a Portland-based behavior specialist to coordinate the Student's behavior support services and to provide staff training. The Parents also requested that the District provide five hours of collaborative services of an Occupational Therapist, a Speech-Language Pathologist, and an Augmentative Communication Specialist. The Meeting Minutes from this IEP Meeting state that "we will work with OT, SLP, Aug Com and Autism Specialist to provide wrap around communication services at the highest level we can provide." The District refused these requests and issued a Prior Written Notice for each denial.
24. The February 28, 2017 IEP has never been implemented, as the parties do not agree on the services to be provided.

Facts relating to the allegations of IDEA violations by ODE

25. On January 4, 2017, the Department received an email from the Attorney that included a brief summary of the Student's situation and the District's inability to hire an instructional assistant to work with the Student and implement the Behavior Support Plan. The email asked for direction to a Department staff member who could help to solve the problem.
26. The email was forwarded to the Department's Special Education Legal Specialist (Legal Specialist), who referred the Complainant to the Department's County Contact for the District.
27. On January 11, 2017, the County Contact sent an email to the Attorney informing him that she was "having discussions with people" at the Department and that she planned to have a meeting with her director the following day.
28. On January 23, 2017, the County Contact sent an email to the Special Education Director telling him about a phone call with the Attorney. The County Contact stated

that she informed the Attorney of the Special Education complaint process, but the Attorney did not believe that was the right approach, as he thought the District lacked capacity to serve the Student and other unspecified clients.

29. The Special Education Director replied that he was disappointed about the suggestion of a complaint investigation. He wrote that he had hoped to find direct assistance from the Department. He expressed agreement with the Attorney that a lack of regional resources limited the District's ability to serve the Student and a "bubble" of high-needs students whose "needs outpace programs and resources."
30. On January 24, 2017, the County Contact replied to the Special Education Director and stated that she hoped that ODE could serve as a resource and asset to further [the District's] impact and efficacy, and collaborate in finding solutions to overcome barriers and challenges". She added that she would be in Roseburg on February 15, 2017 for a meeting at the Douglas County ESD "to have a needs-based conversation about these concerns and try to work collaboratively towards a solution".
31. The Special Education Director states that he did meet with the County Contact on February 15, 2017, when she was in town to attend a meeting. According to the Special Education Director, he and the County Contact inquired about the possibility of obtaining behavior-support assistance from the ESD through the Ready-Set-Learn (RSL) program for students whose behavior disrupts classroom learning. They were told that the RSL program was limited to children in grades K-3 and that no other ESD programs were available that could assist the District in serving the Student.
32. Before this Complaint was filed, no previous Department sponsored dispute resolution, investigative, quasi-judicial, or judicial proceedings involving this Student had taken place. The Department reviewed the self-assessment compliance reporting from the District; however, the data reported is aggregated and does not identify IDEA compliance with respect to individual students. The Department's Legal Specialist had no interaction regarding the Student in this Complaint with the Special Education Director and had no interaction with the Attorney beyond clarifying what school district the Student attended and the forwarding of an email to an Education Specialist. The Assistant Superintendent had no interaction with the Special Education Director or the Attorney regarding the Student in this Complaint.

IV. DISCUSSION

1. Evaluation

The Complainant alleged that the District delayed initiation and completion of an evaluation of the Student's need for assistive technology, specifically an augmentative communication system that would address the Student's expressive communication needs.

The IDEA requires that IEP teams consider a student's communication needs, including the need for assistive technology.³ In order to determine the nature and extent of those needs, a district must conduct an evaluation or reevaluation in accordance with numerous procedural requirements.⁴ Relevant to the allegations in this complaint are the requirements that a district provide prior written notice and obtain parent consent⁵ and that the district complete the evaluation within 60 school days of receiving parent consent.⁶ A district may take longer than 60 school days to complete an evaluation if the parents of a child repeatedly fail or refuse to produce the child for an evaluation, or for other circumstances outside the school district's control."⁷

The District acknowledged the need for an assistive technology assessment and an augmentative communication device. However, the District did not give the Parents Prior Written Notice of its intent to conduct the assessment, did not seek parent consent for the assessment, and did not begin an assessment until eight months after the IEP Team identified that need.

The Department substantiates this allegation.

2. Individualized Educational Program (IEP) Content

The Complainant alleges that the District did not develop an IEP that included specially designed instruction and related services that addressed the Student's academic, behavioral, and communication needs.

