

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Eugene School District 4J)
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FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 18-054-025

I. BACKGROUND

On April 6, 2018, the Oregon Department of Education (Department) received a Letter of Complaint (Complaint) from the parents (Parents) of a student (Student) attending school in the Eugene 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 April 6, 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 On April 16, 2018, the Department sent a *Request for Response* to the District identifying the specific IDEA allegations in the Complaint to be investigated. On April 30, 2018, the District timely submitted its *Response* to the *Request for Response*, with accompanying documentation.

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

1. District's narrative *Response*
2. Notice of Team Meeting 4/19/17
3. Meeting Attendance/Summary 4/21/17
4. Occupational Therapy Service Summary 4/21/17
5. IEP 4/21/17
6. Seizure/Health Plan 2016-17
7. PLAAFP (Augmentative Alternative Communication) April, 2017
8. Special Education Placement Determination 4/21/17
9. Handwritten "Transition" meeting minutes 3/13/18.
10. Notice of Team Meeting 3/20/18.
11. Meeting Attendance/Summary 4/10/18
12. IEP Meeting Agenda 4/10/18.
13. IEP Meeting Agenda (annotated in handwriting) 4/10/18
14. Meeting notes (handwritten): 3/13/18.
15. Meeting notes (handwritten) 4/20/18
16. Meeting/Attendance/Summary 4/17/18
17. Email communication 4/25/18
18. Meeting Notes 4/21/17
19. IEP Meeting Notes 4/10/18.
20. IEP Meeting Notes 4/20/18
21. Schedule (proposed)
22. Email communication 3/23/17, 4/7/17, 4/11/17
23. Email communication 8/31/17, 9/1/17, 9/4/17, 9/5/17.

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

24. Email communication 9/24/17, 9/25/17, 9/26/17
25. Email communication: 9/29/17
26. Email communication: 3/8/18, 3/9/18.
27. Email communication 3/12/18
28. Email 3/13/18
29. Letter (undated) from OT, to Student's parents
30. OT Service Summary 4/21/17
31. OT Service Summary 4/26/16
32. Peabody Developmental Motor Scales (PDMS) assessment results. 4/26/16
33. OT service log 9/2017-11/2/17)
34. OT Notes 9/7/2015- 4/6/2016
35. Email communication 3/16/18 (with "Feeding Guidelines" attached)
36. Email communication 3/22/18, 3/23/18
37. Email communication 4/4/18.
38. Email communication January, 2018, 4/5/18, 4/6/18, 4/7/18
39. Email communication 4/6/18, 4/4/18 [re transportation issue]
40. Report cards Semester 1
41. Email communication 6/22/17 (progress reports and data attached)
42. Augmentative & Alternative Communication Report 12/5/2017
43. Email communication 1/11/18
44. Eligibility Summary Statement 6/6/16
45. Disability Statement 6/6/16:
46. Note re "behavior"
47. Statement on the Impact of [] Syndrome (undated, but during 2nd grade)
48. Disability Statement – OHI 6/6/16
49. Disability Statement – Communication Disorder 6/6/16
50. PWN 6/6/16
51. PWN 1/20/18
52. Psychoeducational Evaluation 6/6/2016
53. OT note 6/6/2016
54. Notice of Team Meeting 4/20/16
55. 4/26/16 IEP
56. Special Education Placement Determination 4/26/16
57. PWN 4/26/16.
58. [] Elementary Enrollment History
59. [] Elementary Daily Attendance By Week 3/12/18 to 6/11/18
60. [] Elementary Daily Attendance Profile 4/3/18 – 4/26/18
61. PWN 1/10/18
62. [] Elementary Daily Attendance By Week, ending 1/8/18
63. [] Elementary Daily Attendance Profile ending 1/8/18
64. Staff or others knowledgeable about circumstance of complaint

On May 15, 2018, the Department's Contract Complaint Investigator (Investigator) interviewed one of the Parents by telephone. Thereafter, the Parents provided the following documents in reply to the District's *Response* in this case:

