

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of Bend-La Pine	)	FINDINGS OF FACT,
Administrative School District 1	)	CONCLUSIONS,
	)	AND FINAL ORDER
	)	Case No. 21-054-032

**I. BACKGROUND**

On September 24, 2021, the Oregon Department of Education (the Department) received a written request for a special education complaint investigation from the parents (the Parents) of a student (Student) residing in the Bend-La Pine Administrative School District 1 (District). The Parents requested that the Department conduct a special education investigation under OAR 581-015-2030. The Department confirmed receipt of this Complaint and forwarded the request to the District.

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 Parents and the District agree to the extension in order to engage in mediation or local resolution or for exceptional circumstances related to the complaint.<sup>2</sup>

On October 1, 2021, 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 October 15, 2021.

The District submitted a *Response* on October 14, 2021, denying the allegations, providing an explanation, and submitting documents in support of the District's position. The District submitted the following relevant items:

1. District's Written *Response* to Complaint, dated 10/5/21 (*but sent on 10/14/21*)
2. Individualized Education Program (IEP), incorrectly dated 5/11/22
3. IEP, 5/15/20
4. IEP Progress Report, 2/5/21
5. Prior Written Notice (PWN) – Educational Placement, 5/15/20
6. Special Education Placement Determination, 5/15/20
7. Meeting Request, 5/14/20 (for 5/15/20 meeting)
8. Prior Notice of Special Education Action – Provision of FAPE, 5/15/20
9. High Desert Education Service District (HDESD) Prior Notice About Evaluation/Consent for Evaluation, 5/2/19
10. Statement of Eligibility for Special Education (OHI), 5/2/19
11. HDESD Early Childhood Special Education Evaluation Report, 5/2/19
12. HDESD Prior Notice and Consent for Initial Provision of Special Education Services, 9/6/19

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<sup>1</sup> OAR 581-015-2030(12) and 34 CFR § 300.152(a)

<sup>2</sup> OAR 581-015-2030(12) and 34 CFR § 300.152(b)

13. Medical Statement, 2/4/19
14. Individualized Family Service Plan (IFSP), 9/24/19
15. IEP Meeting Notes, 5/15/20
16. IEP, 5/12/21
17. IEP Meeting Notes, 5/12/21
18. IEP Progress Report, 6/17/21
19. IEP Amendment, 9/2/21
20. Special Education Placement Determination, 5/12/21
21. Special Education Placement Determination, 9/2/21
22. Meeting Request, 4/26/21 (for 5/12/21 meeting)
23. Prior Notice of Special Education Action – Provision of FAPE, 9/2/21
24. HDESD Occupational Therapy (OT)/Physical Therapy (PT) Report, 5/12/21
25. IEP Meeting Notes, 9/2/21
26. Meeting Request, 8/31/21 (for 9/2/21 meeting)
27. Email exchanges between the Parents and the District, 9/7/21 – 9/27/21

The District submitted additional documents on October 25, November 4, and November 8, 2021:

1. District Home Tutoring/Instruction Program Administrative Regulation, 2/11/13
2. Internal District email exchanges, 5/13/21 - 9/20/21
3. Email exchanges between the Parents and the District, 4/28/21 – 10/20/21
4. Student Attendance for Individual Class Sessions (compiled by the Special Education Team), 10/12/20 – 6/15/21
5. Student's Schedule, 2/1/21
6. Student's Schedule, undated
7. Student's Schedule, undated
8. Daily Attendance Profile, 2020-21 school year
9. Special Education Contact Log, 11/8/21

The Parents submitted a *Reply* on October 21, 2021, providing an explanation and rebuttal, and documents in support of the Parents' position, as well as additional documents submitted on October 27, November 7, and November 8, 2021. The Parents submitted the following relevant items:

1. Parents' *Reply* to the District's *Response to RFR*, 10/21/21
2. Email exchanges between the Parents and the District, 8/25/21 – 8/31/21
3. Letter from the Student's Medical Provider, 9/22/21
4. Student's Schedule, 9/11/21
5. Student's Schedule, 10/12/21
6. Emails exchanges between the Parents and the District, 9/2/21 – 9/4/21
7. Emails from the District to the Parents, 9/3/21 and 9/13/21

The Complaint Investigator interviewed the Parent on October 27, 2021. From October 28 to November 4, 2021 the Complaint Investigator interviewed District personnel. Virtual interviews were conducted instead of on-site interviews due to the Coronavirus pandemic. The Complaint Investigator reviewed and considered all of 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 this Complaint under 34 CFR §§ 300.151-153 and OAR 581-015-2030. The Parents' allegations and the Department's conclusions are set out in the

chart below. The conclusions are based on the Findings of Fact in Section III and the Discussion in Section IV. This Complaint covers the one-year period from September 25, 2020, to the filing of this Complaint on September 24, 2021.

<b>Allegations</b>	<b>Conclusions</b>
<p><b><u>When IEPs Must Be In Effect</u></b></p> <p>The Parents alleged that the District violated the IDEA by not providing special education and related services in accordance with the Student’s IEP.</p> <p><i>(OAR 581-015-2220; 34 CFR §300.323)</i></p>	<p><b><u>Substantiated</u></b></p> <p>The District did not provide special education and related services in accordance with the Student’s IEP. The District did not fully deliver the Student’s SDI or fully provide accommodations.</p>
<p><b><u>Placement of the Child</u></b></p> <p>The Parents alleged that the District violated the IDEA by failing to ensure that the Student's placement was determined by a group of persons, including the parents, and other persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options.</p> <p><i>(OAR 581-015-2250; 34 CFR §300.116)</i></p>	<p><b><u>Substantiated</u></b></p> <p>IDEA procedures for placement determination were not followed. The District determined that the only placement option for the Student was home instruction without having a team discussion of the potential benefits and harms of home instruction or providing other options to consider.</p>
<p><b><u>Review and Revision of IEPs</u></b></p> <p>The Parents alleged that the District failed to follow IDEA requirements for reviewing and revising the Student’s IEP. Specifically, the IEP team did not revise the Student’s IEP as needed for implementation of the IEP in the home environment.</p> <p><i>(OAR 581-015-2225; 34 CFR §300.324)</i></p>	<p><b><u>Substantiated</u></b></p> <p>The District did not review or revise the Student’s IEPs as needed. The Student’s IEPs were written for the school environment although the Student remained at home for the entire Complaint period. The District made a unilateral change to the Student’s IEP after the September 2, 2021 meeting, outside of the IEP meeting and without any agreement with the Parents to amend or modify the IEP.</p>
<p><b><u>Content of IEP</u></b></p> <p>The Parents alleged that the District violated the IDEA when it (a) included incorrect information in the Student’s IEP, and (b) failed to include measurable annual goals, as well as special</p>	<p><b><u>Substantiated</u></b></p> <p>The Student’s IEPs did not reflect the Student’s learning environment. The IEPs included</p>

