

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of)
Portland School District 1J)

FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 18-054-045

I. BACKGROUND

On November 15, 2018, the Oregon Department of Education (Department) received a written request for a special education complaint investigation (Complaint) from an attorney (Attorney) representing the Parents (Parents) of a student (Student) who receives special education services from the Portland School District 1J (District). The Department confirmed receipt of the Complaint and forwarded it to the District on November 15, 2018.

Under state and federal law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue an order within sixty days of receipt of the complaint.¹ This timeline may be extended if the Parent and the District agree to the extension to engage in mediation or local resolution of the complaint, or for extenuating circumstances. A complaint must allege a violation that occurred not more than one year before the date the complaint was received by the Department.² Based on the date the Department received the Complaint, the relevant period for this Complaint is November 16, 2017 through November 15, 2018.

On November 20, 2018, the Department's Complaint Investigator sent a *Request for Response* (RFR) to the District identifying the specific allegations in the Complaint to be investigated and establishing a *Response* due date of December 4, 2018.

On December 4, 2018, the District submitted a packet of materials to the Department's Complaint Investigator (Investigator). These materials are listed in the chart below:

Document Title

1. Exhibit List
2. IEPs in effect during the 2017-2018 and 2018-2019 school years, Meeting Minutes
3. Prior Written Notices from the 2017-2018 and 2018-2019 school years
4. Copies of all requests for records Parents submitted to the District during the 2017-2018 and 2018-2019 school years
5. Written communication between District and Parents. Emails between April 18, 2018 and November 15, 2018
6. Copies of documents relied on by District that "The district does not agree that ABA services are necessary to provide FAPE."
7. June 15, 2018 Settlement Agreement
8. August 24, 2018 IEP meeting Transcript
9. September 5, 2018 meeting Transcript
10. September 12, 2018 IEP meeting Transcript

¹ 34 CFR § 300.152(a); Oregon Administrative Rule (OAR) 581-015-2030(12).

² 34 CFR § 300.152(b); OAR 581-015-2030(5).

11. 6 Audio Files, IEP's parts 1-6
12. List of staff knowledgeable about the circumstances in the complaint.

During the interview process, and in an email afterwards, the District provided the Investigator with copies of draft IEPs written at August 24, September 5, and September 12, 2018 IEP Team Meetings. The District also shared the final language of the Present Levels of Academic Achievement and Functional Performance (PLAAFP) agreed upon at the November 28, 2018 IEP Team Meeting.

The Investigator determined that on-site interviews were necessary. On December 12, 2018, the Investigator interviewed two District special education administrators, one of the District's attorneys, and one of the District's special education teaching staff. On December 13, 2018, the Investigator interviewed another District special education staff member and another of the District's attorneys. On December 14, 2018, the Investigator interviewed the Parents and the Parent's Attorney.

During the Interview and in an email afterwards, the Parents gave the Investigator copies of the following five documents: (1) pp.95-102 of a transcript from September 12, 2018 IEP meeting; (2) a timeline with emails the Parent created to document communications with the District in 2017; (3) an outline the Parent created of the Student's behavioral issues and feedback during the 2017-2018 school year; (4) the Synergy Security Administrator's Guide; and, (5) a copy of a complaint the Parent and others filed with the District regarding Applied Behavior Analysis (ABA) on November 14, 2017.

The Investigator reviewed and considered the previously-described documents, interviews, and exhibits 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.³ The Parent's allegations and the Department's conclusions are set out in the chart below. These conclusions are based on the Findings of Fact in Section III and on the Discussion in Section IV. This complaint covers the one-year period from November 16, 2017 through November 15, 2018.