1. Narrative Reply from Parents 5/14/18
2. Email communication 5/14/18 with emails from 1/4/18 and 1/5/18
3. Email communication 1/23/18
4. Email communication 2/21/18 with attachment

The Investigator reviewed and considered all of the documents received in reaching the findings of fact and conclusions of law contained in this order. This order is timely.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this Complaint under OAR 581-015-2030 and 34 CFR §§ 300.151-153. The Parent’s allegations and the Department’s conclusions are set out in the chart below. The Department based its conclusions on the Findings of Fact in Section III and the Discussion in Section IV. This Complaint covers the one-year period from April 7, 2017, to the filing of this complaint on April 6, 2018.

| | Allegations | Conclusions |
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| 1. | <p>When IEPs Must Be In Effect (Implementation); Free Appropriate Public Education (FAPE)</p> <p>The Complaint alleges that the District violated the IDEA and is not providing a Free Appropriate Public Education (FAPE) to the Student, by failing to implement the Student’s IEP. Specifically, the Complaint alleges that on or about March 12, 2018, following a switch from one elementary school to another elementary school within the District, the District has refused to implement the Student’s April 21, 2017 IEP by “denying [the Student] general education time as specified” in the Student’s IEP. The Complaint further alleges that the District is allowing only “one 20 minute ‘morning meeting’ per day with the general education class before being returned to the Lifeskills class for the rest of the day.” The Complaint further alleges that the Student’s participation in library, lunch and general education P.E. does not comply with the requirements of the Student’s IEP, which provides for “70% Gen Ed with support and 30% lifeskills class time”. The Complaint further alleges that the District enrolled the Student in what the District refers to as “general education PE”, however, the Student’s IEP requires adaptive PE.</p> <p>34 CFR §§ 300.323, 300.324, 300.101; OAR 581-015-2040, 581-015-2220.</p> | <p>Substantiated</p> <p>The Student’s April 21, 2017 IEP does not clearly describe how much of the Student’s school day is to be spent in the general education environment, and how much the Student is to be removed from the general education environment. This lack of clarity constitutes a procedural violation of IDEA and a FAPE denial based upon its depriving the Parents of their right to meaningfully participate in developing the Student’s IEP. The Department substantiates this allegation.</p> |

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| <p>2.</p> | <p>When IEPs Must Be In Effect (Implementation); Content of IEP; FAPE</p> <p>The Complaint alleges that the District violated the IDEA and is not providing FAPE to the Student, by failing to provide “a 1:1 EA” to accompany the Student to general education, as required by the Student’s April 21, 2017 IEP, which provides for “250 minutes per day in general education with support; 110 minutes per day in life skills.”</p> <p>34 CFR §§ 300.323, 300.324, 300.320, 300.101; OAR 581-015-2220, 581-015-2200, OAR 581-015-2040.</p> | <p>Not Substantiated</p> <p>The Student has a history of 1:1 adult support and assistance in school. However, the Student’s IEP does not call for a dedicated 1:1 educational assistant. Rather, the Student’s placement page calls for adult support in the Life Skills classroom and adult assistance in general education. There is no indication that appropriate adult support was not provided, nor that the absence of a dedicated 1:1 deprived the Student of a FAPE. The Department does not substantiate this allegation.</p> |
| <p>3.</p> | <p>When IEPs Must Be In Effect (Implementation); Content of IEP</p> <p>The Complaint alleges that the District violated the IDEA by failing to implement the Student’s April 21, 2017 IEP, which provides for transportation “To and From School” in 60 minutes. The Complaint further alleges that transporting the Student requires the Student be on the bus, on average, 65-70 minutes each day “to travel 7.6 miles”.</p> <p>34 CFR §§ 300.323, 300.324, 300.320; OAR 581-015-2200, 581-015-2220.</p> | <p>Not Substantiated</p> <p>The Student’s increased bus time did not result in a loss of educational opportunity or constitute a change in placement. The Student transferred to a non-neighborhood school that is six miles further from the Student’s home than the previous elementary school. The Parents were on notice of the increased distance between the Student’s new school and their home. The Department does not substantiate this allegation.</p> |

The Parent requests the following Proposed Solutions, concerning the allegations being investigated in this matter:

“1a.) Become Compliant with the IEP immediately.