<p>education and related services, designed to enable the Student to be involved in and make progress in the general education curriculum.</p> <p><i>(OAR 581-015-2200; 34 CFR §300.320)</i></p>	<p>special education services and supplementary aids and services that either could not be implemented at home, or that the District did not intend to provide in the home environment.</p>
<p><b><u>Parent Participation</u></b></p> <p>The Parents alleged that the District violated the IDEA by (a) not providing the Parents with an opportunity to participate in meetings with respect to the IEP and placement of the Student, and (b) not providing meeting notices with required information.</p> <p><i>(OAR 581-015-2190; 34 CFR §300.322; 34 CFR §300.501)</i></p>	<p><b><u>Substantiated</u></b></p> <p>The District did not follow IDEA requirements for parent participation, which interfered with the Parent’s opportunity to participate at the September 2, 2021 meeting:</p> <p>The District’s meeting request did not contain sufficient information to identify the September 2, 2021 meeting as an IEP or placement meeting.</p> <p>The District determined that the only placement option for the Student was home instruction for five hours per week, without a team discussion or parent input.</p> <p>The District unilaterally wrote an IEP Amendment and Placement Determination document after the IEP meeting without discussion by the team. The Parents were not notified that this occurred.</p>
<p><b><u>Free Appropriate Public Education (FAPE)</u></b></p> <p>The Parents alleged that that the District’s refusal to provide effective services and supports has denied educational opportunity to the Student, and thus constitutes a denial of FAPE.</p> <p><i>(OAR 581-015-2040; 34 CFR §300.101)</i></p>	<p><b><u>Substantiated</u></b></p> <p>The District violated both procedural and substantive IDEA requirements, including the failure to develop an appropriate IEP and failure to provide special education and related services in accordance with the Student’s IEP, resulting in lost educational opportunity and denial of FAPE.</p>

**REQUESTED CORRECTIVE ACTION**

- Follow the law. Do not mislead parents. Notice for change of placement and IEP should be taken seriously and followed;
- The Student should receive tutoring during school hours and around the Student's medical care;
- The tutoring should be based on the Student's 1<sup>st</sup> grade teacher's current curriculum with the Student's IEP supports to aid the Student in learning;
- As the Student's goal is to return to the Student's classroom, the Student should have access to the classroom's Seesaw app to meet the Student's goal of social skills and returning to class. In this app the Student could participate with the Student's classroom peers and teacher on the current class curriculum;
- The Department's guidance and the District's policy on maximum hours of tutoring in the Homebound program are not being interpreted appropriately. The Parents ask for further conversation around the State's guidance and the Student's need to be supported because the Student is at risk for not being at grade level status; and
- Because of no fault of the Student, the Student is being denied a Free Appropriate Public Education. The Parents request that these solutions be implemented immediately.

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

IDEA regulations limit complaint investigation to alleged violations occurring no more than one year before the Department's receipt of the special education complaint. This Complaint Investigation did not consider any IDEA violations alleged to have occurred before September 25, 2020. Any facts listed below relating to circumstances or incidents earlier than that date are included solely to provide context necessary to understand the Student's disability and special education history.

1. The Student is 6 years old and in the first grade.
2. The Student is eligible for special education as a child with Other Health Impairment (OHI). The Student's medical history includes maternal PKU syndrome, cerebral palsy, cystic fibrosis (CF), feeding difficulties, esophageal dysfunction, cognitive impairment, gross motor delay, bilateral pes planus, speech delay, gastronomy tube dependent, low muscle tone, attention deficit hyperactivity disorder (ADHD), and autism.
3. The Student attended preschool intermittently until March 2020, when schools shut down due to the COVID-19 pandemic.
4. On May 15, 2020, the District convened an IEP meeting to develop the Student's initial IEP in preparation for the Student's transition from Early Childhood Special Education services to kindergarten in the fall.
5. The May 15, 2020 District Meeting Notes stated the following, among other things:
  - a. "[The Student] needs a lot of accommodations";
  - b. The IEP team talked about school closures for COVID-19 and that the team is "writing this plan as if school will happen... Again, things may change and we may need to amend in the fall";

- c. The District suggested conducting an assistive technology (AT) evaluation in the fall; and
  - d. “Medical and feeding protocols will be developed in August. Further planning in August as things develop. And other changes possibly for school services in the fall for [the Student]. [The Student] may or may not be able to attend in the fall... We will be in touch in August.”
6. The May 15, 2020 IEP included the following, in relevant part:
- a. Parent Concerns: ensuring that a solid support plan is in place to address the Student’s medical needs, including danger of exposure to COVID-19, as Student is high risk. Medical needs take up most of the day, which is arranged so that the Student can spend the maximum amount of time in school;
  - b. Emergency Protocols: “Trained feeders MUST be CPR certified... All trained feeders need to follow the universal health care precautions during preparation. Medication MUST be administered in accordance with feeding protocol”;
  - c. Specially Designed Instruction (SDI): for functional skills, social skills, writing, self-advocacy, and motor skills, for a total of 465 minutes per week, all to occur in a life skills class;
  - d. Annual Goals: included goals developed for the school environment, such as a motor skills goal for climbing stairs, a goal to improve “self advocacy across the school settings,” a social skills goal for initiating and maintaining play or social engagement, a functional skills goal for improving skills for zipping/buttoning/fastening/snapping, and a functional skills goal for attending to a task and staying in a designated area;
  - e. All goals to be measured by “teacher observation and ongoing data collection” or “student work samples and teacher observation”;
  - f. Related Services: speech/language therapy, 60 minutes per month;
  - g. Accommodations for Adult Support: adult support for specials, adult support for cleaning and sanitizing items before the Student uses them, adult support for accessing lunch and recess, and adult support for toileting;
  - h. Other Accommodations: feeding protocol/G-tube protocol, health safety protocol, frequent check-ins for understanding, and visual supports, among others; and
  - i. Nonparticipation Justification: removed up to 480 minutes per week, for SDI and related services “where it is quieter and less distractions.”
7. The District issued a Placement Determination dated May 15, 2020, which listed the Student’s selected placement as “From 40-79% General Education with Special Education outside classroom.”
8. On May 15, 2020, the District issued a Prior Written Notice (PWN) which stated, among other things, that “Medical and Feeding protocols will be updated before the beginning of the school year in late August or early September, 2020.”
9. The District did not convene a meeting in August or September 2020. The Student’s IEP was not reviewed or revised to reflect that the Student would not be attending school in-person.

Medical and feeding protocols for the Student were not developed, although they remained as accommodations on the Student's IEP. An AT evaluation did not occur.

10. The District convened one meeting for the Student during the 2020-21 school year; the Student's annual IEP meeting on May 12, 2021.
11. Starting in September 2020, the Student received virtual special education services from the District special education team, including a District Special Education Teacher/Case Manager (Case Manager), a District Speech-Language Pathologist (SLP), District Educational Assistants (EAs), and consultation services from a District Occupational Therapist (OT).
12. The Student did not attend school in person and remained at home for the entire 2020-21 school year.
13. One of the Student's Parents (the Parent) reported that the Student had limited access to general education during the 2020-21 school year. The Student often missed general education class sessions for SDI instruction. When the Student did attend general education class sessions, the class was moving at a faster pace and the Student could not keep up. The Parent reported this was due to a lack of general education instruction and not providing the Student with accommodations. Once the District students returned to in-person learning in January 2021, the Parent reported that the Student had fewer opportunities to participate in general education with the reduction of online classes.
14. The Parent reported that starting in January 2021, the District offered the Student the opportunity to participate in the general education class "calendar time" for 30 minutes each day, but the only time offered was during the Student's breathing treatments, and the Student could not attend.
15. In an April 28, 2021 email to the Case Manager, the Parent requested a copy of the Student's IEP and stated, "[The Student's] IEP meeting is coming up and I thought I should review what we put in place when we thought [the Student] would be in person. Keeping the hope that will be the case by late fall."
16. On May 12, 2021, the District convened an annual IEP meeting for the Student.
17. The May 12, 2021 IEP included, in relevant part:
  - a. Parent Concerns: making sure that the Student attends the general education class as much as possible, and that a plan is in place to address the Student's medical needs;
  - b. Present Levels: the Student did not attend in-person school this school year, nor has the Student had an in-person tutor. The Parents made this decision due to medical concerns about COVID. The Student did have "opportunities at different times during the school day, to meet with staff online. This schedule was created and built around [the Student's] at-home medical needs and protocols... Though there are regular times to meet daily, [the Student] has not been able to attend many of these classes due to the challenges of the year... Attendance in the available classes was about 50%... Parents have decided to have [the Student] attend school in-person, half-day, when [the Student] is fully vaccinated, starting in the Fall of 2021. [The Student] will be relearning, at first, how to generalize [the Student's] skills to a classroom environment";

