

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of: )  
Portland School District 1J )

FINDINGS OF FACT,  
CONCLUSIONS,  
AND FINAL ORDER  
Case No. 19-054-030

**I. BACKGROUND**

On July 15, 2019, the Oregon Department of Education (Department) received a written request for a special education complaint investigation from an Attorney (Legal Counsel) 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 July 15, 2019.

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.<sup>1</sup> 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.<sup>2</sup> Based on the date the Department received this Complaint, the relevant period for this Complaint investigation is July 16, 2018 through July 15, 2019.

On July 25, 2019, 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 August 8, 2019. Due to extenuating circumstances involving interview availability of District staff and Parents, the volume of the documentary responses from both parties, and a medical procedure and recovery experienced by the Complaint Investigator (Investigator) during the complaint process, the final order issuance date was extended.

On August 20, 2019, the District submitted a packet of materials to the Investigator. The materials included in the submission are listed below:

1. IEPs in effect relating to the Student during the complaint period
2. Prior written notices provided to the Parent.
3. Copies of all requests for records Parents submitted to District along with documentation of response to requests.
4. Written communication between District and Parent relating to the allegations in this complaint.
5. Copies of health plans written for the Student.
6. Policies, procedures the District uses to determine the content of health plans.
7. Documents that relate to the development of the IEP the team began writing 8/24/2018.
8. Policies, procedures the District uses to determine the release of educational records to parents
9. Other documentation
10. A list of staff who are knowledgeable about the circumstances in this Complaint.

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

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

During the interviews, the District gave the Investigator these two additional documents.

1. IEP, August 24, 2018 with all Parents' documents attached.
2. IEP, November 28, 2018 with all Parents' documents attached:

When Parents filed the Complaint they submitted the following list of Exhibits:

1. Transcript from 8/24/2018 IBP Meeting
2. Transcript from 9/5/2018 IBP Meeting
3. Transcript from 9/12/2018 IBP Meeting
4. Transcript from 11/28/2018 IBP Meeting
5. Tort Notice of 1/12/2018, with letter from BCBA LBA describing medical necessity of ABA services in school
6. Parent's motion for ruling on the pendency "stay put" placement, 2/5/2018
7. Ruling on Parent's Motion for Stay Put, 3/7/2018
8. Letter from BCBA LBA, describing Student's clinical regression, 9/4/2018
9. Developmental Pediatrics Evaluation Report from MD, 9/14/2018, prescribing ABA services in school
10. Children's Program Evaluation and Management Progress Note from MD, 10/16/2018, prescribing ABA services and medication in school
11. Settlement Agreement, approved by PPS Board on 6/28/2018
12. Meeting Notes from IEP meeting on 8/24/2018
13. Meeting Notes from IEP meeting on 9/5/2018
14. Meeting Notes from IEP meeting on 9/12/2018
15. Email from Parent Attorney to District Attorney, "Fwd: Still waiting for records," 10/13/2018
16. Email from [Districts Counsel] to [Parents' Counsel], "RE: RE: [External Sender] -Fwd: Still waiting for records," 11/5/2018
17. Request for Complaint Investigation, 11/14/2018
18. Findings of Fact, Conclusions, and Final Order in Case No. 18-054-045, 1/15/2019
19. Email from Parent to District, "RE: Final Order ODE Complaint 18-054-045," 2/10/2019
20. Email from Parent to Special Education Director, "[Student] IBP meetings in August and September 2018 -- general concerns, corrections to meeting minutes, missing "Prior Written Notices", 11/12/2018; with attached letter
21. Email from [NAME] to Parent, "Re: [External Sender] -RE: feedback from math teachers," 12/13/2018
22. IBP Meeting Notes from 11/28/2018 IBP meeting, attached to [NAME] 12/13/2018 email
23. Email from Parent to [NAME], "RE: [External Sender] -RE: feedback from math teachers," 12/13/2018
24. Email from [NAME] to Parent, "Re: [External Sender] -RE: feedback from math teachers," 12/17/2018
25. Draft IBP from 11/28/2018 IBP meeting, provided 12/17/2018
26. Email from Parent to [NAME], "RE: [External Sender] -RE: feedback from math teachers," 12/17/2018.
27. Email from Parent to [NAME], "RE: [External Sender] -RE: feedback from math teachers," 12/21/2018
28. Excerpts from IBP meeting of 9/12/2018, with discussion of Health Management Plan, attached to 12/21/2018 email from Parent to [NAME]
29. Email from District Counsel to Parents' Counsel, "FW: [External Sender] -RE: feedback from math teachers," 1/2/2019

30. Prior Written Notice from 11/28/2018 IBP meeting, refusing to add ABA to the IBP under Related Services and refusing to add Health Management Plan for ABA services to the IBP, provided 1/2/2019
31. Email from Parent to [NAME], "RE: [External Sender] -RE: feedback from math teachers," 1/4/2019
32. Parent's feedback on draft IBP from [Student]'s 11/28/2018 IBP meeting, attached to e-mail sent on 1/4/2019
33. Email from [NAME] to Parent, "Re: [External Sender] -RE: feedback from math teachers," 1/17/2019
34. Email from Parent to [NAME], "RE: [External Sender] -RE: feedback from math teachers," 1/17/2019
35. Email from [NAME] to Parent, "Progress Report," 1/24/2019
36. Email from [NAME] to Parent, "Re: [External Sender] -RE: Progress Report," 1/26/2019
37. Email from [NAME] to Parent, "Re: [External Sender] -RE: feedback from math teachers," 1/29/2019
38. Email from Parent to [NAME], "RE: [External Sender] -RE: feedback from math teachers," 2/6/2019
39. Email from District Counsel to Parents' Counsel, "Fwd: Fw: [External Sender] -RE: feedback from math teachers," 2/15/2019
40. Email from Parents' Counsel to District Counsel, "LT at Access," 2/26/2019
41. Email from District Counsel to Parents' Counsel, "FW\_ Follow-up paper work," 3/5/2019
42. IEP from 11/28/2018 IBP meeting, provided 3/5/2019
43. Evaluation PWN from 11/28/2018 IBP meeting, provided 3/5/2019
44. PWN from 11/28/2018 IBP meeting, refusing to add ABA to the IBP under Related Services and refusing to add Health Management Plan for ABA services to the IEP, provided 3/5/2019
45. PWN from 11/28/2018 IEP meeting, refusing to include letters and recommendations from outside providers in the body of the present levels, provided 3/5/2019
46. Disability Statement from 11/28/2018 IBP meeting, provided 3/5/2019
47. Eligibility Summary Statement from 11/28/2018 IBP meeting, provided 3/5/2019
48. Autism Spectrum Disorder Eligibility Summary Statement from 11/28/2018 IBP meeting, provided 3/5/2019
49. IEP from 8/24/2018, 9/5/2018, 9/12/2018 IBP meetings, provided 10/5/2018
50. Email from District Counsel to Parents' Counsel, "RE: [External Sender] Meeting with [Special Education Director], [NAME], and the Parents," 12/18/2018
51. Email from Parent to [NAME], "RE: [External Sender] -RE: feedback from math teachers," 1/2/2019
52. Email from Parent to [NAME], "RE\_ Update," 1/11/2019
53. Email from Parent to [NAME], "RE\_ Update -- follow-up regarding questions, especially nature of professional relationship with [Student]," 1/16/2019
54. Email from [NAME] to Parent, "Fw: [External Sender] -Question response," 1/24/2019. Includes email from [NAME] to [NAME] on 1/17/2019.
55. Email from Parent to [NAME], "Discrimination complaint regarding Health Plan development for [Student] (CONFIDENTIAL)," 1/21/2019
56. Discrimination complaint regarding Health Plan development for [Student], attached to e-mail submitted on 1/21/2019
57. Email from Parent to [NAME], "RE\_ [External Sender] -Question response," 1/25/2019
58. Email from [NAME] to Parent, "Re\_ Discrimination complaint regarding Health Plan development for [Student] (CONFIDENTIAL)," 1/25/2019
59. Email from [NAME] to Parent, "Re\_ [External Sender] -Re\_ When MESD creates a health management plan," 1/30/2019. Included Health Plan as an attachment.