Principal * * * suggests this may not be physically possible due to the stretch of space and obstacles between the Gen Ed classrooms and the Lifeskills classrooms. One example given, the LS kids must navigate outside in the rain, wind and cold to utilize a ramp while their neurotypical peers have comfortable, straight shot easy access to a warm, safe, enclosed stair case and breezeway. The ramp and breezeway are side by side. When 4J chose to cover and enclose the breezeway they elected to cover and enclose the breezeway only, leaving the access ramp exposed to the outdoor elements. This issue alone is an equality issue and should be looked into by the ADA. Ultimately in the best interest of education and in line of what we know of [] Syndrome where their receptive skills are capable of grade level understanding and it is their expressive ability that is their

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| floor, not their ceiling. [The Student] should be in more general education time to avoid the back and forth rather than less time if that is the issue.” |
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III. FINDINGS OF FACT

1. The Student in this case is ten years old and attends the fourth grade at an elementary school in the Eugene School District (District). The Student is eligible for special education services under the disability categories of Other Health Impairment and Communication Disorder.
2. An Augmentative and Alternative Communication (AAC) report from December 2017 states that the Student is non-verbal and initiates interactions with smiles, waves, gestures, and body proximity. The Student answers yes/no questions by head shaking or nodding, and can use some modified signs such as “bathroom.” The Student uses a communication device to make requests, comments, and communicate with classmates and peers. The Student is described as “very expressive” with a “contagious smile.”
3. Because of the Student’s documented medical and educational needs, the District has provided consistent adult support in school, typically from an educational assistant.
4. The Student’s operative Individualized Education Program (IEP) at the time of the Complaint’s filing is dated April 21, 2017. The Student’s affable nature was cited as a strength. The Parents expressed an interest in expanding the Student’s use of communication devices, and less on handwriting.
5. The IEP Team developed goals in the areas of Communication, Reading (identifying new sight words), Math (independently counting out the correct number of things 1-10), Social/Emotional/Behavioral, and Writing.
6. The IEP Team decided that the Student’s specially designed instruction (SDI) services would be delivered as follows: Life Skills (360 minutes per day), Mathematics (150 minutes per week), and Reading (150 minutes per week). The “Anticipated Location” for each of these services was “Self Contained / General Ed.”
7. The IEP Team agreed that the District would provide related services in the form of “Transportation Service” for 60 minutes per day, “Communications Skills” for 120 minutes per month, and “Adaptive PE,” for 300 minutes per year.
8. At the time of the April 21, 2017 IEP, the Student did not attend the school designated as a “home school” based on the Parents’ address, but rather attended a different elementary school, approximately 1.3 miles from the Student’s home.
9. At the time of the Complaint, the Student had transferred to another District elementary school located approximately seven and one-half miles from the Student’s home. The Parent reports that an incident occurred during the 2017-2018 school year related to improper feeding of the Student, which required the Student’s hospitalization on or about December 15, 2017. After not attending school between mid-December 2017 and March 2018, the District and Parents agreed to enroll the Student at a different elementary school.
10. The Student’s “home school” is approximately three-tenths of a mile from the Student’s home.