- c. Annual Goals: four of the Student's goals were carried over almost word-for-word from the May 15, 2020 IEP. Some goals were written for in-person instruction or were based on peer social contact. The SDI minutes listed totaled was 465 minutes per week, or 7.75 hours;
- d. All goals will be measured by "teacher observation and ongoing data collection" or "student work samples and teacher observation";
- e. SDI: remained the same except that the location of SDI for social skills and self-advocacy SDI was changed from "Life Skills Class" to "General Education Class";
- f. Accommodations: all accommodations from the May 15, 2020 IEP were carried over; and
- g. Nonparticipation Justification: changed to state that the Student would be removed from the general education setting for up to 315 minutes per week, reduced from the 480 minutes of removal per week in the May 15, 2020 IEP as it was determined that the Student could receive much of the SDI in the general education classroom. The explanation and justification of the removal stated that the Student "needs to be removed for [the Student's] specially designed instruction... where it is quieter and fewer distractions."

18. The May 12, 2021 District meeting notes included the following:

- a. The Parent stated that if the Student could get vaccinated in or close to September, then the Student would be able to attend school in person approximately five weeks later;
- b. "Once the Student is fully vaccinated for COVID-19, the plan is for [the Student] to start attending school for 3-4 hours a day";
- c. The Student experiences chronic exhaustion and chronic back pain, which impacts the Student's attendance;
- d. "Times for each area of Specially Designed Instruction were included. This may also change depending on the amount of time [the Student] actually spends at school";
- e. "[The Parent] would like to discuss planning for the fall (time before [the Student] can actually come into the building) and what this will look like prior to [the Student] getting the vaccination. Team wants to meet first week in the fall, prior to school starting, so we can discuss the plan";
- f. The Parent asked what they could do prior to the Student entering the classroom to help the Student connect in a meaningful way and be prepared;
- g. The first-grade general education teacher (Teacher) "talk[ed] about things she has done in the past to include students who could not attend school in-person"; and
- h. The District stated that it would send the Parent all the IEP meeting paperwork electronically following the meeting.

19. On May 12, 2021, the District issued a Special Education Placement Determination, stating that the placement selected was "More than 80% General Education with Special Education outside classroom."



20. On May 23, 2021, an email exchange occurred between the Principal and the Case Manager about getting equipment ready at the school in preparation for the Student returning in-person. The Case Manager suggested they should wait until the fall for the Student to be fitted for support bars and “the family’s concern regarding C-19 would hopefully be lessened by then.” The Principal responded, “I can put it on my calendar for early August so we can be sure the work is done in time for [the Student] coming to school; especially since [the Student] will likely not be in person until late September/early October according to mom.”
21. On February 2 and June 17, 2021, the District issued an IEP Progress Report for the Student’s Measurable Annual Goals. The Parent reported that she did not know where some of this progress information came from, since some of the goals could only be worked on with the Parent’s knowledge and assistance. The Parent did not work on the goals or report data to the District.
22. The District reported that it obtained progress information for some of the Student’s IEP goals through informal conversations with the Parent, when the District would ask how the Student was doing in certain skill areas. The District indicated that it was being sensitive to what the family was experiencing and did not want to add to the demands on the family.
23. The Parent reported that the family was never asked about the Student’s motor skills goal or the Student’s use of stairs. The Parent reported that the District did not provide instruction on the Student’s functional skills goal, except that the District sent home a puzzle with a zipper, button, and snap in the last two months of the school year.
24. Throughout the 2020-21 school year, it is unclear to what extent the Student’s IEPs were implemented. The IEPs were written for the school environment. Accommodations for adult support, toileting schedule, personal sensory material, and others were not provided to the Student at home. The Parent reported that some of the Student’s goals were not worked on. The District acknowledged that it was impractical to provide SDI for some of the Student’s goals and accommodations when the Student was at home.
25. Both the District and the Parent reported that the schedule changed frequently throughout the Complaint period. It is unclear from the five different schedules submitted by the District and the Parent which IEP services were provided. SDI for functional skills, motor skills, and self-advocacy are not mentioned in these schedules. Social skills instruction is mentioned occasionally. Math and reading were listed under life skills, not general education, although none of the Student’s IEPs included special education services for math or reading.
26. The District reported that the “math” on the schedule was a time that the Student attended class sessions with another student. The District reported that during the life skills math and reading sessions, the Student worked on academic readiness and IEP goals, including social skills, functional skills, and self-advocacy.
27. The Parent reported that the Student worked on the social skills goal (initiating play or social engagement, taking turns, sharing, and resolving peer conflict) during the life skills math sessions but did not work on the functional skills and self-advocacy goals.
28. The District and the Parent dispute the number of online sessions that the Student missed. The District informally tracked the Student’s participation in individual class sessions on a spreadsheet, reporting that the Student attended approximately 50% of the sessions offered, with the Student having 140 absences out of the 279 sessions offered.

29. The District reported that the Student frequently missed class for medical reasons, including appointments, illness, fatigue, and chronic pain.
30. The Parent reported that the District's spreadsheet included inaccurate information and does not reflect the Student's daily attendance in all class offerings.
31. On August 25, 2021, the Case Manager emailed the Parent to schedule a meeting, stating, "At our spring IEP meeting, we talked about getting together prior to school starting this fall."
32. On August 30, 2021, the Parent agreed to the proposed meeting date of September 2, 2021, and the Parent asked the Case Manager who would be attending the meeting.
33. In an August 31, 2021 email to the Parent, the Case Manager wrote, "At our spring IEP meeting, we had a plan for [the Student], but said that we would meet to see how things were before school started. The purpose of the meeting is to see if [the Student] would like to start in-person school and what we can do in the interim if [the Student] doesn't start in the building right away... Those attending besides you and I are [the Student's] new [Teacher] (who you met at the last meeting) and [sic] [the SLP]. One of my supervisors will be attending to answer any questions about services. Maybe [the Principal]."
34. On August 31, 2021, the District emailed the Parents a Meeting Request for a meeting scheduled for September 2, 2021. The purpose of the meeting is listed as "Discuss Plan for returning to in-person learning and the interim." Although the Meeting Request is on the District's Special Programs letterhead, the words "IEP" or "placement" were not included in the document.
35. On September 2, 2021, the District convened a meeting to discuss a plan for the Student.
36. The District reported mixed information about whether it planned for the September 2, 2021 meeting to be an IEP or placement meeting, or whether the meeting evolved into an IEP/placement meeting once the Parent stated that the Student was not medically cleared to attend school in-person.
37. The Parent reported that it was not clear to the Parent that the meeting was going to be an IEP or placement meeting.
38. The September 2, 2021 District Meeting Notes included the following:
  - a. "The team is meeting today to review options for the 2021-2022 school year for [the Student.] COVID-19 vaccinations have not yet been approved for children under the age of 12... Previous thought was that [the Student] would start outside the building, then vaccines, then would begin joining us for part-days. However, we are still waiting on the vaccine, so now we need to have a plan for this fall";
  - b. The District's Director of Special Services (Director) stated, "Since [the Student] is not medically cleared, we will need to change [the Student's] placement to homebound instruction. In the past, someone has come into the home, but currently that is not happening. Instead, we offer 5 hours a week of someone connecting with the student via a distance learning format." The District would work toward the Student's IEP goals, likely through the existing special education team, until the Student had medical clearance to attend in-person;