60. Mental Health Care Plan for [Student], dated 1/8/2019, attached to email from [NAME] on 1/30/2019.
61. Email from Parent to [NAME], "RE: [External Sender] -Re: When MESD creates a health management plan," 1/30/2019
62. Email from Parent to [NAME], [NAME], [NAME], "ABA data from 2014 regarding Methylphenidate side effects," 1/31/2019, with data collected on Student in 2014 regarding use of Methylphenidate
63. Email from [NAME] to Parent, "Re: [External Sender] ABA data from 2014 regarding Methylphenidate side effects," 2/1/2019
64. Behavior Analysis Regulatory Board, Oregon Administrative Rules (unofficial copy), Chapter 824, Division 010-070, Effective 7/28/2017
65. Behavior Analyst Certification Board's (BACB's) Professional and Ethical Compliance Code for Behavior Analysts
66. Email from [NAME] to Parent, "Re: [Student]'s ABA service records at school-- qualitative notes by [NAME], [Student]'s RBAI," 2/27/2019
67. Email from Parent to [NAME], "Request for all service records and data for [Student]," 10/13/2018
68. Email from Parent to [NAME] and [NAME], "RE: [External Sender] -Follow-up from 10/22/2018 meeting; next steps; and requested schedule for next two meetings in advance of 11/28/2018 IEP meeting," 11/16/2018
69. Email from Parent to [NAME], [NAME] "RE: Monthly Meeting- January," 1/7/2019
70. Email from [NAME] to Parent, "Re\_ Documents for our meeting Tomorrow," 1/14/2019
71. Email from Parent to [NAME], "RE: Monthly Meeting- January-- request for [Student]'s ABA Service Records and Data," 1/16/2019
72. Records request from Parents' Counsel, 1/23/2019
73. Email from District Counsel to Parent Counsel, "LT document request," 2/6/2019
74. Email from [NAME] to Parent, "Re: [External Sender] -RE: Update on fade plans," 5/16/2019, with attached summary of RBAI hours and supervision log
75. Email from Parent to [NAME], [NAME], [NAME], "RE: [External Sender] -RE: Thursday June 6th Meeting," 6/8/2019
76. Email from District Counsel to Parents' Counsel, "RBAI & BCBA notes," 6/13/2019
77. Email from District Counsel to Parents' Counsel, "FW\_ LT RBAI Notes," 6/13/2019
78. Qualitative notes from [NAME] RBAI, from 9/12/2018 to 2/22/2019
79. McHenry v PacificSource, Case CV-08-562-ST, United States District Court for the District of Oregon; Opinions and Orders from 1/5/2010, 4/16/2010, 9/28/2010, and 8/30/2011.
80. AF v Providence, Case 13-cv-00776, United States District Court for the District of Oregon, 8/8/2014
81. Oregon Department of Justice, "Statutory Questions Related to Applied Behavior Analysis (ABA) and Mental Health Parity Bulletins," 11/11/2014 (<https://dfr.oregon.gov/business/reg/health/Documents/bulletin2014-0102opinion.pdf> )
82. Oregon Health Authority, "Coordinating care for Oregon Health Plan members who receive applied behavior analysis services," 6/7/2016 (<https://www.oregon.gov/oha/HSD/OHP/Announcements/Coordinating%20care%20for%20Oregon%20Health%20Plan%20members%20who%20receive%20applied%20behavior%20analysis%20services.pdf>)
83. American Medical Association (AMA) Press Release "AMA releases 2019 CPT code set," 9/5/2018 (<https://www.ama-assn.org/press-center/press-releases/ama-releases-2019-cpt-code-set>)
84. CPT Steering Committee, letter on Applied Behavior Analysis CPT codes with Adaptive Behavior Assessment and Treatment Code Conversion Table, 10/19/2018

On September 2, 2019, the Parents submitted these additional documents:

85. ODE Correspondence re 18-054-045 Compliance and Corrective Actions: copies of our e-mail messages with ODE regarding the previous complaint.
86. District Special Education Manual, section 6, regarding IEPs. Accessed on 8/26/2019 from: <https://www.pps.net/Page/609>
87. Annotated Table 1 – listing all of the PWNs (from original complaint, pages 16 to 25) with new column identifying statements or promises in the IEP meetings to provide PWN
88. Kaiser Psychology report of 7/12/2019, reiterating recommendation for ABA in school as treatment for autism
89. Photograph of Student’s ABA binder, taken on 6/6/2019 in the Learning Center. Binder was sitting, unattended, in plain view on a desk.
90. Complaint documentation about District attorney’s inaccurate statement in the 9/5/2018 IEP meeting that we rebuffed at least 12 offers to meet in late 2017. Included as an illustration of our communication issues with the District, and the inaccuracy of [NAME] responses and claims
91. District’s response to complaint about [NAME] inaccurate statement that we rebuffed at least 12 offers to meet in late 2017.
92. Step 2 Appeal to Superintendent regarding complaint about [NAME] inaccurate statement that we rebuffed at least 12 offers to meet in late 2017

The Investigator determined that on-site interviews were necessary. On September 9, 2019, the Investigator interviewed the Parents and their Legal Counsel. On September 10, 2019, the Investigator interviewed three District Special Education Administrators, the Case Manager, and two District Attorneys.

The Investigator reviewed and considered all these 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 the Complaint.<sup>3</sup> 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 July 16, 2018 through July 15, 2019.