11. The Student receives the IEP related service of round trip home/school transportation. When the Student began attending the school that is more than seven miles from the Student's home, the District developed different routing plans to transport the Student.
12. The Student's IEP also contains a number of supplementary aids and services, and "Supports for School Personnel," including consultations in the areas of occupational therapy, augmentative communication, physical therapy, and behavior.
13. The IEP Team noted that the Student's "delays in communication, social, and self-care skills make it difficult for [the Student] to make measurable progress in the general education curriculum without significant supports."
14. In the Student's "Statement of Nonparticipation Justification," the IEP states that the Student requires individualized instruction to address functional, communication, adaptive, and social needs. As such, the Student would spend "250 minutes per day in general education with support" and "110 minutes per day in life skills."
15. The placement team selected a placement option of "33-Regular class less than 40%." This placement is described as in ". . . Lifeskills. Much of [the Student's] program includes access to the general education classroom (about 90% of [the Student's] school day), with adult support from the life skills classroom." This placement option included "access to more frequent adult assistance in regular classes."
16. On March 13, 2018, the District held a meeting characterized as a "transition meeting" at the Student's new elementary school. The meeting minutes from March 13, 2018 state that, due to the Student's significant period of absence from school since mid-December of 2017, District staff needed to get to know the Student, build a relationship, and measure the Student's present levels. During that "start up" the Student would be in general education for morning meeting, PE, music and lunch. The Parent requested that the Student be in general education as much as possible, preferably all day. The Student's participation in "morning meeting," physical education, music class, and lunch translates to the Student spending approximately 37% of the school day with nondisabled peers.
17. On March 14, 2018, the Student began attending school at the new elementary school. The Student's April 21, 2017 IEP was not revised at this time.
18. The Parents report that the Student's bus ride home is often "nearly an hour and a half for a 7.6 mile journey."

IV. DISCUSSION

A. Denial of FAPE

1. Failure to Comply with IEP General Education Service Requirements

The Complaint alleges that the District violated the IDEA by failing to implement the Student's IEP. Specifically, the Complaint alleges that following a switch from one elementary school to another elementary school within the District, the District has refused to implement the Student's April 21, 2017 IEP by denying the Student general education time as specified in the Student's IEP.

It is appropriate for an IEP team to discuss a range of possible placements and services at IEP team meetings. However, after discussing potential appropriate placements and services, "the

school district must take the final step and clearly identify an appropriate placement from the range of possibilities.”² The District violates the IDEA when it fails to articulate a clear, coherent offer of FAPE that a parent can reasonably evaluate and decide to accept or challenge.

The District denied the Student a free appropriate public education (FAPE) by creating the internally inconsistent and unclear April 21, 2017 IEP. The “Statement of Nonparticipation Justification” portion of the IEP states that the Student requires individualized instruction to address functional, communication, adaptive, and social needs. As such, the Student would spend “250 minutes per day in general education with support” and “110 minutes per day in life skills.” The fair conclusion drawn here is that approximately 69% of the Student’s day will be spent in the general education environment. However, the Student’s placement team selected a placement option of “33-Regular class less than 40%,” meaning the Student would spend no more than 40% of the Student’s day in the general education environment. The two placement selections cannot be reconciled. To further confuse matters, the District described the Student’s placement as including access to the general education classroom, which would represent “about 90% of [the Student’s] day.”

The Student’s IEP does not signal to the Parents or District staff a clear indication of how much of the Student’s school day is to be spent in the general education environment, and how much the Student is to be removed from the general education environment. This lack of clarity constitutes a procedural violation of IDEA and FAPE denial based upon its depriving the Parents of their right to meaningfully participate in developing the Student’s IEP. The Department substantiates this allegation.

2. Failure to Provide the Student with a 1:1 Educational Assistant

The Complaint also alleges that the District violated the IDEA by failing to provide a 1:1 educational assistant (EA)³ to accompany the Student in the general education environment. A student’s IEP must contain a “statement of the specific special education and related services and supplementary aids and services . . . to be provided to the child, or on behalf of the child”⁴

The Student’s April 21, 2017 IEP does not include the services of a 1:1 EA accompanying the Student in any academic setting, general education or otherwise. Because of the Student’s documented medical and educational needs, the District has provided the Student with consistent adult support in school, typically from an EA. The Student’s April 21, 2017 IEP does indicate that the Student will have “adult support from the life skills classroom” in the general education classroom, and elsewhere that the Student will have “access to more frequent adult assistance in regular classes,” but no specifically assigned 1:1. After returning to school on March 14, 2018, the Student did have consistent adult assistance in both general education environments (morning meeting, music, physical education, and lunch) and the Life Skills classroom. There is no indication that the Student was not making academic progress in the Student’s current circumstances with adult support, but in the absence of a dedicated 1:1 EA. The Department does not substantiate this allegation.