- c. The Parent asked about how this would affect the Student's access to general education curriculum and materials, assistance needed by the Student, and connections with the classroom; and
  - d. The Director recognized that "this is not the best way to have instruction," adding that the team could work with the Teacher to make sure that the Student had some classroom materials. "We also know that [the Student] will likely need a step-in plan for return. At a minimum, we need to make sure that [the Student's] IEP goals get addressed."
39. The September 2, 2021 Meeting Notes included an attendance cover page. The District note taker reported that she did not fill out this cover page, rather it was filled out by the Case Manager. The cover page included the following information:
- a. The type of meeting was listed as "Placement Determination/Change" and "Placement Discussion update";
  - b. Under Documents given to Parents, one item is checked: "IEP Placement Determination";
  - c. The Meeting Purpose was listed as "Review plan for this school year; update service location; placement change";
40. At the September 2, 2021 meeting, the team did not review or revise the IEP, nor did a discussion about amending the IEP occur. The potential benefits and harms of various placement options were not discussed. A Special Education Placement Determination document was not discussed or reviewed. The amount of five hours of tutoring for home instruction was not discussed, nor was the amount based on the needs of the individual Student.
41. At the time of the September 2, 2021 meeting, the District did not have a home instruction teacher/tutor available but stated that the Case Manager and special education staff would provide the Student with special education services until someone could be hired. The District reported that it struggled with staff shortages and hiring tutors.
42. The District issued an IEP Amendment dated September 2, 2021, which made one change to the May 12, 2021 IEP. A statement was added to the present levels, stating, "The IEP team met to discuss placement options for [the Student]. There was hope at the last IEP meeting that [the Student] would be able to return to the physical school building in the fall of 2021. Given the lack of Covid-19 vaccine available for young under [*sic*] 12 years and the parent's concern for [the Student's] health returning to the school building, and that parents report that [the Student] is not medically cleared by [the Student's] doctor, other options were not looked at... As [the Student] is not medically cleared to attend a physical school building, [the Student's] placement will be changed to Homebound Instruction. At this time, [the Student] will receive 5 hours of homebound instruction."
43. The IEP Amendment was not discussed at the September 2, 2021 meeting; rather it was written and issued by the District after the meeting.
44. The District issued a Special Education Placement Determination dated September 2, 2021, with three placement options listed (home tutoring, more than 80% general education with special education within in the classroom, and more than 80% general education with special

education outside of the classroom). The document included the following regarding the selected placement:

- a. "This placement is based on the child's current IEP dated: 5/11/2022";
  - b. The placement selected was "Home Tutoring – 100% of time... All SDI provided via Home Tutoring";
  - c. For "Benefits of Option (Academic and Nonacademic)," the only item listed was "Student would benefit from specialized instruction";
  - d. For "Possible Harmful Effects on the Child or Services," the only item listed was "Student may feel singled out"; and
  - e. For Modifications/Supplementary aids and services considered to maintain the student in a less restrictive option (before selection of a more restrictive option)," the only item listed was "Timing accommodations."
45. The Placement Determination document was not discussed at the September 2, 2021 meeting; rather it was written and issued by the District after the meeting.
46. The District issued a PWN – Provision of FAPE dated September 2, 2021, which stated, "The IEP team is proposing to adopt and implement the recently developed IEP... [The Student's] IEP reflects current information regarding present levels of performance, goals, and service summary." It further stated that in-person instruction was considered but since the Student did not have a medical release to attend school in-person, the option was rejected.
47. The Parent reported that at the September 2, 2021 meeting, they did not realize that it was intended to be an IEP or placement meeting until the District used the words "placement change." Further, it was the Parent's understanding that home instruction would cover both general education and special education services. The Parent believed that the Student would be involved with the Student's general education classroom.
48. The Director reported the following regarding the September 2, 2021 meeting:
- a. As the District sent a meeting invitation to the Parent, the Director did not know how the Parent, or anyone else, would not know that this was going to be an IEP meeting;
  - b. No one knew that the Student was not medically cleared until the Parent mentioned it in the middle of the meeting. Everyone on the District side thought that Student would be starting school in-person right away;
  - c. The only option for a student who is not medically cleared is home instruction. The District always starts home instruction with 5 hours, then adjusts instruction time if the individual student needs it. The District had to start with providing special education services, and then the District could add in general education afterward; and
  - d. The plan moving forward was to implement the IEP as written.
49. The Case Manager asked the Director to attend the meeting to address the Parent's questions about service options. The Case Manager reported that it was unclear whether the Student would be attending in-person, and the Case Manager wanted to invite additional District

representatives in case other service or placement options needed to be discussed at the meeting. The Case Manager reported that the check-in meeting evolved into an IEP/placement meeting because of the circumstances, as the Student was not medically cleared.

50. Most District personnel reported in interviews that the Parent had clearly stated at the May 12, 2021 IEP meeting that the Student could not attend school in-person until fully vaccinated, although some personnel reported that they still hoped that the Parent might change her mind or find some way for the Student to attend.
51. Several District personnel reported that at the time of the September 2, 2021 meeting, District staff did not yet know what educational options would be available that fall and the District had not fully developed its online programs. Shortly after the meeting, the District finalized an “enhanced” online program option, which included virtual contact and instruction with certified teachers and virtual contact with peers, including students with and without disabilities.
52. The Teacher reported that the Parent’s questions at the meeting about the impact of the Student’s change in placement on the Student’s access to the general education class and curriculum were not addressed. The Teacher was also confused and had questions about expectations for the Teacher and what would be provided to the Student for the general education portion of home instruction.
53. The Teacher reported that following the meeting, the Teacher was told only to provide the Student with what would be provided to any student who was at home temporarily for medical reasons, such as a student at home in quarantine after a COVID-19 exposure. This meant providing a weekly packet of paper worksheets and assignments.
54. On September 2, 2021, the Case Manager emailed the Parent to ask what times were best for scheduling the Student’s “CDL class,” which would be “up to an hour a day, maximum 5 hours a week.” The Parent expressed concern that the Student would not be exposed to the general education curriculum and would not understand what the students were doing when the Student joined the general education class.
55. On September 3, 2021, the Case Manager emailed the Parent, stating that the Parent should consider signing the Student up for the District’s enhanced online program, stating it would provide the Student with more opportunities to learn with a teacher.
56. The Teacher invited the Parent and the Student to come to the school on September 3, 2021, meet the Teacher, and see the classroom. The Teacher showed the Student the Student’s desk, with the Student’s name on it, stating that they were ready for when the Student could return in-person to the classroom.
57. The Case Manager emailed the Parent on September 4, 2021, acknowledging the Parent’s concern about the Student getting behind the general education class and again suggested the District’s enhanced online program so the Student could have regular online interaction with a first-grade teacher. The Case Manager stated that if the Student did this online program, the Student would still “continue to follow our plan of regular CDL with my staff and connection to [the Teacher].”
58. In a September 7, 2021 email to the Case Manager, the Parent expressed concern about the District’s offer of home instruction. The Parent wrote that it was not in line with state

educational guidelines and would not provide the Student with an appropriate education or inclusion.