<b>1.</b>	<p><b><u>Access to Student Education Records</u></b></p> <p>The Parents allege the District violated the IDEA when it:</p> <p>a) Failed to provide educational records as ordered by the Department in Final Order 18-054-045. The Parents’ Legal Counsel requested education records on August 24, 2018. On January 15, 2019, ODE ordered the District to respond to the Parents’ request for records as required by 34 CFR § 300.614-617 and OAR 581-015-2300 by February 1, 2019; and,</p>	<p><b><u>Substantiated</u></b></p> <p>a) The District has not provided the Parents with a correspondence that explains or interprets the August 24, 2018 record where it “does not agree that Applied Behavior Analysis (ABA) services are necessary to provide [the Student with a] FAPE.”</p>
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<sup>3</sup> 34 CFR §§ 300.151-153; OAR 581-015-2030.

	<p>b) Failed to comply in a timely manner with the Parents’ repeated requests to inspect education records, including “qualitative notes with ABA [Applied Behavior Analysis] service records.”</p> <p>(34 CFR § 300.613; OAR 581-015-2300(3)(b))</p>	<p>b) The Board Certified Behavior Analyst’s (BCBA) notes are exempt from disclosure as “sole possession” records, and the <b>RBAI</b> notes have been disclosed. However, the District did not provide the Parents with a timely response to their October 13, 2018 records request.</p>
<p><b>2.</b></p>	<p><b><u>Prior Written Notice</u></b></p> <p>The Parents allege the District violated the IDEA when it did not give the Parents Prior Written Notice (PWN) for 23 of 32 instances where the District proposed or refused to initiate or change the identification, evaluation, or educational placement of the Student or the provision of FAPE to the Student during the August 24, 2018, September 5, 2018, and September 12, 2018 IEP Team Meetings.</p> <p>(34 CFR § 300.503; OAR 581-015-2310)</p>	<p><b><u>Not Substantiated</u></b></p> <p>The District gave the Parents written notice within a reasonable time before it proposed or refused to initiate or change the identification, evaluation, educational placement, or provision of FAPE to the Student. The Department does not substantiate this allegation.</p>
<p><b>3.</b></p>	<p><b><u>Parent Participation: Review and Revision of IEPs &amp; When IEPs Must Be in Effect</u></b></p> <p>The Parents allege the District violated the IDEA when it:</p> <p>a) Refused to accept the Parents’ requests and refused to meet with the Parents to address their concerns;</p> <p>b) Provided the Parents with incomplete IEP documents on March 5, 2019, long after the IEP had been implemented; and</p> <p>c) Amended the IEP outside of the IEP Team process, without the Parents’ participation or agreement.</p> <p>(34 CFR §§ 300.323, 300.324, 300.327, 300.501(b); OARs 581-015-2190(1), 581-015-2220(1)(b), OAR 581-015-2225)</p>	<p><b><u>Not Substantiated</u></b></p> <p>The District provided many opportunities for the Parents to participate in all phases of the process and provided IEP services to the Student while allowing opportunities for editing of the IEP document. The District did not amend the IEP without the Parent’s involvement. The Department does not substantiate this allegation.</p>

4.	<p><b><u>IEP Content</u></b></p> <p>The Parents allege the District violated the IDEA when it failed to develop and implement a Health Plan, despite IEP Team agreement to do so. The Parents also allege the District has prevented the Student's IEP Team from making decisions about inclusion of ABA services in the Health Plan.</p> <p>(34 CFR § 300.320; OAR 581-015-2200(1)(d))</p>	<p><b><u>Not Substantiated</u></b></p> <p>It was appropriate for the District to not include medication administration in the Student's IEP at times when the Student's prescription did not call for administration during school hours. The Student did not require ABA services incorporated into the IEP through a Health Plan. The Student's IEP already contains provisions that detail the delivery of ABA services. The Department does not substantiate this allegation.</p>
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**Requested Corrective Action**

The Parent requests the following action be implemented as a resolution to the Complaint:

- 1) Proposed Solution to Allegation #1: Failure to provide educational records as ordered by ODE in Case No. 18-054-045
  - The Oregon Department of Education should issue an order finding that District is in violation of IDEA for failure to provide the requested educational records within 45 days after the request has been made.
  - The Oregon Department of Education should issue an order finding that District is in violation of IDEA for failure to comply with the order in Case No. 18-054-045 to provide the requested educational records, along with an explanation or interpretation, by February 1, 2019.
  - The Oregon Department of Education should reiterate its order in Case No. 18-054-045 requiring District to 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 educational records identifying the names of the individuals who made this determination.
  - The Oregon Department of Education should compel the District to provide Parents with a copy of the data relating to the statement in the August 24, 2018 IEP that the Student did not need ABA to receive FAPE, including records identifying the names of the individuals who made that determination, and an explanation and interpretation of the records.
  - The Oregon Department of Education should withhold special education funding from District until both District and Parents certify full compliance with this order.
- 2) Proposed Solution to Allegation #2: Failure to provide Prior Written
- 3) Notices from 8/24/2018, 9/5/2018, and 9/12/2018 IEP meetings
  - The Oregon Department of Education should issue an order finding that District is in

violation of IDEA for implementing an IEP from the August 24, 2018, September 5, 2018, and September 12, 2018 meetings despite incorporating proposed changes that Parents have not agreed to, and refusing Parent requests for changes, including topic numbers 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 21, 23, 24, 25, 27, 28, 29, and 31 in Table 1, above, without Prior Written Notice.

- The Oregon Department of Education should issue an order requiring District to adopt all changes requested by Parents, and withdraw all District proposed changes rejected by Parents, as described in topic numbers 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 21, 23, 24, 25, 27, 28, 29, and 31 in Table 1, above, since it failed to provide timely Prior Written Notice as required by IDEA.
- The Oregon Department of Education should withhold special education funding from District until both District and Parents certify full compliance with this order.

4) Proposed Solution to Allegation #3: Failure to provide a timely and accurate IEP from the 11/28/2018 IEP meeting

- The Oregon Department of Education should issue an order finding that District is in violation of IDEA for making changes to the IEP outside of the IEP team meeting without Parent approval or participation [34 CFR 300.320(a); 34 CFR 300.322; 34 CFR 300.324(a)(4),(6)].
- The Oregon Department of Education should issue an order finding that District is in violation of IDEA for proposing (and enacting) changes to the identification, evaluation, or educational placement of the child or the provision of FAPE without prior written notice [34 CFR 300.503].
- The Oregon Department of Education should issue an order finding that District is in violation of IDEA for refusing Parent requests for changes without prior written notice [34 CFR 300.503].
- The Oregon Department of Education should issue an order finding that District is in violation of IDEA for enacting an IEP that did not accurately reflect the decisions made in the IEP team meeting [34 CFR 300.320(a)].
- The Oregon Department of Education should issue an order requiring District to adopt all changes requested by Parents, and withdraw all District proposed changes rejected by Parents, since it failed to provide timely Prior Written Notice as required by IDEA.
- 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 develop a new IEP that considers the concerns of the parents for enhancing the education of their child.
- The Oregon Department of Education should reiterate its order in Case No. 18-054-045 requiring District to provide professional development and/or consultation to District participants in the student's IEP meeting; the District's Special Education management; and the District's special education attorneys regarding IDEA and OAR requirements related to: (1) Parent participation in IEP review and revision,



including in developing statements of the child's present levels of academic achievement and functional performance; (2) Link between parent participation and a District's provision of a Free Appropriate Public Education (FAPE); and (3) Prior Written Notice.