1.	<p>Access to Student Education Records</p> <p>The Parents allege the District violated the IDEA when it failed to comply with the Parents' request for education records made on August 24, 2018.</p> <p>(34 CFR § 300.613; OAR 581-015-2300(3)(b))</p>	<p>Substantiated</p> <p>The District did not respond to the Parents' request for records, nor did it provide the Parents with a timely explanation or interpretation of the records.</p>
2.	<p>Parent Participation Requirements for IEP and Placement Meetings</p> <p>The Parents allege the District violated the</p>	<p>Substantiated</p> <p>The District did not include the Parents</p>

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

<p>IDEA when it prohibited the Parents from participating in an IEP Team decision regarding inclusion of the statement “The district does not agree that ABA services are necessary to provide FAPE.”</p> <p>(34 CFR § 300.322; OAR 581-015-2195(1))</p>	<p>in a discussion about methodology at the August 24, 2018 IEP Team Meeting.</p>
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Requested Corrective Action

The Parent requests the following actions be implemented as resolutions to the Complaint:

- “The Oregon Department of Education should issue an order finding that District is in violation of IDEA for failure to provide the requested records within 45 days after the request was made”
- “District should provide Parents with a copy of the data relating to the statement in the IEP that the Student did not need ABA to receive FAPE, including records identifying the names of the individuals who made that determination”;
- “The Oregon Department of Education should issue an order finding that District is in violation of IDEA prohibiting Parents from participating in IEP Team decision regarding inclusion of the statement “The district does not agree that ABA services are necessary to provide FAPE.”
- “District should be ordered to remove the statement that “[t]he district does not agree that ABA services are necessary to provide FAPE” from the Student’s IEP.
- District should be ordered to allow the IEP team to make decisions about whether or not ABA services are necessary to provide FAPE without interference.
- The Oregon Department of Education should order the District to convene, and pay all costs of providing, a facilitated IEP Team Meeting with a facilitator that is mutually agreeable to the parties, to discuss the statement that “[t]he district does not agree that ABA services are necessary to provide FAPE” and to discuss the data relied upon by District to make that determination.

III. FINDINGS OF FACT

1. The Student is thirteen years old and is in the seventh grade. The Student attends school in a District program for students who are gifted and talented. The Student is eligible for special education as a student with an Autism Spectrum Disorder (ASD).
2. The Student’s IEP was written on May 26, 2017, and included Specially Designed Instruction in Adapted Physical Education, Social/Emotional Skills, Writing Skills, Communication, and Classroom/School Skills. The IEP also included Occupational Therapy under Related Services, and a number of Supplemental Aids and Services. Applied Behavior Analysis (ABA) services were not included in the specially designed instruction, related services or Supplementary Aids and Services sections of the IEP. The IEP does include 30 minutes per

week of staff collaboration with “outside providers”⁴ as part of the Supports for School Personnel.

3. During the 2015-2016 school year, the District allowed students to receive “push-in” ABA services from private ABA providers during the school day and on school campuses. These services were paid for by the parents’ private insurance companies as “medically necessary” services. The amount of service provided varied by student but was generally approximately three to five hours per week.
4. At the beginning of the 2016-2017 school year, the District limited the amount of allowable service time delivered to students by private ABA providers to two hours per week. The services provided were to be limited to observation and consultation and did not include direct service to the Students. The Student’s private ABA providers delivered “push-in” ABA services in excess of the agreed upon two hours per week and some services were provided directly to the Student. The Parents disagreed with the District’s limiting outside ABA service delivery in school.
5. Multiple attempts were made to schedule a meeting between the Parents and the District to discuss the change in ABA service delivery, however no such meeting occurred. As a result, on December 29, 2017, the Parents’ Attorney filed a request for a due process hearing and a Motion for Stay Put.
6. On January 2, 2018, the Student’s school principal ordered an ABA provider to leave campus, ending the therapy session with the Student. On March 9, 2018, an Administrative Law Judge (ALJ) issued a Ruling and Order on the Parent’s Motion to Stay Put. The ALJ wrote: “Parents . . . have proved that their ABA provider’s work with student at school is part of Student’s 2017 IEP . . . Student’s current educational placement includes behavioral therapy for Student by Parents’ ABA provider at [the Student’s school] during the school day. Student’s current educational placement also includes collaboration between the District and Parents’ ABA provider regarding Student’s behavioral therapy for 30 minutes each week.” The ALJ granted the Parents’ Stay Put Motion and the ABA providers returned to provide services to the Student beginning March 14, 2018.
7. The District and the Parents participated in mediation and agreed to a settlement in lieu of a due process hearing. On June 28, 2018, the District’s Board of Education approved a settlement agreement between the parties. The Settlement Agreement included the following terms:
 - “Student’s IEP shall be amended to include that the District will use ABA services, among other evidence-based practices, to deliver Student’s specially designed instruction and behavior support plan”.
 - “The District will use ABA services as long as Student’s IEP Team determines that these services are necessary for Student to receive a free appropriate public education (FAPE), or for the entirety of the 2018-2019 school year, whichever is longer. The IEP Team’s determination regarding the use of ABA services will be data-driven.”
8. The Student’s original IEP annual review date was May 25, 2018. Given the ongoing due process matter and mediation amongst the parties, the IEP Team—including the Parents—agreed to postpone the annual IEP review until August 24, 2018. District IEP Team Members drafted designated sections of the Student’s IEP and a draft was mailed to the Parents and

