

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Winston-Dillard
School District 116

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FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 18-054-022

I. BACKGROUND

On March 21, 2018, the Oregon Department of Education (Department) received a Letter of Complaint (Complaint) from the parents (Parents) of a student (Student) residing and attending school in the Winston-Dillard School District (District). The Parents requested a special education investigation under Oregon Administrative Rule (OAR) 581-015-2030. The Department provided a copy of the Complaint to the District on March 22, 2018.

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 sixty days of receiving the complaint unless exceptional circumstances require an extension.¹ This Order is timely.

On March 29, 2018, the Department sent a *Request for Response* to the District identifying the specific IDEA allegations in the Complaint to be investigated.

On April 20, 2018, the District, through its legal counsel, submitted its *Response* to the Department with accompanying documentation. The Parents received the District's *Response* on April 26, 2018. On April 29, 2018, the Parents provided a *Reply* to the District's *Response*.

The District provided the following documentation in its *Response*:

1. IEP 9/7/17
2. Placement determination 9/7/17
3. Conference Summary 9/6/17
4. Prior Written Notice 9/6/17
5. Notice of Team Meeting 8/30/17
6. Prior Written Notice 9/8/16
7. IEP 9/8/16
8. Notice of Team Meeting 9/6/16
9. IEP 5/11/16
10. Conference Summary 5/11/16
11. Notice of Team Meeting 5/4/16
12. Prior Written Notice 3/2/16
13. IEP 3/1/16
14. Placement Determination 3/1/16

¹ 34 C.F.R §§ 300.151-153; OAR 581-015-2030.

15. Meeting minutes 3/1/16
16. Conference Summary 3/1/16
17. Notice of Team Meeting 2/18/16
18. Email communication 2/20/18 to 4/17/18
19. Notes from Instructional Assistant 2/26/18
20. Speech Pathologist materials 2017-2018
21. Assessment results & Report cards–Spring 2016 to Winter 2018
22. Email communication 3/21/18–4/17/18
23. Email communication 11/16/17–4/19/18
24. List of Staff knowledgeable about circumstances of Complaint
25. Special Education Contact Log 11/4/13–3/21/18
26. Report cards, assessment results & Progress Reports 6/9/16–4/6/18
27. District Staff Certificates of Completion
28. Email communication 10/2/17–4/11/18

The Parent provided the following documents in reply to the District's *Response*:

1. Narrative Reply from Parents
2. Email Communication 10/2/17–4/11/18
3. Notes of IA 2/26/18
4. District Public Complaint policy

On May 5, 2018, the Department's Complaint Investigator (Investigator) interviewed one of the Student's parents by telephone. The 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 34 CFR §§ 300.151-153 and Oregon Administrative Rule (OAR) 581-015-2030. 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 March 22, 2017, to the filing of this Complaint on March 21, 2018.

	Allegations	Conclusions
1.	<p>When IEPs Must Be In Effect</p> <p>The Complaint alleges that the District violated the IDEA by failing to implement the Student's IEP. Specifically, the Complaint alleges that on or about February 15, 2018, a paraprofessional refused to implement the Student's IEP by demanding that the Student not refer to familiar students as the Student's</p>	<p>Not Substantiated</p> <p>On February 15, 2018, an educational assistant (paraprofessional) instructed the Student to stop referring to a familiar student as a "friend" because the Student was stating it repeatedly, aggravating the other student. The educational assistant did this to keep both students from getting angry.</p>

<p>friends, contrary to the express terms of the Student's IEP, which the Parents allege states the Student is to address both familiar and unfamiliar students as the Student's friend(s). The Complaint further alleges that the paraprofessional knew of the relevant specific provisions of the IEP prior to February 15, 2018.</p> <p>(34 CFR §§ 300.323, 300.324; OAR 581-015-2220)</p>	<p>In this isolated incident, the educational assistant did not fail to implement the Student's IEP, which notes that the Student requires "verbal supports as expectations and scenarios change in [the Student's] academic environment." The Department does not substantiate this allegation.</p>
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PARENT'S REQUESTED CORRECTIVE ACTION:

Provide training on Autism Spectrum Disorder and IDEA, to all paraprofessionals employed by the [District] assigned to work in any capacity with individuals with Autism Spectrum Disorder who are attending the [District]. It should be noted that there needs to be an accountability component to this solution, be it a certification, accreditation, or letter of completion by the instructor. Moreover, it is imperative that timelines be created by an outside agency to avoid bias and to ensure compliance from the [District].