5) Proposed Solution to Allegation #4: Failure to comply with IEP team decisions regarding Health Plan

- The Oregon Department of Education should issue an order finding that District is in violation of IDEA for failure to include a Health Plan in Student's IEP documentation in compliance with IEP team decisions on September 12, 2018 and November 28, 2018.
- The Oregon Department of Education should issue an order finding that District is in violation of IDEA for failure to implement the IEP team's decision to develop a Health Plan for Student.
- The Oregon Department of Education should issue an order finding that District is in violation of IDEA for preventing the IEP team from making decisions about inclusion of ABA services in Student's Health Plan, and instead referring the issue to a "stakeholder" group from which Parents were excluded.
- The Oregon Department of Education should order District to issue Student a corrected IEP document that includes a Health Plan, and to cease and desist any further actions preventing implementation of Student's Health Plan.
- 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 develop a new IEP that considers the concerns of the parents for enhancing the education of their child, including a Health Plan that incorporates the medical prescription from Student's Developmental Pediatrician for "ABA therapy services as a treatment for Autism Spectrum Disorder, to be administered at home, at school, and in other community settings," and medication (methylphenidate) to be administered at school.
- The Oregon Department of Education should withhold special education funding from District until both District and Parents certify full compliance with this order.

6) Proposed Solution to Allegation #5.<sup>4</sup> Failure to comply with Parents' requests to inspect education records including qualitative notes with ABA service records

- The Oregon Department of Education should issue an order finding that District has willfully and intentionally violated IDEA for failure to provide the requested educational records within 45 days after the request has been made, and knowingly making false statements to Parents and their Attorney to justify withholding them.
- The Oregon Department of Education should compel the District to provide Parents with a complete copy of Student's ABA service records and data, including all

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<sup>4</sup> The Attorney and the Parents separated this allegation from Allegation #1. The Department had placed it as Allegation 1.b in the Request for Response. It will be discussed in this order as part of Allegation #1.

qualitative written treatment notes from Ms. Cooper, Mr. Reed, and any other ABA provider employed or contracted by the District, and all records of dates and times of ABA service provision.

- The Oregon Department of Education should order the District to 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, specifically to include the IDEA requirements to provide access to records within 45 days, and to establish disciplinary standards for staff who make false or misleading statements to parents to justify unlawful denials of access to records.
- The Oregon Department of Education should order the District provide professional development and/or consultation to District participants in the student's IEP meeting; the District's Special Education management; and the District's Special Education attorneys regarding access to student education records including, but not limited to, responding to requests for records; the importance of being truthful and accurate when responding to parent requests; and the District's disciplinary standards for staff who make false or misleading statements to parents to justify unlawful denials of access to records.

### **III. FINDINGS OF FACT**

1. The Student is a fourteen year old eighth grade student in the District and participates in a District program for talented and gifted students. The Student is eligible for special education under the categories of Autism Spectrum Disorder and Other Health Impairment, established on November 28, 2018. The Student is described as having a keen sense of humor, with interest in reading, technology, and an enjoyment of working with animals. One staff person noted the Student has had a "flawless" beginning to the 2019—2020 school year.

#### **FACTS RELEVANT TO ALLEGATION 1**

2. The Parents made a request for the Student's educational records at an IEP meeting held on August 24, 2018, after the District's attorney stated during an IEP team meeting that the "District does not agree that Applied Behavior Analysis (ABA) services are necessary to provide FAPE." The Parents and their Legal Counsel also asked how the District had reached this conclusion. The District replied that "the School District has relied on all of the data it currently has from former IEP meetings, the existing IEP, prior determinations of what FAPE is necessary for the child..." The Parents' Legal Counsel then submitted a formal request for the records the District was referencing.
3. The Parents' Legal Counsel emailed the District on October 13, 2018 and November 5, 2018 asking why the District had not complied with the records request. On November 5, 2018, an attorney for the District emailed the Parents' Legal Counsel and stated, "I can now confirm that all records in support of this statement and position (see Fact # 2), have already been provided to you."

4. On November 15, 2018, the Parents, represented by their Legal Counsel, filed a complaint with the Oregon Department of Education.<sup>5</sup> In the Final Order, dated January 14, 2019, the Department found the District had violated the IDEA when it “did not respond to the Parents’ request for records, nor did it provide the Parents with a timely explanation or interpretation of the records”. As part of the Corrective Action Plan, the Department ordered the District to:
  - a. “If not already completed by the date of this Final Order, respond to the Parents’ request for education records as required by 34 CFR §§ 300.614 – 300.617 and OAR 581-015-2300”; and,
  - b. To “Submit a copy of the response to the Parents’ request for records to the Department”.
  - c. The due date established for these corrective actions was February 1, 2019.<sup>6</sup>
5. On June 14, 2019, at the Department’s request, the District expanded on the November 5, 2018 explanation. The District wrote to the Department:
  - a. “The history of the underlying issue is summarized In the ODE Findings of Facts for this case. During the 2015-2016 school year, with District approval, the Student received ABA services from a private ABA provider during the school day on school campus. The services were paid for by the Parents' private insurance. The Parents' disagreed with Districts action at the beginning of the 2016-2017 school year to limit the amount of time, and the scope of delivery service, of all private ABA providers in District schools. The Student's private ABA provider was directed on 1/2/18 to end therapy sessions with the Student at school. The Parents were in-turn granted a Stay Put Motion and the ABA provider returned to school to work with the Student on 3/14/18.”
  - b. “District and Parents participated in mediation, and in June 2018 an agreement was reached that included the following terms:
    - "Student's IEP shall be amended to include that the District will use ABA services, among other evidence-based services, 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.”
  - c. “In August 2018 the District contracted with an outside company for two Board Certified Behavior Analysts (BCBAs) and 6 Registered Behavior Analysis Interventionists (RBAs) to provide ABA services to PPS students, and specifically to provide ABA services to Student under the June 2018 settlement agreement.”
  - d. “Prior to the 2018-2019 school year, District staff did not directly provide ABA services to students. As stated above and summarized by ODE in its Findings of Fact, ABA services received during the school day by the Student prior to fall 2018 were provided by a private provider, under a medical treatment plan, paid for by the Parents' medical insurance. Further, the services were not provided in coordination or collaboration with the Student's school, nor were they provided under or in connection to the Student's IEP. Although the private ABA provider presumably collected data on the Student (their

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<sup>5</sup> Final Order Case No. 18-054-045.