59. In a September 7, 2021 email, the Case Manager sent the Parent a schedule for the Student's home instruction, for a total of 4.5 hours per week to be provided by EAs. The Case Manager noted that the schedule was based on the time of day that works best for the Student, from 9:00 a.m. to 11:30 a.m. The schedule consisted of SDI for motor skills and writing, which started on September 9, 2021. The Student's other SDI areas were not mentioned.
60. In a September 7, 2021 email response, the Parent asked if anything else could be added to the Student's CDL classes. "I understand you need to stick to [the Student's] IEP goals but there must be away [*sic*] we can add something [the Student] would be supported or accommodated in the classroom to support [the Student's] academics."
61. The Case Manager emailed the Parent on September 8, 2021, stating, "We will schedule times for [the Student] to have [the Student's] IEP goals addressed as best as possible online and look forward to having [the Student] with us in person once [the Student] is able to."
62. On or about September 8, 2021, the Parent called the District to ask about the enhanced online program. The Parent reported that they were told by someone at the District that the program was not appropriate for the Student.
63. The first day of the 2021-22 school year for District students was on September 8, 2021.
64. In a September 8, 2021 email to the Parent, the Case Manager wrote, "The 5 hours of Home bound instruction is a placement determination. It is not related to and is not CDL. CDL does not exist in [the District] schools anymore... [the District] schools have worked hard to have all students return to the classroom. Due to this all resources are going to in person instruction. Therefore, when we have a student who is unable to attend due to not being medically cleared must [*sic*] use homebound instruction to work towards progress for students as we did in the pre-covid era. This is not ideal by any means, and hope this is a short term solution... once special [*sic*] designed instruction can be addressed we can look at adding some other materials that are accessible for [the Student]."
65. The Case Manager emailed the Parent again on September 8, 2021, reporting that the District was offering homebound instruction for IEP services, which would include functional skills, social skills, writing, self-advocacy, and motor skills. In addition, the District was willing to "add in Reading and Mathematics per [the Parents'] request..."
66. On September 9, 2021, the Case Manager emailed the Parent to schedule an IEP meeting. The Parent stated the Parents were "not quite ready" to schedule the IEP meeting as they were working with advocates to help them understand the Student's rights under the State's guidance for home instruction.
67. In a September 9, 2021 email to the Director, the Case Manager wrote, "My staff is able to continue with supporting [the Student's] IEP goals of Writing and Motor Skills directly, with Self-Advocacy Skills and the Functional Skills of using a timer in the context of the other two. The other skills of Social Skills and toileting are best addressed in the school setting. Also, we will be sending home some materials from [the Teacher]... It seems a home tutor would be best to support the additional Reading and Math Instruction."

68. In a September 9, 2021 reply, the Director wrote, "At this point we will focus on the IEP based services. I would make sure we try some social skills if that is on [the Student's] IEP otherwise we would need to amend. Anything is better than nothing at this point. Since reading and math were not part of the IEP at this point, we will wait on that discussion till we meet."
69. On September 9, 2021, the Case Manager responded to the Director, reporting that "[the Teacher] has all, including Math and Reading, 1<sup>st</sup> grade subjects developed for online learning. This was developed by the 1<sup>st</sup> grade team last year. It is impressive and might be helpful."
70. When asked about this option, the District reported that this first-grade online program could only be used in conjunction with a certified teacher, such as a home instructor, as the program is interactive.
71. The SLP reported that they were unable to find another student to join the Student's speech/language sessions, as the SLP had done in the previous year to work on the social skills.
72. On September 13, 2021, the Parent emailed the District, requesting a formal IEP meeting and expressing concern that the Parent was not notified before the September 2, 2021 meeting that it was an IEP meeting. The Parent noted that they "did not have an opportunity to prepare or understand the gravity of this 'meeting.' ... [The District] made this decision prior to the meeting and did not include [the Parents] as parents and team members."
73. In a September 14, 2021 email to the Parent, the Case Manager offered to schedule the requested IEP meeting and asked for dates and times that would work for the Parents.
74. In a September 17, 2021 email to the Parent, the Case Manager again requested dates and times to schedule the IEP meeting. The Parent stated that the family needed outside assistance to prepare for this IEP meeting, since they were not afforded the opportunity to be prepared at the previous meeting. "We will reach out to you as soon as we are able to have the proper supports and information available for [the Student's] IEP meeting."
75. On September 22, 2021, the Director emailed the Parent, reporting that the District found a home instruction tutor for the Student who would "be taking over supporting [the Student] directly. The tutor will work with [the Case Manager] and [the Teacher] to get materials and then work with [the Student] for the 5 hours per week. Since our tutors work during the day as teachers, the two available times would be 3:30 or 5:30 daily, if one hour a day is the best. You could also consider doing longer times less frequently.... The tutoring will again be virtual. Our hope would be to get this up and running next week."
76. The Parent sent an email on September 22, 2021 in response, stating that the times offered were not appropriate and would not work for the Student. The Student could not focus at that time of day and "also has breathing treatments and dinner during this window of time." The Parent stated that it is unreasonable that the only option offered for home instruction is in the afternoon or evening because it is more convenient for the District. The Parent expressed concern that the Student did not have access to the Teacher, the District was excluding the Student, and the District was not providing FAPE.
77. The Director replied to the Parent by email on September 22, 2021, writing, "At this time these are the only two options. Please let me know your preference." The Director stated that the

District was happy to discuss these issues at an IEP meeting but until the IEP meeting could happen, they needed to get tutoring in place.

78. In a September 22, 2021 email to the District, the Parent wrote that they could not have an IEP meeting until the District provided its policy on homebound instruction, as the Parents have a right to read and understand the policy and guidelines.
79. On September 22, 2021, the Student's doctor wrote a letter, which the Parent provided to the District. The letter stated that the Student could not attend school in-person and educational instruction for the Student should be provided during regular school hours, as late afternoons and evenings are "consumed by extensive breathing treatments that must be done" to maintain the Student's lung health. Further, the Student "needs accommodations to allow [the Student] the benefits of live instruction that [the Student] so desperately needs."
80. The District emailed the Parent a copy of the "Home Tutoring / Instruction Program" Administrative Regulation on September 22, 2021, which stated the following:
  - a. "The amount of instructional service provided will be in relation to each child's educational and physical needs and physical and mental health"; and
  - b. "An alternative to Home Tutoring services may be on-line programs... This option is typically provided to students capable of working on assignments/courses in a more independent fashion who have sufficient familiarity with technology."
81. On September 22 and 24, 2021, the Parent emailed the Case Manager, expressing concern that removing the current EAs providing special education instruction to the Student and having the tutor take over would be confusing and upsetting for the Student. The Parent was also concerned that, as the Student could not participate in home instruction during the only times offered by the District, the Student would not get any instruction at all. The Parent expressed concern that the Teacher had not included the Student in the general education class, which was confusing for the Student as the Teacher invited the Student to see the classroom at the beginning of the school year.
82. In a September 24, 2021 email, the Case Manager responded by stating that the District will continue to provide services through the EAs until a tutor takes over.
83. The Teacher reported that it was difficult to determine what was expected of the Teacher. The Teacher asked the District weekly what the expectations were to make sure that the Student was included in general education but was told to "keep providing paper and pencil work" and nothing else. The Teacher continued to provide a weekly packet of assignments and collaborated with the EAs providing home instruction. The Teacher wanted to include the Student in the class and provide more opportunities for the Student to engage in general education, but the Teacher was limited in what she was allowed to do.
84. On September 24, 2021, the Parents filed this Complaint.

