

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of )  
Dallas School District 2 )

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FINDINGS OF FACT,  
CONCLUSIONS,  
AND FINAL ORDER  
Case No. 23-054-008

**I. BACKGROUND**

On February 27, 2023, the Oregon Department of Education (the Department) received a written request for a special education complaint investigation from an interested individual (Complainant) of a student (Student) residing in the Dallas School District 2 (District). The Complainant 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 March 2, 2023, 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 March 16, 2023.

The District submitted a *Response* on March 16, 2023, 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, 3/16/23
2. Emails amongst District staff, the Education Service District (ESD), and the Parent, 9/20/22-2/27/23
3. Service Record for Student, 3/2/22-2/22/23
4. Individualized Education Program (IEP) – Amendment 2, 1/26/22
5. Special Education Placement Determination, 1/26/22
6. IEP Meeting Agenda, 1/26/22
7. IEP Meeting Notes, 1/26/22
8. Prior Notice of Special Education Action (PWN), 1/26/22
9. Written Agreement between the Parent and the District, 1/11/22
10. Written Agreement between the Parent and the District, 1/16/22
11. Notice of Team Meeting on 1/26/22, 1/11/22
12. ESD Augmentative and Alternative Communication (AAC) Evaluation, 1/21/22
13. Notice of Team Meeting on 4/12/22, 3/16/22
14. IEP - Amendment 3, 4/12/22

<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)

15. Special Education Placement Determination, dated 1/26/22 (*most likely attached to or from the 4/12/22 IEP meeting*)
16. PWN, 4/12/22
17. IEP Meeting Notes, 4/12/22
18. IEP Snapshot, 4/12/22
19. IEP Progress Report, 6/13/22 (*includes entries from 1/28/22 and 6/13/22*)
20. Health Management Plan, 9/28/22
21. Safe Feeding Protocol, 9/6/22
22. Letter to Parents, dated 2022/2023 School Year
23. Notice of Team Meeting on 9/28/22, 9/14/22
24. IEP – Amendment 4, 9/28/22
25. Extended School Year Data and Recommendations, 10/25/22
26. IEP Meeting Notes, 9/28/22
27. Notice of Team Meeting on 10/26/22, 9/21/22
28. Notice of Team Meeting on 10/26/26, 10/26/22
29. IEP - Annual, 10/26/22
30. Special Education Placement Determination, 10/26/22
31. IEP Meeting Notes, 10/26/22
32. PWN, 10/26/22
33. IEP Snapshot, 10/26/22
34. Prior Notice about Evaluation/Consent for Evaluation, 10/31/22
35. IEP Progress Report, 2/10/23 and 2/28/23
36. IEP Meeting Agenda, 2/22/23
37. Notice of Team Meeting on 2/22/23, 1/20/23
38. Notice of Team Meeting on 2/22/23, 1/18/22
39. IEP Amendment, 2/22/23
40. Special Education Placement Determination, 2/22/23
41. IEP Meeting Notes, 2/22/23
42. PWN, 2/22/23
43. Functional Behavior Assessment (FBA), 2/22/23
44. “Events for Student” (log of events), 8/30/21 - 3/13/23

The District submitted additional documents on April 5,10,11, and 12, 2023:

1. IEP Progress Report for Speech-Language Therapy Goal, dated 1/28/22 and 6/10/22 (this one was missing from the documents submitted by the District)
2. File Review of Existing Information/Student Referral, 9/2/21
3. Prior Notice about Evaluation/Consent for Evaluation, dated 9/2/21 and signed 10/5/21
4. ESD Audiological Report, 10/6/21
5. IEP from out of state school district, 5/27/21
6. “Team Action” document from out-of-state school district, 1/5/21
7. IEP, 9/2/21
8. Special Education Placement Determination, 9/2/21
9. Notice of Team Meeting on 9/2/21, 8/30/21
10. PWN, 9/23/21
11. IEP Meeting Notes, undated (but likely from 9/2/21)
12. IEP, 12/8/21
13. Special Education Placement Determination, 12/8/21
14. IEP Meeting Agenda, 12/8/21
15. IEP Meeting Notes, 12/8/21
16. IEP Snapshot, 12/8/21
17. PWN, 12/8/21

- 18. Notice of Team Meeting on 12/8/21, 10/13/21
- 19. IEP Amendment (cover page and meeting participant sections only), 12/9/21
- 20. IEP Meeting Agenda, 12/9/21
- 21. IEP Meeting Notes, 12/9/21
- 22. Notice of Team Meeting on 12/9/21, 12/9/21

The Complainant submitted a *Reply* on March 23, 2023, providing an explanation and rebuttal in support of the Complainant’s position.

The Complaint Investigator interviewed the Complainant and the Parent on April 4, 2023. From April 4 to April 6, 2023, the Complaint Investigator interviewed District personnel. Virtual interviews were conducted instead of on-site interviews. 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 Complainant’s 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 February 28, 2022, to the filing of this Complaint on February 27, 2023.