Under OAR 581-015-2200, an IEP must contain a statement of the student's present levels of academic achievement and functional performance, including how the student's disability affects the student's involvement and progress in the general education curriculum. The IEP must also include a description of how the student's progress toward meeting annual goals will be measured and when progress toward these goals will be reported. The IEP must also contain a statement of the specific special education and related and supplementary aids and services that will be provided to the student.

Throughout the fall of the 2016-2017 school year, it was apparent to all parties that the supports provided in the IEP were insufficient to allow the Student to attend school with any degree of consistency. The District took numerous steps to try to remedy this situation, but at no time was the Student's IEP amended to provide for additional services or accommodations; nor was the Student's IEP amended to reflect numerous changes in placement that occurred during the school year.

It is important to note that the February 28, 2017 IEP (which was never implemented) did not reflect substantial educational gains from the Student's present levels noted in the March 14, 2016 IEP. The Parents asked to include more intensive Occupation

³ OAR 581-015-2205(2)(a)&(b)

⁴ OAR 581-015-2105(4)(a)&(b)

⁵ OAR 581-015-2110(2)(a)&(b)

⁶ OAR 581-015-2110(5)(b)

⁷ OAR 581-015-2110(5)(c)(A)

Therapy, Speech-Language Therapy, and Augmentative Communication Services in the February 28, 2017 IEP, but the District denied that request because the District uses a consultation model for specialist services. The IDEA requires that IEP team decisions about IEP content must be based on individualized assessment of a student's needs, not on preferred district practices. The Department cannot determine whether the Student needed the services the Parents requested, but the District clearly violated the IDEA by not making a student-specific determination of need for the requested services.

The Department substantiates this allegation.

3. Free Appropriate Public Education (FAPE)

School districts must provide a free appropriate public education (FAPE) to all school-age children with disabilities for whom the district is responsible.⁸ The IDEA defines FAPE⁹ as special education and related services

- (a) provided at public expense, under public supervision and direction, and without charge;
- (b) meet the standards of the [state education agency];
- (c) Include an appropriate preschool, elementary school, or secondary school education; and
- (d) are provided in conformity with an individualized education program (IEP).

The meaning of most elements of FAPE is clear, but the element of appropriateness has been debated throughout the history of the IDEA. The US Supreme Court has twice attempted to clarify the appropriateness requirement. In the 1982 *Rowley*¹⁰ case, the Court held that the IDEA did not require school districts to maximize the potential of a student with a disability but instead, a school district satisfies the FAPE requirement by

“providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”¹¹

Thirty-five years later, the Supreme Court revisited the meaning of appropriateness. The child in *Endrew*¹² had Autism, manifesting as significant problems with sensory processing and behavior regulation that interfered with his ability to access and benefit from his education. His IEPs included similar goals year after year, but the district

⁸ OAR 581-015-2040

⁹ 20 USC §1401(9) and 34 CFR §300.17

¹⁰ *Bd of E of the Hendrick Hudson Central Sch Dist v. Rowley*, 458 U.S. 176 (1982)

¹¹ *Id* at 204

¹² *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___ (2017)

argued that he gained some benefit, even if only minimal. The Court rejected the minimal benefit standard and held that “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”¹³ The Court added that

“The ‘reasonably calculated’ qualification reflects recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The [IDEA] contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians.”¹⁴

The Court reaffirmed the *Rowley* standard but expanded the analysis to include children with more severe disabilities than those of the student in *Rowley*. In the case of a child for whom full integration in the regular classroom is not a reasonable prospect, grade-to-grade advancement may not be the goal, but the IEP should be “appropriately ambitious”¹⁵.

For the Student in this Complaint, full integration in the regular classroom is not a reasonable prospect. In determining whether the District offered a FAPE to the Student, the Department must apply the *Rowley* standard as refined in *Endrew* for students with more severe disabilities: Were the Student’s IEPs formulated in accordance with IDEA procedural requirements, and the resulting IEPs reasonably calculated to enable the Student to make progress appropriate in light of the Student’s circumstances.

The Complainant alleges that the District:

- a. Did not timely assess the Student’s communication needs and provide assistive technology to address those needs.

This allegation was addressed previously in this Order. The Department substantiates this portion of the allegation.

- b. Did not develop an IEP reasonably calculated to enable the Student to make progress appropriate in light of the Student’s circumstances.