All paraprofessionals employed by the [District] that work in any capacity with individuals with Autism Spectrum Disorder, be considered by the [District] to be a member of [the Student's] IEP Team. For example, in the case of [the particular educational assistant involved in this complaint, that they] be a member of [the Student's] IEP Team. If the [District] does not wish a paraprofessional to be included as an IEP Team member, a letter stating the substantive explanations why the paraprofessional be excluded, be provided to all other members of the IEP Team.

All paraprofessionals employed by the [District] that work in any capacity with individuals with Autism Spectrum Disorder be required to read that individual's IEP and sign off that they have read and understood all aspects of the individual's IEP.

III. FINDINGS OF FACT

1. The Student is in the eighth grade and, until recently, attended middle school in the District. The Student is eligible for special education under the disability category Autism Spectrum Disorder.
2. The Student's operative Individualized Education Program (IEP) is from September 7, 2017. The Student's IEP notes that the Student's parents express concern about the Student "not knowing social boundaries." The Student has demonstrated progress both academically and socially. Specifically, the Student "has decreased [the] amount of scripting during academic work times [and] has a visual reminder . . . that helps [the Student] understand when it is appropriate to talk," but nevertheless still requires "[instructional assistant] support and/or assistance . . . in the general education class."

3. The Student has a “Social/Emotional/Behavior” goal directed at the Student asking for a break to script when needed during structured academic activities. The Student also has a Communication goal wherein the Student will “demonstrate understanding of expected language and behavior for a variety of social interactions within different levels of relationships (such as teacher:student, familiar student:familiar student, unfamiliar student:unfamiliar student, etc.)” The Student’s “Present Level” notes that the Student has demonstrated awareness of social behavior, but needs reminders and “continues to require visual and verbal supports as expectations and scenarios change.” The Student receives 45 minutes per week of “Social Skills” specially designed instruction.
4. The Student’s placement team selected the Student’s placement as three special education classes and four general education classes, with additional supports from classroom aides. Noted benefits of such placement are “social interaction with typically developing peers” and the delivery of “small group/individualized instruction.”
5. As part of the Student’s expected language and behavior, District staff had taught the Student that it was acceptable to refer to familiar students in the Student’s class as “friends.” This practice was developed to replace the Student referring to other students as “rivals.” The specific practice of referring to familiar students as “friends” does not appear in the Student’s IEP.
6. On February 15, 2018, during physical education class, a District educational assistant (EA) instructed the Student to stop referring to a peer as a friend. This instruction upset the Student, prompting the Student to make negative remarks toward the EA, break out in a rash and become red and flustered. The Student’s Special Education Contact Log notes that on the day of the incident, District staff spoke to the Parent by phone, describing the incident and noting that the Student was held from the Student’s next class because of the Student’s agitated state.
7. In a handwritten and signed note dated February 26, 2018, the EA describes the February 15, 2018 incident. According to the EA, one or two days before February 15, 2018, the Student had “targeted” the other student involved in the February 15, 2018 incident, running toward the student, striking the student in the head several times with a dodgeball and “blurting” that the student was a “friend.” On February 15, 2018, the Student continued to “blurt” about this student being a friend, which aggravated the other student. In an effort to “keep both students from getting angry,” the EA told the Student to stop referring to the other as a “friend.”
8. The Parents contend that the EA also told the Student that “people get sick and tired of hearing it,” referring to the Student describing other students as friends.
9. Later in the day on February 15, 2018, a District related service provider who works with the Student sent an email to Parent, acknowledged the incident, and stated that the EA told the Student to stop referring to another student as a “friend,” which elicited a negative reaction from the Student. The related service provider emphasized to the Parent that the EA was mistaken in the moment, and that it was okay for the Student

to refer to other students as “friends,” which was developed as replacement behavior. The Student previously referred to other students aloud as “rivals.”

10. The Parent was told by email that the related service provider and the Student’s special education teacher reinforced with the EA that the Student could call this particular student a “friend.” The related service provider also noted that the Student was calm and engaged after having this “rough moment” earlier in the day. It was made clear that the Student was not in “trouble” for calling someone a “friend.”
11. The Parents contend that as a result of the EA’s conduct, the Student is hesitant around the EA and requires reinforcement that the Student will not be disciplined for referring to other students as “friends.”
12. In response to a “Public Complaint” filed by the Parents with the District concerning the February 15, 2018 incident, a District administrator responded to the Parents in a March 20, 2108 email, noting that the District found “[the EA] intervened when your child perseverated in statements that appeared to anger another child, before a physical altercation occurred.”