⁴ Details about the “outside providers” is not included in the IEP.

their Attorney on August 21, 2018. On August 23, 2018, the Parents emailed a document entitled “Parent Concerns” to the District.

9. When the Student’s IEP Team met on August 24, 2018, the Parents brought a transcriptionist who transcribed a record of the proceedings at the meeting. The District provided a facilitator to conduct the IEP Team Meeting. Eleven District staff members and five other individuals attended the meeting. Of the eleven District staff, four were newly hired staff,⁵ and two others were staff from the new location of the Student’s Talented and Gifted Program. Prior to the meeting, none of the new staff had previously met the Student or the Parents. Both Parents and their Attorney attended the meeting, as did two individuals from an outside behavioral interventions group. A general education teacher who had taught the Student the previous year and the Student’s building administrator were also in attendance.
10. The Parents presented the previously-emailed “Parent Concerns” document and requested that the document be pasted into the Parent Concerns section of the Student’s IEP. The list of concerns the Parents presented contained a wide variety of issues, including cultural concerns, a question about whether the Student qualified under the eligibility category of Other Health Impairment, and details⁶ about the Parents’ belief that ABA services are necessary for the Student to obtain a free appropriate public education (FAPE).
11. When the Student’s IEP Team began reviewing the draft IEP, there was immediate disagreement about a statement in the Present Level of Academic Achievement and Functional Performance IEP Review Section. The District had written: “The District does not agree that ABA services are necessary to provide FAPE. The District will collect data to evaluate if ABA services are necessary to provide FAPE. All ABA Services incorporated in the IEP are pursuant to the Settlement Agreement.”
12. The District’s position was that because the District had not previously provided ABA services to the Student, it consequently had no ABA data, and felt compelled to clarify in the IEP that the District could not conclude ABA services were a necessary component of FAPE for the Student in the August 24, 2018 draft IEP. Similarly, District staff felt it was important to note that the District would provide ABA services in conformity with the settlement agreement and would collect data to be considered at the next annual IEP review meeting in 2019.
13. One of the Parents asked why the statement had been added to the draft IEP. One of the District’s attorney’s stated that the statement encapsulated the District’s position and declined to discuss the statement further.
14. The Parents and their Attorney inquired about how the District had reached such a conclusion and what IEP Team Members participated in making such a decision. In response, District staff asked for and took a fifteen-minute break from the discussion.
15. After the break, the District’s Attorney stated that the District’s position was not to change the language, but rather to focus on the District’s intention to collect data on the ABA service provision during the 2018-2019 school year. A Parent and the Parents’ Attorney asked what data and analysis had the District used to conclude that the District did not agree that ABA services were necessary to provide FAPE. The District’s Attorney stated that “the School District has relied on all of the data it currently has from former IEP meetings, the existing IEP,

⁵ Including a Board Certified Behavior Analyst (BCBA) the District had hired as per the Settlement Agreement.

⁶ Much of these details were quotes from the ALJ’s Stay Put Order ruling and from the parties’ settlement agreement.

prior determinations of what FAPE is necessary for the child, and we believe, again, we've captured that as the current status and then indicated as we go forward a determination about ABA/FAPE will develop across the school year.”