#### **IV. DISCUSSION**

##### **When IEPs Must Be In Effect**

The Parents alleged that the District violated the IDEA by not providing special education and



related services in accordance with the Student's IEP.

School districts must ensure that an IEP is in effect for each child with a disability within the district's jurisdiction at the beginning of each school year.<sup>3</sup> Districts must provide special education and related services to a child with a disability in accordance with a child's IEP.<sup>4</sup> The district must ensure that each staff member, including service providers, has access to a student's IEP and is informed of their specific responsibilities for implementing the IEP and the specific accommodations, modifications, and supports in accordance with the IEP.<sup>5</sup>

With alternative placements, such as home instruction, school districts must make provisions for supplementary aids and services to be provided to the student.<sup>6</sup> "When a child with a disability is classified as needing homebound instruction because of a medical problem... an individualized education program (IEP) is necessary to change the child's placement and the contents of the child's IEP, if warranted... The IEP Team must determine whether the child is available for instruction and could benefit from homebound services such as online or virtual instruction, instructional telephone calls, and other curriculum based instructional activities, to the extent available."<sup>7</sup>

A district violates the IDEA when it materially fails to implement an IEP.<sup>8</sup> "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."<sup>9</sup>

Three IEPs were in effect during the Complaint period; the May 15, 2020 IEP; the May 12, 2021 IEP; and the September 2, 2021 IEP Amendment. All three IEPs were written for the school environment. The IEP team stated at the May 15, 2020 IEP meeting that the team would meet in fall of 2020 to amend the IEP if the Student did not attend school in person. However, the IEP was not reviewed until the Student's annual IEP meeting on May 12, 2021. The services from the May 15, 2020 IEP were largely carried over to the May 12, 2021 IEP. The May 12, 2021 IEP was developed for in-person learning, with the intention that the Student would return to school in the fall, either at the start of school or shortly thereafter.

During the 2020-21 school year, it is unclear to what extent the Student's IEPs were implemented. The Student's IEP goals were written for the school environment. While special education sessions were routinely provided to the Student, the specific SDI areas and amount of instructional minutes are not clear. Additionally, the special education sessions provided did not cover all areas of SDI required by the Student's IEP. The District did not provide SDI for the Student's motor skills goal for climbing stairs nor the functional skills goals for using zippers/buttons/snaps and completing a toileting routine, and progress on these goals was not monitored in any formal way. The District reported that it would occasionally, and informally, ask the Parent how the Student was doing with these tasks, but the District did not ask the Parent to work on these goals, take data, or keep track of progress. Nor did the District observe or assess how the Student was doing in these areas.

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<sup>3</sup> OAR 581-015-2220(1)(a); 34 CFR §300.323(a)

<sup>4</sup> OAR 581-015-2220(1)(a); 34 CFR §300.323(c)

<sup>5</sup> OAR 581-015-2220; 34 CFR §300.323

<sup>6</sup> OAR 581-015-2245(2); 34 CFR §300.115(b)(2)

<sup>7</sup> Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (USDOE, 3/12/2020)

<sup>8</sup> *Van Dуйn v. Baker Sch. Dist.* 5J, 502 F3d 811, 822 (9<sup>th</sup> Cir. 2007)

<sup>9</sup> *Id.*

Similarly, the accommodations on all three of the Student's IEPs were written for the school environment. The Student's IEPs reflected the IEP team's determination that the Student required a significant amount of accommodations, including adult support both in and out of the classroom. While many of the accommodations were impractical for the home environment, such as alternative recess plan, the accommodations remained on the IEP. However, the Student's accommodations were largely not provided. Accommodations for frequent breaks, equipment trial, and access to adapted school supplies were partially implemented. When asked, the District was unable to state whether visual supports were provided to the Student. The health, safety, and feeding protocols listed as accommodations on the IEPs did not exist, as the District stated the protocols would not be developed until the Student started school in person.

For the 2021-22 school year, the Student's IEP services continued to be partially implemented. No changes were made to the Student's goals or services at the September 2, 2021 IEP meeting, despite the change in placement to home instruction. The District continued to provide regular scheduled special education sessions, but these did not cover all of the Student's goals. The number of minutes provided to the Student in various SDI areas did not match what was listed in the Student's IEP.

After the September 2, 2021 meeting, the District made attempts to schedule an IEP meeting, but the Parent was unwilling to meet with the District. While the District stated that it wanted to respect the Parent's decision to wait, the District knew that the IEP could not be implemented as written and needed to be amended. The District had an obligation to convene a meeting to review the Student's IEP. The District could have conducted the meeting without the Parent, if the District was unable to convince the Parent that they should attend.<sup>10</sup>

The Department substantiates this allegation.

### **Placement of the Child**

The Parents alleged that the District violated the IDEA by failing to ensure that the Student's placement was determined by a group of persons, including the parents, and other persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options.

School districts must ensure that the educational placement of a child with a disability is determined by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.<sup>11</sup> In addition, the educational placement of a child must be made in conformity with the Least Restrictive Environment (LRE) provisions and be based on the child's current IEP. Children with disabilities should be educated with children who are not disabled to the maximum extent appropriate.<sup>12</sup> Alternative placements, such as home instruction, must be available to the extent necessary to implement the IEP for each child with a disability.<sup>13</sup>

Placement decisions should not be based solely on factors such as category of disability, severity of disability, configuration of delivery system, availability of educational or related

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<sup>11</sup> OAR 581-015-2250(1); 34 CFR §300.116(a)(1)

<sup>11</sup> OAR 581-015-2250(1); 34 CFR §300.116(a)(1)

<sup>12</sup> OAR 581-015-2240; 34 CFR §300.114(a)(2)

<sup>13</sup> OAR 581-015-2250(2);

services, availability of appropriate staff, or administrative convenience.<sup>14</sup> "Each student's placement must be individually-determined based on the individual student's abilities and needs... it is the program of specialized instruction and related services contained in the student's IEP that forms that basis of the placement decision."<sup>15</sup> The IDEA "requires that the placement be based on the IEP, and not vice versa."<sup>16</sup>

This issue revolves around the placement decision made at the September 2, 2021 meeting. The plan made by the IEP team on May 12, 2021 was to have a check-in meeting before the start of the 2021-22 school year, as it was unclear at the time when the Student would be able to return to school in person. The Parent was unaware that the September 2, 2021 check-in meeting was going to be an IEP or placement meeting. Some District IEP team members reported that they thought the meeting would be an informal check-in meeting, while others believed the team needed to be prepared to have a placement discussion if it was not clear when the Student would be able to return to school in person. The Case Manager reported that he invited the required IEP team members, as well as District representatives knowledgeable about placement options, should a placement discussion need to occur.