<b>Allegations</b>	<b>Conclusions</b>
<p><b>IEP Content</b></p> <p>The Complainant alleges that the District violated the IDEA by failing to developing an IEP that included appropriate special education and related services and supplementary aids and services to be provided for the Student to advance appropriately toward attaining the annual goals; to be involved and progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and without disabilities.</p> <p><i>(OAR 581-015-2200; 34 CFR §300.320)</i></p>	<p><b>Substantiated</b></p> <p>The IEPs did not contain appropriate special education and related services, particularly in the areas of language and communication. The Student’s IEPs were not reasonably calculated to enable the Student to make progress appropriate in light of the Student’s circumstances.</p>
<p><b>IEP Team Considerations and Special Factors</b></p> <p>The Complainant alleges that the District violated the IDEA by failing to consider, as a child who is deaf or hard of hearing, the Student’s language and communication needs, opportunities for direct communication with peers and professional personnel in the child’s language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child’s language and communication mode.</p>	<p><b>Substantiated</b></p> <p>The IEP team did not fully consider the Student’s language and communication needs, as well as other factors related to the Student’s disability related needs.</p>

**REQUESTED CORRECTIVE ACTION**

- Send the Student to the Oregon School of the Deaf at the District's expense, or immediately provide a sign language interpreter.
- Pay for the Student's Parent to learn ASL so they can better advocate and communicate with the Student, since the District doesn't care.

**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 February 28, 2022. 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 six years old and in the first grade.
2. The Student was initially found eligible for special education services on December 18, 2019, in an out-of-state school district (Established Medical Disability and Hard of Hearing).
3. The Student is currently eligible for special education services in Oregon under the categories of Other Health Impairment (OHI) and Deaf or Hard of Hearing (DHH).
4. The Student's medical history includes diagnoses of Down syndrome, cardia defect, and bilateral fluctuating conductive hearing loss secondary to middle ear dysfunction.
5. The Student's out-of-state IEP, dated May 27, 2021 (May 2021 IEP), was developed for the Student's transition to kindergarten. The IEP included the following, in relevant part:
  - a. Related Services: specialized deaf and hard of hearing (DHH) services for 15 hours per year; audiological services for one hour per year; and language and speech services for 30 hours per year.
    - i. DHH services: the Student required support in hearing aid usage, self-advocacy, and communication. The Student would receive "Direct service... on IEP goals, hearing aid usage, consultation/ collaboration with staff regarding hearing loss related issues, functional signs, and support with auditory needs."
    - ii. Language and Speech services: the Student required support in "Functional and Social Communication Skills" and "Receptive and Expressive Language Skills." The Student would receive "direct, consult and collaboration with classroom staff on appropriate communication strategies to facilitate increased spontaneous communication and play skills with peers and adults."
  - b. Extent of removal: 76.1% in separate classroom (1785 minutes per week).

- c. Justification for Removal: “[The Student] requires a small, structured and language rich environment in order to access [their] education. [The Student] also needs access to a teacher with specialized training in working with students with a hearing loss, in a room chosen in consideration of acoustical factors.”
6. The Student moved to the District shortly before the start of the 2021-22 school year.
7. The Student started kindergarten at a District elementary school (the Student’s School) in September 2021.
8. On September 2, 2021, the District convened an IEP and evaluation planning meeting.
9. A September 2, 2021 District File Review of Existing Information/Student Referral included the following, among other things:
  - a. The Student’s mode of communication was listed as “Verbal/sign language.”
  - b. Areas of concern included math, reading, written language, functional communication, language, self-help, gross motor, and fine motor skills.
  - c. The existing information about the Student’s communication stated:

“Prior information dated 5/27/21 indicates that [the Student] will use symbol/sign utterances to communicate to others in familiar social situations for a variety of basic purposes. [The Student] demonstrates good eye contact and joint attention in language and play activities. [They] can use simple language modeled by others.

[The Student] communicates primarily using pointing, gestures, vocalizations, and signs. [The Student] presents with severe delays in both receptive and expressive language skills. [The Student] demonstrated an increase imitation of presented communication modalities (signs, gestures, verbal attempts).”
  - d. The team determined additional evaluation data was needed in the areas of classroom skills, health, hearing, and motor abilities. The team determined it did not need additional evaluation data in the areas of academic performance, cognitive ability/general intelligence, communication, behavior (social/emotional and adaptive), and assistive technology.
10. A Prior Notice about Evaluation/Consent for Evaluation, dated September 2, 2021, included:
  - a. The team proposed conducting an initial evaluation of the Student because they “moved to Oregon from out-of-state with a current IEP and eligibilities. The IEP team needs to determine eligibility in the state of Oregon for Other Health Impairment and Deaf or Hard of Hearing.”
  - b. The team decided the Student’s evaluation would include “Medical statement, PT observation, OT observation, Deaf and Hard of Hearing observation, parent interview.”
  - c. Consent for evaluation was signed by the Parent on October 5, 2021.
11. The September 2, 2021 IEP (September 2021 IEP) included the following, in relevant part:

- a. “[The Student] has Down’s [sic] Syndrome with delays that impact all areas of development and also a bilateral fluctuating conductive hearing loss secondary to middle ear dysfunction.”
- b. Much of the statement of present levels of academic achievement and functional performance (present levels) were copied from the May 2021 IEP, along with some updated information from the team.
- c. Present levels for audiology/hearing were copied from the May, 2021 IEP, stating, “Hearing: Evoked response testing for [the Student] on 5/3/2021 revealed normal hearing sensitivity in the right ear and a mild conductive hearing loss rising to normal in the left year.”
- d. Present levels for DHH were copied from the May 2021 IEP, stating, “DHH: [The Student] continues to learn best through a multi-sensory approach that allows [the Student] to respond in a variety of different communication modalities (e.g., vocalizing/speaking, signing, using pictures/symbols, etc.) ... At this time, [the Student] has not been observed using sign language to communicate [their] needs or wants. [The Student] has copied a few signs modeled for [the Student] by an adult...”
- e. Present levels for communication development were copied from the May 2021 IEP, stating “[The Student] continues to present with sever [sic] delays in both receptive and expressive language skills. Per outside Speech and Language provider report dated 1-5-21, [the Student] was reported to understand 50 words, ... comprehension of signed language and gestures has been improving... has demonstrated success in communication through signs, gestures, and/or word approximations... verbalize and /or signs for two different needs and will occasionally imitate words overheard in conversation.”
- f. Special Factors: communication needs, deaf or hard of hearing, and assistive technology (AT) needs.
- g. Goals: all of the goals from the May 2021 IEP were carried over (five goals for motor skills and accessibility; two goals for communication development; one reading goal; two math goals; one social/emotional/behavioral goal; and one goal for adapted/daily living skills).
- h. Specially Designed Instruction (SDI): in the areas of motor skills (180 minutes per week), daily living (150 minutes per week), behavior – social/emotional (150 minutes per week), and functional academics (150 minutes per week).
- i. Related Services: included SLP services for 30 minutes per week; and “Audiology/Hearing service,” which was included twice (first entry listed at 360 minutes per year and the second at 120 minutes per year). For both audiology/hearing services, the provider was listed as the local education service district (the ESD) and the “role responsible for monitoring” was case manager. Except for the anticipated amount of minutes, the service descriptions were identical.
- j. Most of the accommodations from the May 2021 IEP were carried over, including preferential seating for improved hearing, use of classroom speaker system, language scaffolding to learning tasks, visual supports (daily for learning tasks, self-advocacy, and peer interactions), repeated important information (“daily when peers speak in class and

are seated a distance away or use a quiet voice”), increased processing/response time, and visual and verbal cues. An accommodation for adult support was added.

- k. Supports for School Personnel included Speech/Language Pathologist (SLP) consultation (240 minutes per year) and “Teaching/Hearing Impaired” consultation (360 minutes per year).
  - l. Nonparticipation Justification: “During onsite instruction, [the Student] will be removed from the general education classroom for 630 minutes to receive specially designed instruction in the areas of motor skills, communication, reading, math, social/emotional/behavioral learning, and adaptive/daily living skills.”
  - m. Justification for Removal: “benefits from specially designed instruction in the areas of motor skills, communication, reading, math, social/emotional/behavioral learning, and adaptive/daily living skills.”
12. The September 2021 IEP did not carry over the Student’s need for (1) “a teacher with specialized training in working with students with a hearing loss,” or (2) “a room chosen in consideration of acoustical factors,” from the May 2021 IEP.
13. It is unclear why the nonparticipation justification stated that the Student benefits from SDI in communication and would be removed from general education to receive SDI in communication, as the Student only had communication under related services.
14. The District reported that it contracted with the ESD to provide services to District students, including audiology, speech-language therapy, and DHH services.
15. The September 2, 2021 District meeting notes included the following:
- a. The Parent reported that “[the Student] wears hearing aides [*sic*] – does not like them – must be monitored at all times with [their] hearing aids to make sure [the Student] doesn’t take them out... Has a device a teacher can speak into that will go directly to [the Student’s] hearing aid – [the Parent] will bring them in.”
  - b. A DHH specialist from the ESD asked the Parent for a list of American Sign Language (ASL) vocabulary that the Student knew.
  - c. An SLP from the ESD “asked if [the Student] verbalizes/vocalizes – [the Student] will say hi, bye, uh for up, variation of small words and is often accompanying a sign. [The SLP] will do some consulting and does not need any specific testing for consent.”
  - d. All present level information and goals “taken from previous IEP.”
  - e. Related Services: “Audiology/Hearing Service - 6 hours for audiology eval. and for audiology services - 120 min/yr; hearing specialist.”
16. When asked why the September 2, 2021 IEP included two related services titled “Audiology/Hearing services,” the District Special Education Director (the Director) stated one entry was for audiology services and the other was for DHH services. However, there is nothing in the service description to distinguish one entry from the other.

Based on this information and the September 2, 2021 IEP meeting notes, the first audiology/hearing services (360 minutes per year) would have been for audiology services and the second (120 minutes per year) for DHH services.