IV. DISCUSSION

The Complaint alleges that the District violated the IDEA by failing to implement the Student’s IEP. Specifically, the Complaint alleges that on February 15, 2018, an educational assistant (EA) refused to implement the Student’s IEP by demanding that the Student not refer to familiar students as the Student’s friends, contrary to the terms of the Student’s IEP.²

At the beginning of each school year, each school district must have in effect, for each child with a disability within its jurisdiction, an IEP.³ School districts must ensure that service providers have access to a student’s IEP and are informed of their specific responsibilities related to implementing each student’s IEP.⁴ Minor discrepancies between the services provided and the services required under the IEP are not enough to amount to a denial of a free appropriate public education (FAPE). Rather, “when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child’s IEP. A material failure occurs when the services provided to a disabled child fall significantly short of those required by the IEP.”⁵

A. The District Complied with the Verbal Support Component of the Student’s IEP

The Student’s operative IEP from September 7, 2017 does not include any specific script or expected language directing the Student to refer to other students as “friends.” Rather,

² On April 6, 2018, the Parents clarified, via email, that “Nowhere does it state in the IEP exactly what would be said and how it would be accomplished. However, the [Related Service Provider] and the Special Education [Teacher] . . . decided to make, as part of [the Student’s] expected language and behavior, for [the Student] to refer to [the Student’s] peers as [the Student’s] ‘friends’.”

³ 34 C.F.R. § 300.323(a); OAR 581-015-2220(1)(a).

⁴ 34 C.F.R. § 300.323(c)-(d); OAR 581-015-2220(3).

⁵ *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770, 773 (9th Cir. 2007).

the Student's IEP contains a Communication goal directed at understanding expected language and behavior for a variety of social interactions. The "Present Level" for this goal notes that the Student has demonstrated awareness of social behavior, but needs reminders and "continues to require visual and verbal supports as expectations and scenarios change."

On February 15, 2018, a noticeable scenario change arose that required verbal support from an EA. The Student repeatedly stated that another student was a "friend," which aggravated the other student. One or two days earlier, the Student had "targeted" the same student, running toward the student and striking the student in the head several times with a dodgeball and "blurting" that the student was a "friend." In an effort to "keep both students from getting angry," the EA told the Student to stop referring to the other as a "friend." The EA provided verbal input based upon the changing social scenario in an effort to reduce the likelihood of an altercation between the two students. The EA's conduct did not constitute a failure to implement the Student's IEP.

The EA did not deliver services to the Student that "fall significantly short of those required by the IEP." To the contrary, the EA's direction on February 15, 2018—while inconsistent with expected language and behavior developed by the Student's Related Service Provider and Special Education Teacher—aligned with the Student's IEP insofar as the EA provided verbal support to the Student as expectations and scenarios changed in the Student's social environment.

B. The EA's Deviation From the "Friend" Script Was An Isolated Incident

It is not disputed that on February 15, 2018, the EA instructed the Student to stop referring to a familiar student as the Student's "friend." It is also not disputed that such an instruction was a single, isolated event. On the same day the incident occurred, a District related service provider who works with the Student sent an email to Parent emphasizing that the EA was mistaken in the moment, and that it was okay for the Student to refer to other students as "friends," which was developed as replacement behavior. This same related service provider clarified that the Student was not in "trouble" for calling someone a "friend." There is no indication that the EA or other District staff subsequently or previously instructed the Student to stop referring to other Student's as "friends." The District EA's single deviation from expected language and behavior developed by the Student's Related Service Provider and Special Education Teacher was not a material failure to implement the Student's IEP.

The District did not violate the IDEA when on February 15, 2018 the EA told the Student to stop referring to a familiar student as the Student's friend. The Department does not substantiate this allegation.

CORRECTIVE ACTION⁶

In the Matter of Winston-Dillard School District No. 116

Case No. 18-054-022

The Department does not order corrective action in this matter.

Dated this 17th Day of May, 2018

Sarah Drinkwater, Ph.D.

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

Mailing Date: May 17, 2018

Appeal Rights: Parties may seek judicial review of this Order. Judicial review may be obtained by filing a petition for review within sixty days of service of this Order with the Marion County Circuit Court or with the Circuit Court for the County in which the party seeking judicial review resides. Judicial review is pursuant to the provisions of ORS § 183.484.⁷ (OAR 581-015-2030 (14).)

⁶ 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)).

⁷ OAR 581-015-2030(14).