<sup>6</sup> Final Order Case No. 18-054-045, pp. 2 and 8.

patient), the data did not become part of the Student's educational record. The District therefore did not have its own data prior to fall 2018 from which it could determine the necessity of ABA for FAPE for the Student. In other words, the totality of the Student's record did not hold data to support the necessity of ABA for FAPE.”

- e. “The Student has now received ABA services under the June 2018 settlement agreement and [the Student’s] IEP for the entirety of the 2018-2019 school year. Copious data has been collected by the RBAI who worked with the Student, under [sic]. The Student will continue to receive ABA services when school starts again on 8/28/19. When the IEP team convenes (sic) fall 2019, it will look carefully at the year's data to determine the level and scope of ABA for FAPE moving forward. As was agreed upon in the June 2018 settlement agreement, the IEP team's determination regarding the use of ABA services will be data-driven.”
6. During the interview, the Parents and their Legal Counsel stated they have not received any additional copies of the Student’s record, nor have they received any further explanation or interpretation of the records.
7. Staff providing services to the Student included District staff and individuals from the Parents’ private ABA providers. A “Coordination of Care” team met to review data on the Student’s behavior. On September 17, 2018, the Parents asked if they could also attend this meeting. The “Coordination of Care” team met with the Parents during the course of the 2018-2019 school year. The BCBA presented data for discussion by the team. The outside ABA provider observed the Student in class. Sometimes the District BCBA and the private BCBA would observe the Student at the same time.
8. The RBAI accompanied the Student to all the Student's classes daily, providing support and intervention or instruction, if needed. Additionally, the RBAI took observation notes daily from September 18, 2018 until February 22, 2019.<sup>7</sup> On October 13, 2018, in an email to the BCBA, the Parents requested “all service records and data”. The Parent stated this included:
  - a. “Photocopies of all your written notes in your notebook regarding [the Student], with raw data and any graphs.
  - b. A copy of the Excel spreadsheet that you have that tracks [the RBAI’s] time, your time, and any summary of data, for [the Student] (obviously you will delete any tabs with data on other patients).
  - c. Any other service records or data regarding the [Student’s] ABA services.”
9. The Parents repeated this request on October 17, 2018, and on October 18, 2018, the BCBA sent some data records home to the Parents in the Student’s backpack. The records sent did not include any of the BCBA’s or RBAI’s notes they had taken while observing the Student. The Parents continued over the next several months to request all the BCBA and RBAI’s records.
10. On February 6, 2019, the District’s attorney sent an email to the Parents’ Legal Counsel stating that: “[BCBA and RBAI’s] personal notes are sole possession records: they are kept only by the makers, used as personal memory aids, and are not accessible or revealed to any

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<sup>7</sup> After February 22, 2019, the BCBA and private ABA provider decided daily notes were no longer necessary.

other persons . . . The notes are not analyzed and data is not pulled out of the notes and graphed.”

11. The Parents repeated their request for these records on April 10, 2019. On April 18, 2019 the District re-sent the February 6, 2019 email that was previously sent to the Parents’ Legal Counsel and to the Parents directly. There was further and continuing communication in the Spring 2019. In a May 13, 2019 email, the Parent acknowledged a Family Educational Rights and Privacy Act (FERPA) record discussion at a meeting as to whether the RBAI and BCBA notes qualified as records for disclosure. The Parents stated they would follow up with the request later regarding the notes and asked that the District retain possession of the notes until the matter was resolved. In spring of 2019, the District concluded that the sole possession exemption under FERPA was no longer applicable as to the RBAI’s notes, and provided them to the Parents on June 13, 2019. The District maintained its position that the BCBA’s notes qualified as sole possession notes and did not release them.

## **FACTS RELEVANT TO ALLEGATION 2**

12. The Parents allege the District did not provide 23 Prior Written Notices (PWN) for decisions it made at the August 24, 2018, September 5, 2018, and September 12, 2018 IEP team meetings. In these meetings, the Parents made multiple requests for additional information to be added to the Student’s IEP. Some of these were reports and letters from private and previous providers, and some were Statements of Parent Concerns about the Student’s education. The Parents wanted portions of these documents to be quoted in the Present Level of Academic Achievement and Functional Performance (PLAAFP) and the District refused to include all the quotes the Parents suggested. The Team also disagreed during these three meetings on actual content of goals (Adapted PE (APE) Social/ Emotional Skills), as well as specific wording for goals or sections of the PLAAFP. Finally, the Parents requested data to substantiate the statement the District made that “data does not show regression/recoupment that demonstrates need for Extended School Year Services.”
13. The District sent a PWN on September 25, 2018 addressing the issues covered in the three IEP meetings. This PWN listed ten actions the District proposed or refused to initiate or change about the Student’s identification, evaluation, educational placement or provision of a Free Appropriate Public Education (FAPE). However, the Parents believed this PWN did not address the disagreements outlined in Fact #12. Over the next two months, the Parents requested the District send them additional PWNs. The ten actions described in September 24, 2018 PWN are as follows:
  - a. District implemented the May 26, 2017 IEP at the start of the 2018-2019 school year with the addition of the ABA services agreed to in the Settlement Agreement;
  - b. District refused to remove a paragraph in the PLAAFP that describes the Settlement Agreement;
  - c. District refused to change a sentence in the PLAAFP that stated the District does not agree that ABA services are necessary for FAPE;
  - d. District refused to remove statements in the PLAAFP regarding the Student’s access to accelerated math curriculum;
  - e. District refused to add Parent drafted language characterizing the Student’s math progression;
  - f. District refused to add a ‘Behavioral Health’ section drafted by the Parent;
  - g. District refused to change the location of the information about the Settlement Agreement from Academic Achievement section of the PLAAFP to the section which