17. From the May 2021 IEP to the September 2021 IEP, the speech language therapy related services changed from 30 hours per year (roughly 35 minutes per week) to 30 minutes a week. The DHH services were reduced from 15 hours a year to two hours per year.
18. The September 2, 2021 Special Education Placement Determination listed the selected placement as “40%-79% in the general education setting.”
19. The District issued a Prior Notice of Special Education Action (PWN) dated September 23, 2021, which stated, “The team met to create an interim IEP for [the Student] as a new student from [out of state]. The team created a pre-plan to start evaluating [the Student] and create an Oregon eligibility for other health impairment and hearing impairment.”
20. An October 6, 2021 ESD Audiological Report included the following:
  - a. History: “[The Student] was diagnosed with conductive hearing loss in both ears in February 2018... [The Student] received BAHA 5 Power bone-anchored hearing devices for each ear, via soft band, in April 2020... [the Student] does not tolerate the devices for long periods of time. [The Student] uses them for approximately five minutes at a time at home... [the Student] communicates by using sign language and vocalizations... [the Student] uses the BAHA devices intermittently in school... [The Parent] indicated that the teachers in class may have difficulty with proper BAHA placement on [the Student’s] head.
  - b. Tympanometry testing: The Student’s crying and movement during the test made it difficult to interpret the test.
  - c. Impressions: “[The Student] presents with a mild hearing loss in at least on [sic] ear... The type of hearing loss could not be determined as [the Student] would not tolerate bone conduction testing... [The Student’s] hearing loss may continue to impact [their] ability to access spoken language and communication in the educational environment.”
  - d. Recommendations: continue use of BAHA hearing devices “with the goal as increasing to daily use during all waking hours”; use “FM/DM system in the classroom”; return to ESD in three months to repeat audiologic evaluation; continue ESD DHH services; “[The Student’s] DHH teacher can assess [their] classroom set-up and make recommendations; and “assistance can be provided to the teachers regarding proper BAHA placement on [the Student’s] head.”
21. An October 2021 communication development update stated, “[The Student] currently participates in weekly speech-therapy services in the [special education] classroom. SLP provides group-wide, push-in services to provide total communication support throughout the class. This also allows for staff support and modeling strategies. [The Student] uses signs frequently with [their] aids [sic], who model signs with [the Student] as well.”
22. Following a November 2, 2021 observation with an augmentative and alternative communication (AAC) specialist and an SLP, it was determined that the Student met the criteria for an AAC evaluation. The AAC specialist and SLP reported, “It is felt that the student would benefit from additional communicative support in order to further advance [their] speech and language skills.”



23. On December 8, 2021, the District convened an IEP meeting to develop the Student's annual IEP.
24. The December 8, 2021 IEP (December 2021 IEP) included the following changes, in relevant part:
  - a. The September 2021 IEP present levels were largely carried over, with updated information added in some areas.
  - b. An October 2021 update included, "[The Student] wears hearing aids on a head band, along with a mask that attaches to clips on the head band. [The Student] often takes [their] mask off and will take [their] hearing aids off when they bother [the Student]. Staff encourage [the Student] to wear [their] hearing aids and mask, often through modeling, visual cues, and reminding [the Student] [they need] to wear them to be able to do certain activities. When [the Student] does not wear [their] mask, [the Student] works in [their] personal learning area in the DLC. When [the Student] does wear [their] mask, [the Student] is able to join [their] peers in [their] gen ed class. [The Student] joins [their] gen ed peers for all meals, as a mask is not required for meal time. It is inconsistent the frequency and length of time that [the Student] will wear [their] mask, which impacts [the Student's] ability to be in [their] gen ed class."
  - c. A December 2021 update included, "[The Student] will sign several words (both familiar and new) with staff, with a mix of imitation and spontaneity. [The Student] is consistent at signing 'yes' in response to questions..."
  - d. The present levels did not contain evaluation or assessment data, other than evaluation information from the May 2021 IEP. The present level for "hearing" was comprised of information from the May 2021 IEP and was not updated by the IEP team, although an audiological evaluation was completed in October 2021.
  - e. Goals: remained the same except the two communication development goals were removed and replaced by one speech-language therapy goal ("Using a multimodality approach (e.g. signs, gestures, words, or an augmentative communication system), [the Student] will increase age-appropriate receptive and language skills to 80% accuracy within the educational setting...").
  - f. The objective for the reading goal stated that the Student would "demonstrate awareness of letters by labeling, signing, or using a device when presented with a letter." The goal for adaptive/daily living skills stated that the Student would "gain attention and request help verbally, gesturally, using sign or an AAC device when needed."
  - g. Related services: the first "Audiology/Hearing Service" entry was reduced from 360 to 180 minutes per year; the second "Audiology/Hearing Service" entry was increased from 120 to 240 minutes per year; and SLP services were reduced from 30 minutes a week to 60 minutes per month.
25. The December 8, 2021 District meeting notes included the following: (D441)
  - a. DHH Specialist: "observed during [the Student's] speech time. Signed with [the Student]. [The Student] was attentive when signed to, receptive. Understands my turn, your turn. –

[The Parent] gave input that [the Student] open ups [sic] when [they] see others using ASL.”

- b. The Student “is interested in different ways of communicating” and “will receive total communication approach.”
  - c. Related services information was noted as follows:  
“Related Services  
Audiology:  
180 booth  
240 minutes”
26. Present level information carried over from the previous IEPs was largely undated, making it difficult to determine what information was current and what information was from the May 2021 IEP.
27. Neither the December 2021 IEP nor the December 8, 2021 IEP meeting notes explain the reduction in SLP related services from 30 minutes per week to 60 minutes per month.
28. On December 9, 2021, the District convened another IEP meeting as the Student’s eligibility for DHH could not be completed at the December 8, 2021 IEP meeting because the team was unable to locate the audiology evaluation report prior to the December 8, 2021 IEP meeting.
29. A December 9, 2021 PWN stated, “The team reviewed a medical statement, audiological evaluations, informal assessments, and teacher/parent input. The team found [the Student] eligible for special education services in the state of Oregon under the categories of Other Health Impairment and Hearing Impairment. The team revised the IEP to reflect the eligibilities...”
30. On January 26, 2022, the District convened an IEP meeting to discuss the results of the AAC evaluation.
31. The January 26, 2022 amended IEP made the following changes, in relevant part:
- a. Present Levels: “Given [the Student’s] limited verbal output, strong communicative intent, use of sign language and stimulability” AAC recommendations were made to the team.
  - b. The AAC recommendations included the use of augmentative and alternative communication, “iPad with speech generating app TD Snap,” and use of signs associated with visual supports, among other things.
  - c. Accommodations: added “AAC supports: ipad.”
  - d. Supports for School Personnel: added AAC consultation for 420 minutes per year.
32. The January 26, 2022 District IEP meeting notes included the following:
- a. “[The Student] is rapidly developing the use of ASL. Increase of visual supports will help [the Student] soar in [their] communication abilities. Concerns: ASL is doing so well, if a device is implemented, will it disrupt [the Student’s] ASL ability? Conclude that it will not since [the Student] can shift between communication modalities with ease. [The Student] is able to receptively and expressively communicate with different modalities. AAC feels that a device will be beneficial, [the Parent] is excited. [The Student] is a quick learner. A