16. The Parents' Attorney then asked the District for a copy of the data that was used to reach the conclusion indicated by the District's statement. The Parents' Attorney asked that the records be sent within the 45-day timeline as indicated in IDEA, and the Parents asked the District to include the names of the individuals who had written the IEP.
17. The Parents, their Attorney, and District staff met on two additional occasions⁷ to finish reviewing the Student's IEP. The above-mentioned disputed statement remained in the IEP, a version of which was ultimately agreed upon. Additional terms were added to the Student's IEP per request of the Parents. These were attached to the IEP and include the following:
 - Executive Summary of Parent Concerns;
 - Full Text of Parent Concerns Statement;
 - Settlement Agreement;
 - Ruling and Order on Parents' Motion to Stay Put;
 - Letters from former special and general education teachers and from private ABA providers;
 - Excerpts from BACB, Inc. "Applied Behavior Analysis Treatment of Autism Spectrum Disorder: Practice Guideline for Healthcare Funders and Managers, pp. 34 & 38;
 - Daily Self-Assessment Sheet;
 - Behavior Services Progress Report, dated 8/31/18, from private ABA provider;
 - Letter from private ABA provider describing clinical regression the Student experienced during the time the ABA services were not provided in the public-school setting (January 2 - March 14, 2018);
 - Parents' Proposed Revisions to "Present Levels" statement in IEP.
18. The Student's IEP was finalized on September 12, 2018. There, the IEP Team agreed to conduct an evaluation to determine whether the Student qualified for an additional special education eligibility of Other Health Impairment. District special education staff, including a Board Certified Behavior Analyst (BCBA) and the Student's private providers agreed to work collaboratively to gather data so that the Student's IEP Team could address the Student's IEP goals at a later meeting. The IEP Team scheduled that meeting for November 28, 2018.⁸
19. The Parents' Attorney sent two emails to the District's attorneys inquiring why the District had not complied with the records request they made at the August 24, 2018 IEP Meeting. The emails were sent on October 13, 2018 and November 5, 2018. On November 5, 2018, the District's Attorney responded, stating: "I can now confirm that all records in support of the [disputed statement in the August 24, 2018 IEP] and position have already been provided to you. As was stated at the meeting, [the District] relied, and will continue to rely, on [the Student's] records as a whole to determine necessary methodologies and services for FAPE. These records include, but are not limited to, current and past IEPs and the totality of information used to create and support the IEPs, including assessments, evaluations, and IEP team input, including staff and parents."

⁷ September 5 and 12, 2018.

⁸ When the District presented a new draft of the IEP at the November 28, 2018 IEP meeting, the statement from the August 24, 2018 IEP had been removed. The District offered no explanation.

IV. DISCUSSION

A. Access to Student Education Records

The Parents allege the District violated the IDEA when it failed to comply with the Parents' August 24, 2018 request for education records. A school district must comply with a parent's request to inspect and review records without unnecessary delay and in no case more than 45 days after the request has been made.⁹ This inspection and review right includes, "the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records."¹⁰

Both the Parents' Attorney and the Parents requested that the District provide them with the records the District used to reach the conclusion that, "The District does not agree that ABA services are necessary to provide FAPE," a statement the District included in a draft IEP presented to the Parents at the August 24, 2018 IEP Meeting. In concert with this records request, the Parent and the Parents' Attorney asked the District for an explanation of what data and analysis were considered in its decision-making. The District did not provide the Parents with any such records, in 45 days or otherwise. Rather, just before the Parents' Attorney made the records request at the August 24, 2018 IEP Team Meeting, then again on November 5, 2018, the District stated that it relied on the Student's records in totality to reach its conclusion, and on November 5, 2018, noted that all such records had already been provided to the Parent.

The District violated the IDEA when it failed to provide the Parents with records and an explanation and interpretation of the records within 45 days. The District reached a conclusion about whether the Student needed ABA services to receive a FAPE, then memorialized it in the Student's IEP. The Parents made a reasonable request for an explanation of the statement, including what data and analysis were considered in reaching it. The District's response that it relied on all of the Student's data in its control does not constitute a sufficient explanation or interpretation. The District's responses on August 24, 2018 and November 5, 2018 did not bring the Parents any closer to understanding the District's interpretation of the Student's records, nor the reasoning behind its decision-making. The Department substantiates this allegation.