This allegation was addressed previously in this Order. The Department substantiates this portion of the allegation.

- c. Provided only sporadic trained staff, specially-designed instruction, and related services to the Student during the 2016-2017 school year up to the present time.

This Complaint involves allegations that the IEP for a student with a disability was incompletely implemented or not implemented at all. The IDEA requires that an IEP be in effect at the beginning of a school year, and a school district must provide special

¹³ *Id* (slip op., at 11).

¹⁴ *Id*

¹⁵ *Id* at 14

education and related services in accordance with the IEP.¹⁶ A District must ensure that the IEP of a student with a disability is available to all staff members who are responsible for implementing the IEP and that each staff member is informed of his or her specific responsibilities for implementing the IEP and the specific accommodations, modifications and supports that must be provided for or on behalf of the student in accordance with the IEP.¹⁷

The Ninth Circuit Court of Appeals has held that “a material failure to implement an IEP violates the IDEA.”¹⁸ The court stated that, “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.”¹⁹

The March 14, 2016 IEP included goals to address the learning needs identified in the present level statement. The District was in compliance with the requirement that the Student’s IEP be in effect at the beginning of the 2016-2017 school year. However, implementation was a problem. During the year this Complaint covers, the Student was sometimes in school and sometimes at home, sometimes receiving services from CIIS staff and sometimes receiving services from District staff. The Student was unable to return to school at all after Winter Break because there were no staff members available to provide the services required in the IEP. Except for a brief introduction to an augmentative communication device, the Student has had no access to an augmentative communication device and has not had adequate training in its use. The District provided no IEP progress reports, so it is impossible to determine whether the Student made any headway toward the goals in this IEP.

The February 28, 2017 draft IEP did not reflect substantial educational gains from the Student’s present levels noted in the March 14, 2016 IEP. The Parents asked to include more intensive Occupation Therapy, Speech-Language Therapy, and Augmentative Communication Services in the February 28, 2017 IEP, but the District denied that request, stating that the District uses a consultation model for specialist services. The IDEA requires that IEP team decisions about IEP content must be based on individualized assessment of a student’s needs, not on preferred District practices. The Department cannot determine whether the Student needed the services the Parents requested, but the District clearly violated the IDEA by not making a student-specific determination of need for the requested services. It is impossible to assess the overall adequacy of the February 28, 2017 IEP because it has not been implemented.

A child with a disability who receives only some of the services prescribed by an IEP or receives them only sometimes is not receiving a FAPE. Despite the admittedly valiant efforts of District staff, it is impossible to conclude that the Student in this Complaint has received minimal benefit from the Special Education that the District made available.

The Department substantiates this portion of the allegation.

¹⁶ OAR 581-015-2220(1) and 34 CFR 300.323(a)

¹⁷ OAR 581-015-2220(3) and 34 CFR 300.323(d)

¹⁸ *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2007)

¹⁹ *Id.* at 822

4. Placement

The Complainant alleges that the District changed the Student's placement:

- a. Without following IDEA procedures for change of placement, and;
- b. Without providing Prior Written Notice to the Student's Parents.

After the team develops an IEP, it must make a placement determination.²⁰ The IDEA provides in relevant part that the placement decision must be based on the individual student's current IEP and be made in conformity with the IDEA least restrictive environment (LRE) requirement.²¹ LRE does not mean that all children with disabilities must be placed in a regular classroom or their neighborhood school, but rather that a child with a disability be placed in the least restrictive environment in which his or her IEP can be successfully implemented. Some children with disabilities require a more restrictive setting in order to benefit from their Special Education and, for that reason, the IDEA requires local school districts to ensure that a continuum of alternative placements²² is available "to the extent necessary to implement the IEP for each child with a disability."²³

The Complainant alleges that the District did not provide the Parents with Prior Written Notice (PNW) of changes in placement. The Student's Special Education placement was in constant flux ending in extended home placement with no District services during the year that this Complaint covers, and yet the District gave the parents no PWN about placement at all and very few PWNs about any of the many changes that took place during that year. Although it may seem redundant to issue a PWN when parents are present for discussions and decisions or receive email notifications, the IDEA requirement is unambiguous that formal PWN notice is required. The District also never amended the Student's IEP to reflect the issues necessitating these placement changes.

The Department substantiates this allegation.