- lot of the signs [the Student] knows are for objects/nouns. We want to 'beef' up [the Student's] language production – adding verbs, adjectives to increase connected speech... Reiterated that the device is to add visual communication, not to take place of ASL.”
- b. “Reviewed communication goal - goal is the same, however adding in AAC objectives to make [the Student's] language more global.”
33. The District issued a PWN dated January 26, 2022, which stated the team determined that the Student was eligible for AAC services and “has unmet communication needs and AAC will help meet those needs.”
  34. The District provided an IEP Progress Report for the Student’s speech-language therapy goal, dated January 28, 2022. The report stated that the Student’s IEP was recently amended and not all objectives had been targeted at that time. It stated that the Student “has been making consistent progress towards [their] goals,” among other things, but it did not contain any measurable progress information.
  35. The District provided a service log documenting services from March 2, 2022 to February 22, 2023, which recorded the following:
    - a. From March 2, 2022 through the end of the 2021-22 school year, an ESD DHH specialist provided at least 90 minutes of direct instruction to the Student each month (90 minutes in March, 135 minutes in April, 90 minutes in May, and 10 minutes in June, 2022), for a total of 200 minutes. The IEP required 240 minutes of DHH services per year.
    - b. From March 2, 2022 through the end of the 2021-22 school year, the service log included one entry for speech language therapy services provided to the Student (April 5, 2022).
  36. A service log entry dated May 25, 2022 reported, “[The Student’s] hearing was tested and evaluated at [the ESD] in October of 2021 and with a follow-up evaluation in January 2022. The results indicate a mild, low-frequency loss in both ears with the left ear rising to normal from 2000Hz to 8000Hz. The right ear presents as normal except for a loss at 250Hz. The hearing loss has been conductive in the past but was not verified in the most recent test.”
  37. The District provided an IEP Progress Report for the Student’s speech-language therapy goal dated June 10, 2022, which stated in its entirety: “[The Student] continues to make significant progress toward [their] speech therapy goals. [The Student] participates in group speech therapy sessions and is often a role model, showing other students appropriate communication. [The Student] answers many person-centered questions and can label or identify many familiar nouns and descriptors (e.g. animals, colors). [The Student] does not yet answer abstract questions (e.g. relating to events in a book, or describing things) but [the Student] does mirror communication models from staff and responds well to prompts. [The Student] is starting to combine signs to increase [the Student’s] utterances.” The progress report did not contain any measurable progress information.
  38. It is unclear whether the progress report was based solely on the April 5, 2022 speech language therapy session. The Case Manager reported that the SLP wrote the progress report for the Student’s speech language therapy goal and the Case Manager was not involved and did not monitor progress on this goal. That SLP has since left the ESD and was not available to be interviewed.
  39. The Case Manager reported the following about the Student’s language and communication:

- a. The Parent communicated that the Student used ASL at home. Therefore, the Case Manager paired the Student with instructional aides who showed the most interest in learning some sign language. A DHH specialist would provide the Case Manager and aides with resources on sign language, such as books, flash cards, links to websites, and tutorial videos.
  - b. The school had a speaker system in the general education class to help the Student hear the teacher. The classroom teacher wore a microphone, and the sounds was amplified by a speaker. The speaker system did not connect to the Student's hearing aids.
  - c. The Student had ongoing issues with wearing their hearing aids. The Student would come to school with them on but would frequently take them off. The Case Manager stated that there was only so much school staff could do about this.
40. On September 6, 2022, the Student started the 2022-23 school year as a first grader.
41. A new DHH specialist from the ESD (the DHH Specialist) started providing services to the Student at the start of the 2022-23 school year.
42. According to the service logs provided by the District, from the start of the 2022-23 school year through February 22, 2023:
- a. The DHH Specialist provided direct instruction to the Student (40 minutes in September, 0 minutes in October, 60 minutes in November, 30 minutes in December, 30 minutes in January, and 20 minutes in February). The remaining entries for the DHH Specialist were for consultations and material preparation time.
  - b. No speech language therapy services were provided to the Student until January 31, 2023 (20 minutes were provided in January and 135 minutes in February, 2023).
  - c. There were no entries included for AAC consultation services until February 7, 2023, which stated, "Set up student's AAC device (iPad with TD Snap)."
  - d. There was an entry for an audiology evaluation/assessment (180 minutes) on December 12, 2022, and entries for audiology services on January 12 (10 minutes), January 27 (20 minutes) and February 14, 2023 (10 minutes). However, these entries did not include any additional information about evaluation results or the services provided.
43. In a September 20, 2022 email to the Director, the DHH Specialist wrote, "[The Parent] expressed concern about [the Student's] language development and asked me if I could help. [The Parent] mentioned finding a support staff who can sign, or an ASL interpreter, or possibly transferring [the Student] to [the Oregon School for the Deaf (OSD)]. I suggested [the Parent] visit OSD just to see what it's like and told [the Parent] I would consult with my supervisor... [My supervisor] recommends a staff person who can sign, stating an interpreter would be too advanced, and [the Student] wouldn't get any auditory input at OSD."
44. The DHH Specialist reported:
- a. An interpreter would not be appropriate for the Student. The Student's language level was very low and, therefore, they need someone who could teach them sign language rather than someone to translate what the teacher and other students were saying.