3. Transportation in Excess of Related Service Time

The Complaint alleges that the District violated the IDEA by failing to implement the Student’s April 21, 2017 IEP, which provides for transportation “To and From School” in 60 minutes, because the

² *Glendale Unified Sch. Dist. v. Almasi*, 122 F.Supp.2d 1093, 1108 (C.D. Cal. 2000).

³ An EA in a school is tasked with assisting teachers or related service providers in any number of supportive capacities, including instructional support and student supervision. (OAR 581-037-0015).

⁴ OAR 581-015-2200(1)(d).

Student's trips to and from school have increased, where some days the Student experiences "excessive bus time" with rides of nearly ninety minutes "for a 7.6 mile journey."⁵

Transportation is a "related service" that may be required to assist a child with a disability to benefit from special education.⁶ The IDEA does not specifically address the appropriate length of bus rides for students with disabilities. An increase in travel time in some circumstances could constitute a change in educational placement, and the failure to convene an IEP team meeting to address the increase could result in a FAPE denial.⁷ Conversely, there are legitimate reasons for increases in school transportation travel time (e.g., traffic patterns, changes in bus routes, the distance between the student's home and the educational placement, placement of students in non-neighborhood schools, etc.)

The Student's increased bus time was not found to violate the Student's IEP, result in a loss of educational opportunity, or constitute a change in placement. The Student's April 21, 2017 IEP provides for daily transportation to and from school. The Student's IEP Team arrived at a service time of sixty minutes per day for transportation. At the time the IEP was formed, the Student attended a school located approximately 1.3 miles from the Parents' home. Now, the Student attends a non-neighborhood school that is approximately seven and one-half miles from the Student's home. The Parents were on notice of the increased distance between the Student's new school and their home. Furthermore, there is no indication that the increased bus time has resulted in other parts of the Student's IEP not being fulfilled. The Department does not substantiate this allegation.

CORRECTIVE ACTION⁸
In the Matter of Eugene School District
 Case No. 18-054-025

The Department orders the following Corrective Action in this matter.

| No. | Actions | Submissions ⁹ | Due By |
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| 1. | Provide District special education staff with written guidance regarding nonparticipation justification decisions and narrative development within IEPs. | Submit draft staff guidance document to ODE for review prior to distribution. | August 20, 2018 |

⁵ If Parents contend that the Student's excessive bus time constitutes discrimination or denial of a benefit on account of the Student's disability, Parents may seek action under Title II of the Americans with Disabilities Act and/or Section 504 of the Rehabilitation Act of 1973. The Department's resource for action is Winston Cornwall, Civil Rights Education Specialist, 255 Capitol Street NE, Salem, OR, 97310; phone: 503.947.5675 or fax: 503.378.5156. Exploration into such potential violations is beyond the scope of this order.

⁶ 34 C.F.R. § 300.34; OAR 581-015-2000(28).

⁷ *Fremont (CA) Union High School District*, Office for Civil Rights, Case No. 09-11-1212 (September 23, 2011) (finding that a route change increased a bus ride from thirty minutes to two hours, resulting in a student being dropped off last and arriving at a day care with his clothing and diaper wet).

⁸ 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)).

⁹ 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. | Provide nonparticipation justification guidance document to all special education staff. | Submit evidence of completed distribution to ODE. If distributed in a meeting, submit agenda, copy of guidance, and sign-in sheet. If distributed by e-mail, request "read receipt" and include ODE dispute resolution staff in distribution list. | September 10, 2018 |
| 3. | <p>Convene the IEP team to review, and revise as needed, the Student's most recent IEP to ensure:</p> <ul style="list-style-type: none"> • The nonparticipation justification is stated as a specific amount (not a range), and • The nonparticipation justification statement and the student services summary are congruent <p>Immediately following the IEP Team Meeting, conduct a placement team meeting to review, and revise as needed, the description of the placement options considered, and the placement determined, to align with the nonparticipation justification statement in the IEP.</p> | Submit to ODE and the Parent a complete copy of the IEP with any revisions highlighted, and copies of any notes or minutes, and a copy of the prior written notice. | September 28, 2018 |

Dated this 5th Day of June 2018



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

Mailing Date: June 5, 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 from the 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. (OAR 581-015-2030 (14).)