B. Parent Participation Requirements for IEP and Placement Meetings

The Parents allege the District violated the IDEA when it prohibited the Parents from participating in an IEP Team decision regarding inclusion of the statement, "[T]he district does not agree that ABA services are necessary to provide FAPE." A District meets its obligation to ensure parent participation in a student's IEP meeting when it affords the parents the opportunity to discuss the IEP in a meaningful way.¹¹

Here, the District sent the Parents an advance draft of the Student's IEP. At the IEP Team Meeting, the Parents questioned a conclusion the District reached regarding the necessity of ABA services for the delivery of FAPE. The District declined to discuss the matter. One of the Student's Parents asked: (1) who made the determination; (2) when was the determination made; (3) what data and analysis was considered to make the determination; and (4) why was the determination not made by the IEP Team. The District's Attorney called for a break to hold a discussion outside the presence of the Parents. The District then reconvened the meeting and reported that the

⁹ 34 CFR § 300.613; OAR 581-015-2300(3)(b).

¹⁰ 34 CFR § 300.613(b)(1).

¹¹ 34 CFR § 300.322; OAR 581-015-2195(1).

disputed statement would remain in the Student’s IEP. The Parents were not afforded an opportunity to discuss when the District arrived at its decision, who specifically made the decision, how the decision was made, and/or what specific documents, tests, information or other inputs were used in making the decision. In subsequent IEP Team Meetings, the District continued to decline to discuss details about the District’s conclusion that ABA services were not necessary to provide the Student with a FAPE.

The Parents were denied their right to meaningful participation in the IEP process when the District declined to discuss its decision-making surrounding the disputed statement about the Student’s need for ABA services. The Department substantiates this allegation.

CORRECTIVE ACTION¹²
In the Matter of Portland School District 1J
 Case No. 18-054-045

	Action Required	Submissions¹³	Due Date
1.	Provide professional development and/or consultation to District participants in the student’s IEP meeting regarding IDEA and OAR requirements related to: <ul style="list-style-type: none"> • Parent participation in IEP review and revision, including in developing statements of the child’s present levels of academic achievement and functional performance; • Link between parent participation and a District’s provision of a Free Appropriate Public Education (FAPE) ; • Prior Written Notice. Provide professional development and/or consultation to staff regarding access to student education records including, but not limited to, responding to requests	Submit a copy of the Agenda, name of the Presenter(s), copies of materials, and sign-in sheet.	February 15, 2019
2.	If not already completed by the date of this Final Order, respond to the Parents’ request for education records as required	Submit a copy of the response to the Parents’ request for records to the	February 1, 2019

¹² 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)).

¹³ 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: raeannray@state.or.us; fax number (503) 378-5156.

	by 34 CFR §§ 300.614 – 300.617 and OAR 581-015- 2300.	Department.	
3.	In consultation with Department staff, including the County Contact, review and revise, as needed, the District's Board-adopted student records policies and procedures, and District internal operating procedures for student education records to ensure alignment with IDEA requirements. ¹⁴	<p>3a. Submit a copy of the process and timelines the Portland Public Schools' Board of Education follows to amend board-adopted District policies.</p> <p>3b. Submit to ODE the District's proposed revisions of its Board-adopted student records policies and procedures and District internal operating procedures for student records.</p> <p>Contingent: If changes in Board-adopted policies are needed, submit the schedule of tasks that ensure Board consideration by June 30, 2019</p>	<p>January 30, 2019</p> <p>February 28, 2019</p> <p>February 28, 2019</p>
4.	Provide information and training to records management staff and District participants in the student's IEP meeting regarding any changes required in District's internal operating procedures for student records.	Submit a copy of the Agenda, name of the Presenter(s), copies of materials, and sign-in sheet.	March 1, 2019

Dated: this 14th day of January 2019

Candace Pelt, Ed.D

Candace Pelt Ed.D
Assistant Superintendent
Office of Student Services

Mailing Date: January 14, 2019

¹⁴ 34 CFR §§300.612 - 300.624

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).)