- describes how the Student's disability affects progress in the general education curriculum;
- h. District refused to add ABA services as a 'Related Service';
  - i. District refused to increase amount of time the BCBA supervised the RBA; and,
  - j. District proposed to change "Self-Advocacy" goal to "Classroom/School Skills" because of computer system alignment issues."
14. A complete draft of the IEP resulting from these three meetings was 154 pages long and included documents the Parents requested the District attach to the IEP. All<sup>8</sup> of these documents are listed in an Executive Summary under the "Concerns of the Parents for enhancing the education of the Student" and are attached to the IEPs.
  15. The IEP Team met again on November 28, 2018 to complete the IEP. At that meeting, the Team completed the IEP but agreed to finish some "wordsmithing" after the meeting to accurately state the agreements they had made. On November 28, 2018, the District sent the Parents three PWNs. The first PWN notified the Parents the District proposed to provide the Student with FAPE by implementing the attached IEP. The second notified the Parents the District refused to add ABA services to the IEP as a Related Service; and the third PWN notified the Parents the District had found the Student eligible as a Student with Autism Spectrum Disorder and Other Health Impairment.
  16. A revised IEP resulted from the November 28, 2018 IEP Meeting. This IEP is 130 pages long, which includes attached documents referenced in the PLAAFP under Concerns of the Parents.
  17. At the November 28, 2018 IEP Meeting, some of the areas about which the District and the Parents disagreed were resolved. For example, the District agreed to include some sections of the Settlement Agreement in the body of the IEP. The Team also resolved language describing the effect the Student's behavior has on math performance. Several other goal areas were revised to include issues about which the Parents were concerned, although the revisions may not have included the exact words the Parents proposed. In some cases, the issue was mentioned in the PLAAFP, but not included as an objective with a goal.<sup>9</sup>

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<sup>8</sup> Attachments:

- Full text of Parent Concerns statement
- Settlement Agreement, describing agreed Services to Student
- Ruling and Order on Parent's Motion to Stay Put, describing Judge's findings on the importance of ABA to Student's education
- Letter from Special Education teacher and IEP Case Manager, on the necessity of ABA
- Letter from General Education co-teacher, on the necessity of ABA
- Excerpts from BACB, Inc. "Applied Behavior Analysis Treatment of Autism Spectrum Disorder: Practice Guidelines for Healthcare Funders and Managers"; page 34 ("Dosage of Case Supervision") and page 38 ("Coordination with Other Professionals")
- Footprints' Behavior Services Progress Report, dated 8/31/2018, from [NAME], MA, BCBA, LBA, describing Student's progress in ABA therapy since February, 2018, and recommendations for the next 6 months
- Developmental Pediatrics Evaluation, 9/14/2018, from [NAME] MD, Student's Developmental Pediatrician
- Children's Program Evaluation & Management Progress Note, 10/16/2018, from [NAME] MD
- Letter from [NAME], BCBA, LBA, and [NAME], BCBA, LBA, 11/21/2018, with observations and recommendations on ABA services in school
- Letter from [NAME], BCBA, LBA, 9/4/2018, describing the clinical regression that Student experienced during the months of January through May, 2018, resulting from the District's decision to prevent access to medically necessary ABA services in school until ordered by the court to restore access.
- Parent's Proposed Revisions to "Present Levels" in IEP
- Timeline of Communication in Late 2017 / Early 2018

<sup>9</sup> Social/Emotional goal; Adaptive Physical Education goal, and statement about Student's high intellectual ability and the effect of ASD and OHI on classroom performance.

18. On December 19, 2018, the District sent the Parents an additional PWN. This notified the Parents that the District refused to include letters and recommendations from outside providers in the PLAAFP section of the IEP.
19. The Parents asked for a PWN to correct an inaccurately cited OAR and to document a meeting the District canceled with the Parents on short notice.

### **FACTS RELEVANT TO ALLEGATION 3**

20. On December 17, 2018 the District sent the Parents a copy of the IEP paperwork (IEP only, no additional documents attached). This IEP contained language which had been corrected and edited by both the Parents and District staff. In a series of emails exchanged by District staff and Parents during December 2018 and continuing into January 2019, both parties often referred to the IEP as having a “draft status”. There is no concrete date on which all parties agreed the IEP was completed. Many of the emails exchanged during this period contained suggested IEP language corrections or revisions offered by both parties. The Team had agreed at the November 28, 2018 IEP meeting that there would be a ten-day window of time for collaborative correction and revision.
21. On February 15, 2019, the District’s attorney wrote to the Parents explaining the District was implementing the IEP as established on November 28, 2018 and offering another meeting if the Parents wanted to discuss additional issues. No meeting was scheduled.

### **FACTS RELEVANT TO ALLEGATION 4**

22. At the September 12, 2018 IEP Team Meeting, the Parents informed the District that the Student had been given a prescription for Ritalin, the Student was taking it at home, and it “probably should be taken during the school day.” The Senior Special Education Director told the Parents a health plan that could be developed by the School Nurse<sup>10</sup> in accordance with the doctor’s prescription and instructions. There was some conversation about what the medication plan would be, and one staff member noted that many eligible students in the District take medication during the school day without a specific accommodation being added to their IEP.<sup>11</sup> This accommodation was added to the September 12, 2018 IEP. When the Parents received the next IEP draft, October 5, 2018, “medication management” had been added as an accommodation. At the November 28, 2018 IEP Team Meeting, the Parents noted “medication management” had been removed from the accommodations list. When they questioned this, the District Case Manager explained that since the Student was not taking any medication at school at the time, the language had been removed from the draft IEP.
23. Also during the November 28, 2018 IEP Team Meeting, the Team agreed to put the issue of IEP language to describe the Student’s need for ABA services in a “parking lot” for further discussion later. Subsequently, one of the Parents asked if “they wanted to put in a request for a Health Management Plan (HMP) for ABA services, would it go in the Accommodations List?” While the Parents’ Legal Counsel agreed that was the most likely location for the ABA services, no one on the District team responded, and the discussion did not continue.

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<sup>10</sup> PPS delivers school nursing services through Multnomah Education Service District (MESD). At the Student’s school, there is a Health Assistant who is supervised by the Registered Nurse (RN) from MESD. The RN is not present at the school on a daily basis.

<sup>11</sup> When the Parents’ Attorney asked if a ‘health plan’, not ‘medication management’ plan would be added to the IEP, one of the Parents commented: “Whatever”. A staff member replied, “Right”. The Attorney then said, “I don’t care, I am just asking”.

24. The Parent's Legal Counsel emailed the District's attorney on December 16, 2018 asking why a HMP had not been added to the Accommodations in the November 28, 2018 IEP. The District's attorney wrote back on December 18, 2018 and stated that since the Student was not taking any medication at school currently, it would be inaccurate and confusing to add such language to the IEP. On December 21, 2018, the Parents wrote to the District and asked why there was no HMP in the IEP. The Parent quoted their physician's prescription of September 14, 2018 which specified ABA services "applied consistently across all settings." On October 16, 2018, the physician noted in a report that the Student should continue with Ritalin, and if the Student shows benefit the medication should be administered in the morning and at lunch. The Parent concluded by saying that the Parent would come to school with the Student on January 2, 2019 to meet with the School Nurse and begin work on the HMP. The District's attorney emailed the Parents' Legal Counsel on January 2, 2019, stating that the District had not agreed to create an HMP for ABA services.
25. The Student began taking prescription medication at school during lunch on January 2, 2019. The school Health Assistant administered the medication until the Case Manager and the RBAI could be trained in medication administration procedures by Multnomah ESD (MESD) staff. The Parent then arranged a meeting with Health Services staff at MESD and discussed developing a Health Management Plan.<sup>12</sup> The Parent sent several emails to MESD staff to provide background information<sup>13</sup> about the Student's need for ABA services and medication management to be integrated into a Health Management Plan. The Parent also asked some specific questions about how MESD could provide health services to the Student.
26. On January 24, 2019 the District sent an email to the Parents sharing the answers to questions the Parents had posed to MESD staff. In summary, the District noted that: a) Neither District nor MESD staff would meet again with the Parents to discuss the addition of ABA services until the District had received guidance from the Department,<sup>14</sup> b) The MESD nurse supervisor does not have a patient-provider relationship with the Student; and, c) the District has not given MESD any instructions on how to manage health care for the Student. The District also noted that an HMP serves different purposes and is not necessary for the dispensing of medication.
27. The Parent filed this Complaint on July 15, 2019.