- b. The Student had several different instructional aides. The DHH Specialist tried to teach them some sign language and provided them with resources. The aides were very receptive but not sufficiently proficient in ASL to serve as language models for the Student, which was a concern.
- c. The Student had “quite a bit of residual hearing” and the Student likely has access to a lot of speech sounds. The emphasis on the Student learning sign language was because the Parent requested it and the DHH Specialist wanted to support what was happening at home.

45. The Case Manager reported:

- a. The Student had one aide who spent extra time learning ASL. The Student would sign more with this aide than other staff. When the Student was with school staff who could not sign, the Student focused on other modes of communication. The Student knew who could sign and who could not.
- b. The SLP who provided the Student with related services during the 2021-22 school year left the ESD. The ESD was working on filling the position, but the Student did not receive speech services during the first half of the 2022-23 school year. When asked if anyone else would have been working on the speech-language therapy goal with the Student, the Case Manager was not aware of anyone doing so.
- c. When asked whether the Student had opportunities for direct communication with peers in general education, the Case Manager reported that the Student spent about half their time in general education. This was to provide the Student with exposure to general education curriculum and opportunities to be with peers, while also having sufficient time in the special education classroom to access instruction at the Student’s level. The Case Manager scheduled the Student’s time in the general education classroom during core instruction time and during small group activities.
- d. The Case Manager reported that the Student had classmates the Student was familiar with and the Student interacted with peers at recess and lunch. When asked whether the Student and peers were able to communicate with each other, the Case Manager did not know.
- e. When asked whether it was clear from the Student’s IEPs how often the Case Manager and other school staff needed to practice sign language or teach signs to the Student, or if the Case Manager determined when and how often to use sign language with the Student, the Case Manager said it was the latter.
- f. When asked if the Student needed to learn ASL, the Case Manager stated that the Student needed a variation in communication but did not think that the Student needed sign language in isolation. Sign language was not more important than other modes of communication the Student used. The Parent asked for sign language to be used at school, but the IEP team never determined that the Student needed sign language.

46. On October 26, 2022, the District convened the Student’s annual IEP meeting.

47. The October 26, 2022 IEP included the following, in relevant part:

- a. Parent Input: "Biggest concern at this time is that [the Student] would benefit from an ASL aide or interpreter. Concerned about [the Student's] educational progression. [The Parent] is primary person in [the Student's] life with ASL. Would like someone to help [the Student] absorb what is being taught. Concerned that if staff are continually re-learning ASL, it can impact [the Student]... ASL is [the Student's] first language."
  - b. The present levels included updates but much of the information was carried over from the previous IEPs. Among other areas, the present level for "hearing" that was copied from the May 2021 IEP remained. No audiology updates were added.
  - c. The present level statement added for "communication development" dated October 2022 was copied from the June 10, 2022 IEP Progress Report for the Student's speech-language therapy goal.
  - d. The speech-language therapy goal was carried over from the previous IEP without changes.
  - e. SDI: the total SDI minutes were reduced from 630 minutes per week to 1,030 minutes per month (motor skills, split into fine and gross motor, was decreased from 180 minutes per week to 200 minutes per month; SDI for daily living was removed; social/emotional/behavior was replaced by adaptive behavior and decreased from 150 minutes per week to 380 minutes per month; and functional academics decreased from 150 minutes per week to 450 minutes per month).
  - f. Related Services: the first "Audiology/Hearing Service" entry was changed from 360 minutes per year to 60 minutes per month; the second "Audiology/Hearing Service" entry stayed at 240 minutes per year; and SLP services stayed at 60 minutes per month.
  - g. Support for School Personnel: "Teacher/Hearing Impaired" consultation was reduced from 360 minutes per year to 60 minutes per year.
  - h. Nonparticipation Justification: "will be removed from the general education classroom for a minimum of 550 minutes/month to receive specially designed instruction in the areas of fine motor skills and functional academics" and "for a minimum of 60 minutes/month in communication services."
  - i. Justification for Removal: "[The Student] benefits from specially designed instruction in the areas of motor skills, functional academics, and communication."
48. It is unclear which "Audiology/Hearing service" entry (first or second) was for DHH related services. In the previous IEP, the first entry was for audiology services and the second for DHH services. However, in interviews the DHH Specialist reported that the entry for 60 minutes per month was for DHH services.
49. The October 26, 2022 Placement Determination remained the same, with the selected placement of "40%-79% in the general education setting with push in and pull out support by [the special education classroom]."
50. The October 26, 2022 District IEP meeting notes included the following, in relevant part:

- a. Special Factors: The Parent requested that the IEP reflect that ASL was the Student's first language and was told that the District would ask the Director about this. The District agreed to conduct the behavioral assessment requested by the Parent.
  - b. An ESD SLP reported, "We are behind on speech time but will work with [the Student] to make up the time [they] have missed."
  - c. The Parent requested an ASL interpreter for the Student and expressed concern that the Student was not making progress and was losing their ability to sign. The Parent was told that the team would encourage staff to sign with the Student.
  - d. An ESD AAC specialist asked if the Student was using their AAC device and the Case Manager reported, "We have not received [the Student's] device yet."
  - e. The Parent asked if the school was using a speaker system, and whether it "connects directly to [the Student's] hearing aids." It was determined that the Parent would bring the device that connects directly to the hearing aids and the DHH Specialist would "try to make it work."
  - f. The related service time for DHH services was updated to have the DHH Specialist work with the Student on sign language more.
51. It is unclear how much of the Student's SLP related service time was missed or what the plan was to make up the missed time.
52. The District reported that "Special factors were discussed and updated by all participants of the IEP team" at the October 26, 2022 IEP meeting. However, except for the change made to add behavior as a special factor and the Parent's request that the IEP reflect that the Student's primary language was ASL, there is nothing in the IEP or meeting notes to reflect a specific discussion about communication as a special factor (i.e., the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode.)
53. When asked why the October 26, 2022 IEP stated that the Student was making significant progress on the speech-language therapy goal when the Student was not getting speech-language therapy and progress data was not being tracked, the Case Manager did not know.
54. The Parent reported that the device which transmits audio from the teacher's microphone directly to the Student's hearing aids had better sound quality and reduced background noise.
55. The District issued a PWN dated October 26, 2022, which stated:
- a. "[T]he team reviewed parent concerns (ASL interpreter or aide, concerns about educational progression, impact of staff continually re-learning ASL)...."
  - b. "[S]pecial factors – updated letter A (behavior) to say yes... Everything else stayed the same."
  - c. "Team agreed to remove goals in areas of motor skills (as PT recommendation), adaptive/living skills (met), math (met) update social/emotional/behavioral to adaptive, add

functional academics in writing, updated remaining goals to reflect present levels and needs.”

56. Witnesses reported that the team never determined whether the Student needed an interpreter or an educational assistant proficient in ASL. It was decided that the team would start by having the aides learn more sign language.
57. In a November 1, 2022 email to the Parent, the Case Manager wrote: “As for the limited English proficiency spot under special factors... we only mark yes if the student is receiving ELD (English language development) services... Because [the Student] does not receive ELD services, it remains ‘no’ under the special factors section of the IEP.”
58. In a November 21, 2022 email to the Director, an ESD AAC specialist wrote, “...I’m the new AAC SLP serving [the District]... [the previous AAC specialist] left me a note saying the following students had their AAC evaluations but are still waiting for their devices. They were all recommended TD Snap, which is \$50. I added [the Student] because I attended [their] IEP and was told [the Student] never got [their] device. I sent my boss... several emails about this but never received a clear answer. So I thought I’d reach out to you to see if you can get them the devices.”
59. The Parent reported that the Student finally got the AAC device in December 2022, but when it arrived, it did not have the correct icons and it needed to be adjusted before the Student could start using it.
60. In a December 14, 2022 service log note, the DHH Specialist wrote, “I talked with the aide who works most with [the Student] about [the Student’s] language. [The aide] says [the Student] can rarely express [themselves] verbally, sometimes [the Student will] yell something and [the aide] can sort of understand [the Student] based on context. [The aide] said [the Student] has really regressed from last year. [The Student is] more frustrated at school...”
61. The Director reported being notified by the DHH Specialist that the Student was “starting to really grasp more receptive/expressive sign language. [The DHH Specialist’s] recommendation for hiring an EA that could sign would be beneficial.”
62. Because of the updated information from the DHH Specialist, on December 16, 2022 the District posted a job for “a full-time (7 hours a day) American Sign Language/Interpreter/Intervener Educational Assistant. Due to no applicants – the position” continued to be posted as of the date this Complaint was filed.
63. In a January 13, 2023 email to the School Principal, the DHH Specialist wrote, “I forwarded the job posting for the position working with [the Student] to my colleague and [they] informed me that the ASL requirements would be too advanced for anyone who hasn’t graduated from an interpreting program to qualify for... Would it be possible to change the position to an instructional assistant proficient in ASL? This would make it possible for the candidates we had in mind to apply.”
64. District staff reported that the job position was specifically for someone to work with the Student on sign language. However, the Student’s IEP was never revised to reflect that this was something the Student needed.
65. On January 13, 2023, a new ESD SLP emailed the Student’s new Case Manager stating, “We just got confirmation... from [the ESD] ... met with [the Director] who approved a plan that



shifts a bit of [the District] speech caseloads to make it possible to begin to see the students still needing services for speech.”