At the September 2, 2021 meeting, when the Parent shared that the Student was not medically cleared and could not attend in person until fully vaccinated, the District stated that the placement would be changed to home instruction. The District's meeting notes stated that home instruction was the only option considered. The District determined that the Student would receive five hours of home instruction, without any discussion of the instructional needs of the individual Student. A full team discussion on the potential harms of various placement options and the quality of services needed by the Student did not occur. The team did not identify ways to include the Student in general education or establish connections with peers. The Special Education Placement Document was not developed and reviewed by the team; rather, it was written by the District after the meeting.

The Department substantiates this allegation.

### **Review and Revision of IEPs**

The Parents alleged that that the District failed to follow IDEA requirements for reviewing and revising the Student's IEP. Specifically, the IEP team did not revise the Student's IEP as needed for implementation of the IEP in the home environment.

A student's IEP must be reviewed and revised periodically, but at least yearly, to determine whether the annual goals for the child are being achieved.<sup>17</sup> A school district must ensure that the IEP Team reviews and revises the child's IEP, as appropriate, to address: (1) any lack of expected progress towards the annual goals and the general education curriculum; (2) the results of a reevaluation conducted; (3) information about the child provided to, or by, the parents; (4) the child's anticipated needs; or (5) other matters.<sup>18</sup> Changes to the IEP may be made either by the entire IEP team at an IEP team meeting, or without a meeting if an agreement is made between the school district and the parent of a child with a disability.<sup>19</sup>

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<sup>14</sup> OSEP Memorandum 95-9 (11/23/1994); Letter to Veazey (OSEP 11/26/2001)

<sup>15</sup> OSEP Memorandum 95-9

<sup>16</sup> *K.D. ex rel. C.L. v. Dep't of Educ., Hawaii*, 665 F.3d 1110, 1123 (9<sup>th</sup> Cir. 2011)

<sup>17</sup> OAR 581-015-2225(1)(a); 34 CFR §300.324(b)(1)(i)

<sup>18</sup> OAR 581-015-2225(1)(b); 34 CFR §300.324(b)(1)(ii)

<sup>19</sup> OAR 581-015-2225; 34 CFR §300.324

In response to the COVID-19 pandemic challenges, the Department issued guidance for reviewing and developing IEPs across instructional models. This guidance stated that IEP teams should consider the following, in relevant part: What goals are no longer relevant or must be approached differently across different instructional models? How can the team be sure that all of the goals are appropriate to the selected environment? How will the goals be progress monitored in the new environment? How can staff provide supports and services as outlined in the IEP? How will staff/family members be made aware of and trained to implement plans and supports? Will all of the accommodations be appropriate in another instructional model?<sup>20</sup>

As stated above, all three of the Student's IEPs in effect during the Complaint period were written for in-person schooling. Except for the annual IEP meeting on May 12, 2021, the Student's IEP was not reviewed, nor were any revisions made to reflect that the Student was not attending school in person. On September 2, 2021, the District changed the Student's placement to home instruction, but did not review or make any substantive changes to the Student's IEP. The team did not discuss whether the Student's IEP was appropriate for the home setting or whether the IEP needed to be amended to reflect the Student's current needs. The District kept the Student's IEP as written, although it contained services that either could not be provided in the home setting or that the District did not intend on providing in the home setting.

The District unilaterally amended the Student's May 12, 2021 IEP, without a discussion or agreement by the IEP team at an IEP meeting, and without the knowledge of the Parent. There was no agreement between the District and the Parent to amend the IEP outside of an IEP meeting.

The Department substantiates this allegation.

### **IEP Content**

The Parents alleged that the District violated the IDEA when it (a) included incorrect information in the Student's IEP, and (b) failed to include measurable annual goals, as well as special education and related services, designed to enable the Student to be involved in and make progress in the general education curriculum.

There are many items that must be included in an IEP, including a statement of measurable annual goals designed to (1) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and (2) meet each of the child's other educational needs that result from the child's disability.<sup>21</sup> The IEP must also include a description of how the child's progress toward meeting the annual goals will be measured.<sup>22</sup>

The IEP must include a statement of the specific special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided for the child (to advance appropriately toward attaining annual goals, to be involved and progress in the general education curriculum, and to be educated and participate with other children with and without disabilities).<sup>23</sup> The IEP must include the projected dates for initiation of services and

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<sup>20</sup> Individualized Education Program (IEP) Review Tool (ODE)

<sup>21</sup> OAR 581-015-2200(1)(b); 34 CFR §300.320(a)

<sup>22</sup> OAR 581-015-2200; 34 CFR §300.320

<sup>23</sup> OAR 581-015-2200(1)(d); 34 CFR §300.120(a)(4)

modifications and the anticipated frequency, amount, location, and duration of services and modifications.<sup>24</sup> “The IEP must explain the extent, including amount, ... of any removal from the regular classroom environment, and provide justification for the removal.”<sup>25</sup>

“The essential function of an IEP is to set out a plan for pursuing academic and functional achievement.”<sup>26</sup> “The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.”<sup>27</sup> School districts are expected to “be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable to child to make progress appropriate in light of his circumstances.”<sup>28</sup>

Throughout the Complaint period, the Student’s IEPs were not appropriate. The IEPs contained services that could not be implemented as written in the home environment. The IEPs contained goals that were not appropriate outside of the school setting. The District did not have a plan for measuring progress for some IEP goals. The IEPs contained accommodations that did not exist, could not be provided in the home environment, or that the District did not intend to provide.

In the September 2, 2021 IEP Amendment, the location of the Student’s SDI is inaccurate. The IEP stated that social skills and self-advocacy skills will be provided in the general education class, although the Student did not have any general education classes or instruction between September 8 and September 24, 2021, when this Complaint was filed. The nonparticipation justification explanation stated that the Student needs to be removed for SDI in motor skills, writing, advocacy, functional skills, and speech and language services where it is quieter and has fewer distractions. However, the Student was not provided with SDI in some of these areas, and the Student was not in a classroom environment that might be noisy or distracting.

There is insufficient information in the record to determine whether the Present Level statement in the May 12, 2021 IEP and September 2, 2021 IEP Amendment is accurate, which reported that the Student’s attendance in available classes was 50%.

The Department substantiates this allegation.

### **Parent Participation**

The Parents alleged that the District violated the IDEA by (a) not providing the Parents with an opportunity to participate in meetings with respect to the IEP and placement of the Student, and (b) not providing meeting notices with required information.

A school district must provide one or both parents the opportunity to participate in meetings with respect to the identification, evaluation, IEP, and educational placement of the student, and the provision of a free appropriate public education to the student.<sup>29</sup> A school district must provide written notice of the time and purpose of a meeting, who will attend, and allow the parents to bring others knowledgeable about the child.<sup>30</sup> The school district must give parents

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<sup>24</sup> OAR 581-015-2200(1)(e); 34 CFR §300.120(a)(7)

<sup>25</sup> Writing High-Quality IEPs, Best Practices & Supporting Guidance Document, ODE

<sup>26</sup> *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988, 999 (2017)

<sup>27</sup> *Id.* at 1001

<sup>28</sup> *Id.* at 1002

<sup>29</sup> OAR 581-015-2190(1); 34 CFR §300.322(a)

<sup>30</sup> OAR 581-015-2190(2)(b)(A) and (B); 34 CFR §300.322 (b)

a copy of the IEP at no cost to the parent.<sup>31</sup> “Parents must be able to use the IEP to monitor and enforce the services their child is to receive.”<sup>32</sup>