## **IV. DISCUSSION**

### **A. Access to Student Education Records**

#### **1. Reasonable Explanation or Interpretation of Records**

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<sup>12</sup> On January 8, 2019, a nurse drafted a "Mental Health Care Plan: Medication Administration" to outline a plan for giving the Student the Ritalin at school. However, this plan was never presented to the IEP team and as such, was not officially added to the IEP. However, the Student's school completed the necessary paperwork for administration of and record-keeping about the Student taking Ritalin at school.

<sup>13</sup> The Student had taken Ritalin once before and had experienced some negative side effects. The Parents believe that an integrated Health Management Plan would ensure that all staff are aware of what negative side effects might occur.

<sup>14</sup> Earlier in January 2019, the District had hosted a "stakeholders" meeting which included other school districts, parent representatives of students with disabilities, outside ABA providers, and representatives from the Department. This group asked ODE for guidance about issues surrounding the involvement of private providers and the provision of ABA in public schools.



The Parents allege the District violated the IDEA when it failed to provide educational records as ordered by the Department in Final Order 18-054-045. The Parents' Legal Counsel requested a particular subsection of education records on August 24, 2018, but also requested an explanation or interpretation of the District's decision-making regarding whether ABA services were necessary to provide the Student with a FAPE. On January 15, 2019, ODE ordered the District to respond to the Parents' request for records as required by 34 CFR § 300.614-617 and OAR 581-015-2300 by February 1, 2019.

Parents have inspection and review rights with respect to education records relating to their student that are collected, maintained, or used by a school district. 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.<sup>15</sup> A parent's review and inspection rights under the IDEA also include the right to receive "a response from the participating agency to reasonable requests for explanations and interpretations of the records."<sup>16</sup> In this case, the record for which explanation and interpretation was sought is a District statement within the August 24, 2018 IEP that "District does not agree that Applied Behavior Analysis (ABA) services are necessary to provide FAPE."

The documents compiled in this matter reveal that there has been voluminous and regular communications between and among the Student's IEP Team, the Parents, the District, and their representatives over the past year. However, there does not appear to be a discrete correspondence from the District to the Parents that explains why, on August 24, 2018, the District did not agree that ABA services were necessary to provide the Student with a FAPE. A record that most closely reflects such an explanation appears in the District's June 14, 2019 correspondence to the Department. There, the District notes that it did not have sufficient data within the Student's educational record to conclude that ABA services were necessary for the Student to receive a FAPE. Certainly, the District could end its explanation there. However, a more complete explanation and interpretation of the Student's records at the time would include what was in the Student's educational record that prompted the District to reach a conclusion that ABA services were not necessary, at the time (e.g., evaluation reports, teacher observations, grades, discipline incidents, IEP goal progress reports, input from District staff, standardized testing, attendance reports, etc.) As Final Order 18-054-045 notes, pointing to the Student's education record in its totality was insufficient and brought the Parents no closer to understanding the District's reasoning.

Indeed, it appears an explanation of a decision made in August 2018 may not be fruitful at this point. Multiple IEP team meetings have convened since then, the Student has advanced to another grade, is receiving ABA services, and data has been collected on the Student's progress over the course of the now-completed 2018-2019 school year. Nevertheless, to complete the record and fulfill the District's obligations under the IDEA, the Department substantiates this portion of the allegation and orders corrective action.

## **2. Inspection of ABA Service Record Notes**

The Parents allege the District withheld education records in the form of notes taken during observations of the Student by the BCBA and RBAI. As noted above, parents have inspection and review rights with respect to education records relating to their student that are collected, maintained, or used by a school district. A school district must comply with a parent's request to

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<sup>15</sup> 34 CFR § 300.613; OAR 581-015-2300.

<sup>16</sup> 34 CFR § 300.613(b)(1).

inspect and review records without unnecessary delay and in no case more than 45 days after the request has been made.<sup>17</sup> Certain categories of records are expressly excluded from the term, “education records.” One such category is “records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.”<sup>18</sup>

The Parents first requested the BCBA and RBAI observation notes on or about October 13, 2018, then repeated their request throughout the 2018-2019 school year. Outside the 45-day timeline—on February 6, 2019—the District responded to the Parents regarding their request, asserting that the observation notes were “sole possession” records and consequently were excluded from the Parents’ inspection and review rights. Upon further examination of the issue, the District concluded that the BCBA had reviewed the RBAI’s notes, eliminating them from qualification as “sole possession” records. The District released the RBAI’s notes to the Parents on June 13, 2019. The BCBA’s notes have retained their status as “sole possession” records and do not yet qualify as education records available for inspection and review.

The issue of information gathering related to the appropriateness of ABA services for the Student during the 2018-2019 school year was a central theme at the Student’s IEP team meetings. The BCBA and RBAI notes would be instructive to such information gathering. For several months after the Parents’ October 13, 2018 request, they were left without certainty as to whether they would be able to inspect and review the BCBA and RBAI’s notes. Only on February 6, 2019—after the expiration of 45 days—were they notified that the notes would not be disclosed. The District’s delay in providing a response to the Parents as to this category of documents violates the IDEA. The Department substantiates this portion of the allegation and orders corrective action.

## **B. Prior Written Notice**

The Parents allege there were 23 instances where the District was required, and failed, to provide them with Prior Written Notice (PWN) in violation of the IDEA. A school district is required to give parents written notice that contains certain contents, within a reasonable time before it proposes or refuses to initiate or change the identification, evaluation, educational placement, or provision of FAPE to a student.<sup>19</sup>

On September 25, 2018, the District sent a PWN to the Parents after each IEP team meeting that convened near the beginning of the 2018-2019 school year. The District summarized what it proposed or refused to initiate or change in the Student’s IEP. The District also sent the Parents PWNs after the November 28, 2018 IEP Team Meeting, then again on December 19, 2018. Many of the issues the Parents had requested PWNs for were incorporated into the final IEP sent to Parents December 17, 2018.