5. State General Supervision

The IDEA imposes General Supervision responsibility on state education agencies (SEAs).²⁴ The Department must approve local districts' special education programs,²⁵ collect student census data, including children with disabilities attending private and charter schools; and establish a variety of compliance monitoring procedures.²⁶

²⁰ OAR 581-015-2250

²¹ OAR 581-015-2240

²² OAR 581-015-2245

²³ OAR 581-015-2250(2)

²⁴ 34 CFR §300.149

²⁵ OAR 581-015-2005

²⁶ OAR 581-015-2015

The Complaint alleges that the Oregon Department of Education (Department) violated the IDEA by neglecting its General Supervision responsibilities. According to the Complainant, the Department did not monitor the District's compliance with IDEA requirements and did not provide resources for the District that would enable it to make available FAPE and a continuum of alternative placements to the Student.

As discussed above, local school districts must ensure the availability of FAPE for all children with disabilities.²⁷ Local school districts must also ensure the availability of a continuum of alternative placements to meet the needs of children with disabilities.²⁸ The continuum includes (but is not limited to) regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.²⁹ The IDEA placed responsibility for making available FAPE and a continuum of alternative placements directly on local school districts. However, the IDEA places responsibility on SEAs to ensure compliance with IDEA requirements through its General Supervision mechanisms.

The compliance monitoring required by the IDEA includes procedures such as district self-assessment, data collection, analysis and reporting, on-site visits, review of policies and procedures, review of the development and implementation of IEPs, improvement planning, and auditing federal fund use.³⁰ Oregon addresses these monitoring requirements through a variety of procedures, including a District self-assessment of compliance with specific IDEA requirements based on a sample of student information and the collection of aggregated data related to indicators of program effectiveness. The data does not focus on individual children but rather on system-wide progress toward achieving defined goals. Little, if any, of the data obtained through routine monitoring yields information that could put the Department on notice of any issues related to a specific student.

The limitations of routine monitoring modalities do not, however, leave an SEA without opportunities to find and remediate local school district non-compliance.

Under the umbrella of General Supervision is the requirement that SEAs establish and implement a system for investigating complaints alleging IDEA violations,³¹ which typically involve the substantive and procedural rights of individual children with disabilities. If a complaint investigation substantiates any claims of IDEA violations, the SEA "pursuant to its general supervisory authority ... must address"

- (1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and
- (2) Appropriate future provision of services for all children with disabilities.³²

²⁷ OAR 581-015-2040

²⁸ OAR 581-015-2445 and 34 CFR §300.115

²⁹ OAR 581-015-2445(1)

³⁰ OAR 581-015-2015

³¹ OAR 581-015-2030

³² OAR 581-015-2030(13) and 34 CFR §300.151(b)

In pursuit of correction of the non-compliance, an SEA may offer technical assistance and negotiation.³³ If a final order in a complaint investigation requires corrective action, the SEA will specify timelines for completion.³⁴

If an SEA determines, during the pendency of a complaint, that “there is a strong likelihood that the respondent has significantly breached the Individuals with Disabilities Education Act and that delay may cause irreparable harm,” an SEA may order interim relief.³⁵

If a local school district refuses to voluntarily comply with a plan of correction when so ordered, the SEA may:

- (a) Disapprove in whole or part, the respondent's application for federal funding;
- (b) Withhold or terminate further assistance to the respondent for an approved project;
- (c) Suspend payments, under an approved project, to a respondent;
- (d) Order, in accordance with a final state audit resolution determination, the repayment of specified federal funds; and
- (e) Withhold all or part of a district's basic school support.³⁶

The IDEA provides that an SEA must step in and provide services directly³⁷ to one or more students with disabilities if (among other things not relevant to this Complaint), a local school district “is unable to establish and maintain programs of FAPE that meet [IDEA requirements]³⁸ or “[h]as one or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of these children.”³⁹ When the need for direct services arises, the SEA “may provide special education and related services directly, by contract, or through other arrangements.”⁴⁰

The issue of SEA direct services has seldom been litigated, but a 1986 decision of the Ninth Circuit Court of Appeals, *Doe v. Maher*,⁴¹ explained the circumstances under which an SEA must undertake direct service:

State education agency is required by [IDEA],⁴² to directly provide handicapped child with FAPE whenever the local agency refuses or wrongfully neglects to serve a child, provided that local agency's *failure is significant*, state agency officials are given *adequate notice* of local agency's noncompliance, and *state agency is afforded reasonable opportunity to compel local compliance*.⁴³