A school district must consider the concerns of the parents for enhancing the education of their child, among other indicators of the student’s academic, developmental, and functional needs.<sup>33</sup> “Parents have the right to bring questions, concerns, and preliminary recommendations to the IEP Team meeting as part of a full discussion of the child’s needs and the services to be provided to meet those needs.”<sup>34</sup> While school districts have educational discretion, parents still have the right “to remain informed of, and to participate in, educational decisions concerning their children.”<sup>35</sup> “In order to fulfill the goal of parental participation in the IEP process, the school district [is] required to conduct a meaningful IEP meeting, not just an IEP meeting.”<sup>36</sup> When no alternatives to a proposed IEP or placement are considered at an IEP meeting, the Parent is denied meaningful participation as required by the IDEA.<sup>37</sup>

The District did not provide the Parent with proper notice of the purpose of the September 2, 2021 meeting. Although the District sent a Meeting Request, it did not state that the purpose of the meeting was to review the Student’s IEP or placement. The Meeting Request contained errors in identifying the role of individuals listed and whether the individual was required to attend. The District did not mention anything in email communications with the Parent that notified the Parent that the meeting was being scheduled to review the Student’s IEP or placement. It was not clear to other meeting participants, who also thought it was intended to be an informal check-in meeting, not a formal IEP or placement meeting. Because the Parent was not on notice of the purpose of the meeting, the Parent reported being unprepared and unable to meaningfully participate.

At the September 2, 2021 meeting, as previously stated, the team did not have a full discussion about different service or placement options. Since the Student was not medically cleared to attend school in person, the District announced that home instruction was the only option. The Parent’s questions about how the home instruction placement would affect the Student’s access to general education were not answered. The District did not mention an IEP Amendment or Placement Determination document at the meeting. These documents were created by the District after the meeting, without team discussion or agreement and without the participation or knowledge of the Parent.

The Department substantiates this allegation.

### **Free Appropriate Public Education (FAPE)**

The Parents alleged that that the District’s refusal to provide effective services and supports has denied educational opportunity to the Student, and thus constitutes a denial of FAPE.

Each school district is responsible for providing a free appropriate public education to school age children with disabilities for whom the school district is responsible.<sup>38</sup> Notwithstanding

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<sup>31</sup> OAR 581-015-2195; 34 CFR §300.322

<sup>32</sup> *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1198 (9<sup>th</sup> Cir. 2017)

<sup>33</sup> OAR 581-015-2205(1)(b) and (d); 34 CFR §300.324(a)(1)

<sup>34</sup> Letter to Northrop (OSEP 5/21/2013), citing 71 Fed. Reg. 46,678 (2006)

<sup>35</sup> *Pasatiempo v. Aizawa*, 103 F.3d 796, 804 (9<sup>th</sup> Cir. 1996)

<sup>36</sup> *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1485 (9<sup>th</sup> Cir. 1992).

<sup>37</sup> *Id.* at 1484

<sup>38</sup> OAR 581-015-2040(1); 34 CFR §300.101(a)

COVID-19 challenges, school districts “remain responsible for ensuring that a free appropriate public education (FAPE) is provided to all children with disabilities.”<sup>39</sup> If an IEP cannot be implemented as written for distance learning, the IEP team must meet to review and revise the IEP.<sup>40</sup>

In order to determine whether a student has been denied a FAPE, the courts review a district’s compliance with the procedural and substantive components of the student’s education. Reviewing courts must inquire whether the school district complied with the procedural requirements of the IDEA, and whether the school district met the substantive requirement to develop an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.<sup>41</sup> Not every procedural error is sufficient to rise to a denial of FAPE.<sup>42</sup> The procedural test consists of three pivotal procedural errors: (1) whether the student suffers a loss of educational opportunity;<sup>43</sup> (2) whether the Parent’s right to participate in the IEP process was infringed; or (3) whether the procedural error caused a “deprivation of educational benefit.”<sup>44</sup>

The District did not follow IDEA procedures for amending the Student’s IEP, determining the Student’s placement, or parent participation. The Student’s IEPs were inappropriate for the home environment, and not reasonably calculated to enable the Student to make progress appropriate in light of the Student’s circumstances. As the Student’s IEPs could not be implemented as written in the home environment, the team had an obligation to review and revise the Student’s IEP services as necessary to provide FAPE.

These procedural and substantive violations deprived the Student of educational opportunity and resulted in a denial of FAPE. The Department substantiates this allegation.

### **V. CORRECTIVE ACTION<sup>45</sup>**

*In the Matter of Bend-La Pine Administrative School District 1  
Case No. 021-054-032*

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

<b>Action Required</b>	<b>Submissions</b>	<b>Due Date</b>
1. The District must provide the Student with Compensatory Education to make up for SDI not provided pursuant to Student’s IEP. The Compensatory Education to be offered to the Parent shall include at least:	The District shall submit the following:  Completed plan for delivery of Compensatory	<b>December 15, 2021</b>

<sup>39</sup> Questions and Answers: Implementation of IDEA Part B Provision of Services in the Current COVID-19 Environment (OSEP 9/28/20)

<sup>40</sup> Oregon’s Extended School Closure Special Education Guidance (ODE 5/11/20)

<sup>41</sup> *Andrew F.*, 137 S.Ct. at 999

<sup>42</sup> *Amanda J. v. Clark Co. Sch. Dist.*, 267 F.3d 877, 892 (9<sup>th</sup> Cir. 2001) (citing *Roland M. v. Concord 13684 Sch. Comm.*, 910 F.2d 983, 994 (1<sup>st</sup> Cir. 1990))

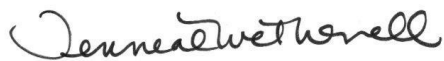
<sup>43</sup> *Target Range*, 969 F.2d at 1484

<sup>44</sup> *Amanda J.*, 267 F.3d at 892 (citing *Roland M.*, F.2d at 994)

<sup>45</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)).

<ul style="list-style-type: none"> <li>• 60 hours of specially designed instruction in functional skills;</li> <li>• 60 hours of specially designed instruction in writing;</li> <li>• 20 hours of specially designed instruction in self-advocacy; and</li> <li>• 20 hours of specially designed instruction in motor skills.</li> </ul> <p>The District must hold an IEP meeting with the Parent to develop a plan to deliver this SDI.<sup>46</sup></p>	<p>Education developed in IEP meeting with Parent;</p> <p>Evidence showing compensatory education was provided.</p>	<p><b>November 1, 2022</b></p>
<p>2. The District must ensure that all District staff responsible for reviewing, revising, developing, and implementing IEPs for this student receive training in each of the following areas:</p> <ul style="list-style-type: none"> <li>• IEP Review/Revision;</li> <li>• IEP Development;</li> <li>• IEP Implementation;</li> <li>• Placement Determinations;</li> <li>• Prior Written Notices; and</li> <li>• Parent Participation</li> </ul>	<p>Training agenda/materials to County Contact for review/approval.</p> <p>Sign-in sheet for training.</p>	<p><b>January 15, 2022</b></p> <p><b>March 15, 2022</b></p>

Dated: this 23rd Day of November 2021




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Tenneal Wetherell  
Assistant Superintendent  
Office of Enhancing Student Opportunities

E-mailing Date: November 23, 2021

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>46</sup> The Department provides IEP Facilitation services when it is mutually desired by parents and school districts and is available to support the Student's IEP team in this meeting. If a Facilitated IEP meeting is desired, please email [ode.disputeresolution@ode.state.or.us](mailto:ode.disputeresolution@ode.state.or.us).