Several of the matters for which the Parents request PWN do not fall into the categories for which prior written notice is not required. To illustrate, the Parents contend that the District violated the IDEA when it failed to deliver a PWN after it declined to add the following to the Student’s IEP: (1) language from a previously-reached settlement agreement and/or a summary description thereof; (2) the identity of certain District decision makers; (3) statements from a local pediatrician; (4) statements from a BCBA from an outside agency; (5) statements from a District staff member; (6) a 2017 statement regarding the impact of removing ABA services from the Student; (7) specific components to the Student’s social-emotional goal; (8) specific objectives related to the Student’s

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<sup>17</sup> 34 CFR § 300.613; OAR 581-015-2300.

<sup>18</sup> 34 CFR § 99.3.

<sup>19</sup> 34 CFR 300.503; OAR 581-015-2310.

adaptive physical education goals; (9) a revised reference to a particular Oregon Administrative Rule; (10) the phrasing of certain parts of the Student's PLAAFP; (11) updated content from the Parents about how the Student's disability affects involvement and progress in the general education curriculum.<sup>20</sup> The Parents also contend that they should have received a PWN after the District canceled a meeting proposed to discuss discussion of incorporating a summary of a previously-reached settlement agreement in the IEP.<sup>21</sup>

None of the above-referenced matters pertain to the District proposing or refusing to identify, evaluate, place, or provide FAPE to the Student. The District developed comprehensive IEPs and issued PWNs to the Parents that covered the District's proposals regarding eligibility, evaluation, placement, and provision of FAPE. The Department does not substantiate this allegation.

### **C. Parent Participation, Review and Revision of IEPs & When IEPs Must Be in Effect**

The Parents allege the District violated the IDEA when it: (a) Refused to accept the Parents' requests and refused to meet with the Parents to address their concerns; (b) Provided the Parents with incomplete IEP documents on March 5, 2019, long after the IEP had been implemented; and (c) Amended the IEP outside of the IEP team process, without the Parents' participation or agreement.

A school district must provide an opportunity to parents to participate in meetings with respect to the identification, evaluation, IEP and placement of the student. Once an IEP has been written for a student, the District must provide the special education and related services in accordance with that IEP. The District must review the IEP annually but can amend the IEP in between reviews if parents are included.<sup>22</sup>

During the Complaint period, the District held four IEP team meetings with the Parents, each lasting at least three hours. The Parents were active participants in each meeting, sharing ideas, asking questions, and providing information regarding the Student's educational progress and needs. The District was receptive to the Parents' input. Additionally, the Parents met with the "Coordination of Care" team and also attended meetings with the District's Senior Director of Special Education. The District read and responded to hundreds of emails from the Parents and the Parents' attorney. The District declined one IEP team meeting with the Parents to discuss ABA services, a matter that had been discussed several other times at previous IEP team meetings. Without convening this meeting, the Student continued to receive appropriate ABA services pursuant to the language in the Student's IEP. The investigative record shows that the Student has received special education and related services outlined in the Student's IEP. There is no indication that the District amended the Student's IEP without the Parents' participation. The Department does not substantiate this allegation.

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<sup>20</sup> While it is outside of the IDEA's regulations, OAR 581-021-0300 *et seq.* provides a mechanism for parents to ask educational agencies to amend a student's education record if the parent believes it to contain information that is inaccurate, misleading, or in violation of other rights.

<sup>21</sup> Whether the District agreed to provide PWN regarding these issues is a separate matter. That the District agreed to send the Parents PWN regarding each of these components does not change the circumstances under which the IDEA requires that PWN be issued.

<sup>22</sup> 34 CFR §§ 300.323, 300.324, 300.327, 300.501(b); OARs 581-015-2190(1), 581-015-2220(1)(b), OAR 581-015-2225.

## **D. IEP Content**

The Parents allege the District violated the IDEA when it failed to develop and implement a Health Plan, despite IEP Team agreement to do so with respect to administration of medication. The Parents also allege the District failed to include ABA services in a Health Plan.

The IDEA specifically enumerates what an IEP must contain. This includes a statement of present levels, a statement of goals and objectives, method for measuring progress, a statement of the special education and related services and supplementary aids and services the student will receive, an explanation of the extent to which a student will not participate with nondisabled children, and other components.<sup>23</sup>

### **1. ABA Services**

Citing a medical doctor's prescription, the Parents contend that the District violated the IDEA when it did not develop a Health Management Plan that includes the delivery of ABA services across all settings. But the Student's IEP already contains provisions that detail the delivery of ABA services. The Student's "Present Levels" section notes that the District will provide a BCBA to support the Student's special education in various ways, including assisting in the delivery of ABA services. The Student's "Present Levels" go on to state that the District will provide an RBAI/RBT to support the delivery of Student's specially designed instruction and positive behavioral supports and interventions. The Student's goals incorporate the involvement of an RBAI. The Student's "Supplementary Aids/Services; Modifications; Accommodations includes 1,800 minutes per week of RBAI/RBT services for social emotional skills, classroom skills, and communication goals. The Student's "Supports for School Personnel" includes consultation with District staff by a BCBA and supervision of an RBAI/RBT by a BCBA.

The District is not in violation of the IDEA by failing to incorporate into the Student's IEP a Health Plan that notes the delivery of ABA services because those services are already reflected in the Student's IEP. The Department does not substantiate this allegation.

### **2. Medication Administration**

At the time of the August 24, 2018, September 5, 2018, September 12, 2018, and November 28, 2018 IEPs, the Student did not have a prescription for administration of medication during school hours. Later, beginning January 2, 2019, the Student took prescription medication at school during lunch on January 2, 2019. The school Health Assistant administered the medication until the Case Manager and the RBAI could be trained in medication administration procedures by MESD staff. The District administered the medication to the Student as prescribed, maintained a written record, and it appears the Student received medication at school without incident. There is no indication in the record that the Student required any related service of nursing service or other medication administration to receive a FAPE. The Department does not substantiate this allegation.

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<sup>23</sup> 34 CFR § 300.320; OAR 581-015-2200.

**V. CORRECTIVE ACTION<sup>24</sup>**  
*In the Matter of Portland School District 1J*  
Case No. 19-054-030

Based on the facts provided, the following corrective action is ordered.

<b>No.</b>	<b>Action Required</b>	<b>Submissions<sup>25</sup></b>	<b>Due Date</b>

Dated: this 27th day of October, 2020

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Candace Pelt Ed.D  
Assistant Superintendent  
Office of Enhancing Student Opportunities

Mailing Date: October 27, 2020

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).)

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<sup>24</sup> 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)).

<sup>25</sup> 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@ode.state.or.us](mailto:raeann.ray@ode.state.or.us) fax number (503) 378-5156.