³³ 34 CFR §300.152(b)(2)

³⁴ OAR 581-015-2030(15)

³⁵ OAR 581-015-2030(16)

³⁶ OAR 581-015-2030(17)

³⁷ 20 USC §1413(g) and 34 CFR §300.227

³⁸ 34 CFR §300.227(a)(1)(ii)

³⁹ 34 CFR §300.227(a)(2)(iv)

⁴⁰ 34 CFR §300.227(a)(2)

⁴¹ *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), *aff'd by an equally divided court sub nom. Honig v. Doe*, 484 U.S. 305 (1988)

⁴² The internal citation in this quote is to an older name and older section number, EHA, 20 U.S.C. 1414(d)(3). The correct current citation is to IDEA, 20 USC 1413(g).

⁴³ *Doe v. Maher*, 793 F.2d 1470, 1492 (9th Cir. 1986)

This holding remains the controlling precedent in Oregon and other jurisdictions in the Ninth Circuit.

The allegations of non-compliance in this Complaint are serious, pointing as they do to a situation in which a child with severe disabilities has received only sporadic services for most of the 2016-2017 school year. Until the investigation of this Complaint was complete, however, the Department’s knowledge of the Student’s situation was slight, and the Department had not yet made a factual determination of the situation involving the Student’s Special Education or had an opportunity to order corrective action and compel the District to make FAPE available to the Student.

For that reason, the Department does not substantiate the allegation that it violated the IDEA by not monitoring the District’s compliance with IDEA requirements with respect to the Student at the center of this Complaint.

Because the Department has substantiated some of the allegations in this Complaint of non-compliance by Douglas Co. (Roseburg) School District 4, it must and will proceed with ordering corrective action as described below.

V. CORRECTIVE ACTION⁴⁴

*In the Matter of the Oregon Department of Education
and Douglas Co (Roseburg) School District 4.
Case No. 17-054-012*

	Action Required	Submissions⁴⁵	Due Date
1.	Alternative and Alternate Communication (ACC) a) With ODE assistance, and the informed written consent of the parents, the District will consult with experts in the field of Speech Language Pathology (i.e. University of Oregon, Oregon Speech and Hearing Association) to identify a	a) Submit evidence of completion of the initial consultation with experts, inclusive of the following information: (1).Meeting date (2).Participants	August 1, 2017

⁴⁴ 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).

⁴⁵ 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.

	<p>licensed Speech Language Pathologist with expertise in Alternative and Alternate Communication (AAC) and its use with school age students.</p> <p>b) The District will secure the services of the selected AAC consultant to assist the District in:</p> <ul style="list-style-type: none"> • Determining the communication system most appropriate for the student's current needs • Assisting the district in acquiring the system; and • Developing an implementation plan 	<p>(3). Selection of AAC consultant</p> <p>b) Submit documentation of contract with AAC consultant, as well as evidence of the communication system purchased for the Student and plan for implementation</p>	<p>August 30, 2017</p>
2.	<p>a) When the AAC consultation is complete with a communication device recommendation, convene the IEP Team, including the ACC Consultant, to review and revise the Student's IEP, in conjunction with the use of the selected system by Student and staff. The IEP meeting will also address the Student's placement for the 2017-2018 school year.</p> <p>b) As part of the IEP meeting the District will develop a schedule to reconvene the IEP team, at least quarterly, to review the student's progress and any needed changes in services and supports.</p>	<p>a) Submit complete copy of revised IEP; a complete copy of the placement decision document; any IEP and placement team meeting notices' related prior written notices (PWN); and any meeting notes</p> <p>b) Submit a calendar of the interim IEP team meetings.</p> <p>c) Submit evidence of completed meetings according to calendar.</p>	<p>September 30, 2017</p>
3.	<p>a) To address the eight-month period of missing and delayed services, provide 160 hours of</p>	<p>a) Submit copy of the compensatory services schedule, signed by the</p>	<p>October 15, 2017</p>

	compensatory education services, based on the student's IEP developed according to Corrective Action 2. (above). The services should be provided by appropriately licensed staff, and the schedule developed collaboratively by the Parent and District.	Parent and the District. b) Beginning November 1, 2017, submit monthly logs of the hours and services provided to the Student.	November 1, 2017
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Dated this 22nd Day of June 2017



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

Mailing Date: June 22, 2017