66. A January 31, 2023 service log entry from the new SLP stated, “This was the first session of the year. SLPA with virtual SLP are in the process of transitioning from another school to provide speech at [the Student’s school].”
67. A February 7, 2023 service log entry from an AAC Specialist stated, “Set up student’s AAC device (iPad with TD Snap).”
68. On February 22, 2023, the District convened an IEP meeting to review and revise the Student’s IEP.
69. The February 22, 2023 amended IEP included the following changes, in relevant part:
  - a. Parent Input: “Continued concerns about wearing hearing aids at school.”
  - b. “Functional Behavior Analysis [sic] (FBA) reviewed and determined Behavior Support Plan is not needed at this time due to limited manifestation of behaviors in the areas of non-compliance, inappropriate location (no physically aggressive behaviors have been seen at school).”
  - c. “Services: Added accommodations: hearing aid tracker/schedule/home-school communication system (to incentivize, track, and document frequency/duration of hearing aid use at school.”
  - d. Communication Development: “[The Student] has begun participating in in-person speech therapy with an SLPA in conjunction with an SLP and AAC specialist. In an initial probe of [the Student’s] goal of answering yes/no questions [the Student] demonstrated 47% accuracy independently... [The Student] has been observed to mostly use 1-word verbal utterances, and specialists and teachers are supporting 2-3 word utterances by modeling on [the Student’s] communication device using the beginning of functional phrases such as ‘help’ and ‘want.’ Data is limited at this time as SLPA and [the Student] are working on building rapport as a critical component of the teaching model while establishing a baseline for all of [the Student’s] goals.
  - e. “There continues to be an ASL interpreter/Intervener EA posting listed for [the District] for [the Student’s school].
  - f. Related Services: DHH services were increased from 60 to 120 minutes per month.
  - g. Supports for School Personnel: “Teacher/Hearing Impaired” consultation was increased from 60 to 120 minutes per year.
70. The February 22, 2023 District IEP meeting notes stated:
  - a. The Parent wanted to know when the Student is or is not wearing their hearing aids, to share with the Student’s private audiologist.
  - b. “Placement: 40-70% of the day within the gen ed setting / OSD information shared.”

71. The February 22, 2023 Placement Determination included OSD as a placement option, stating, “The team considered Oregon School for the Deaf as a placement option but determined that it was not appropriate at the time.”
- a. Benefits of OSD placement: signing environment (ASL).
  - b. Possible harmful effects of OSD placement: “The school is not located in Dallas... Longer bus ride... OSD uses ASL. This may limit [the Student’s] ability to access total communication (Voice/Aug Comm).”
72. On February 22, 2023, the District issued a PWN which stated, “Placement determination – the team determined that a placement of 40-79% in the general education classroom is what best meets [the Student’s] needs at this time. The team also considered Oregon School for the Deaf as a placement options [*sic*] (not appropriate at this time).”
73. The Parent reported that at the February 22, 2023 IEP meeting, the IEP team talked about OSD. However, the team never made a placement determination regarding OSD nor was it decided that OSD was inappropriate. The Parent said the District suggested getting more information about OSD’s ability to meet the Student’s other disability related needs, but the team did not have enough information at the time to make a decision.
74. When asked why the IEP team determined OSD was not appropriate at the time, the Director reported that the statement “not appropriate at this time” was one of two drop-down choices in the computer system when marking a placement option as rejected.
- “Not appropriate at this time” was likely selected because it was more appropriate than the other option.
75. In a February 22, 2023 service log entry, the DHH specialist wrote, “I asked to increase my service time from 60 minutes/month to 120 min/month. Currently I am listed under related services with the label audiology/hearing service- [the District] does not have a more specific label for me.”
76. On February 27, 2023, the Complainant filed this Complaint.
77. The Student’s February 28, 2023 IEP Progress Report for the Student’s speech-language therapy goal stated, “Speech language therapy began with an in-person SLPA and virtual SLP February 2023. No data to report at this time.”
78. The District convened an IEP meeting on April 7, 2023. At the meeting, the team changed the Student’s placement to OSD.

#### **IV. DISCUSSION**

##### **IEP Content**

The Complainant alleges that the District violated the IDEA by failing to developing an IEP that included appropriate special education and related services and supplementary aids and services to be provided for the Student to advance appropriately toward attaining the measurable annual goals; to be involved and progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and without disabilities.

"[The] essential function of an IEP is to set out a plan for pursuing academic and functional achievement."<sup>3</sup> "It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth."<sup>4</sup>

An IEP must contain (1) a statement of the student's present levels of academic achievement and functional performance, including how the student's disability affects the student's involvement and progress in the general education curriculum; (2) measurable annual goals and a description of how the student's progress toward meeting the annual goals will be measured and reported; (3) a statement of the specific special education and related services and supplementary aids and services to be provided to the student; (4) the projected dates for initiation of services and the anticipated frequency, amount, location, and duration of the services; (5) and an explanation of the extent to which the student will not participate with children without disabilities in the regular class and activities.<sup>5</sup>

The specific special education and related services and supports to be provided must enable the student to (1) advance appropriately toward attaining annual goals, (2) be involved and progress in the general education curriculum, and (3) be educated and participate with other children with and without disabilities.<sup>6</sup> "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created."<sup>7</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 a child to make progress appropriate in light of his circumstances."<sup>8</sup>

Two IEPs were in effect during the complaint period, the December 2021 IEP (with multiple amendments) and the October 2022 IEP (amended on February 22, 2023). The present levels of functional performance in the Student's IEPs did not include any evaluation or assessment data, except for recommendations from the January 2022 AAC evaluation and audiology/hearing information from May 2021. Although there is evidence that audiology evaluations were completed by the ESD in October 2021, January 2022, and December 2022, updated audiology information was not added to the Student's IEPs. Much of the present levels of functional performance consisted of information copied from the May 2021 IEP, including information on the Student's communication development. These sections were largely undated, with no indication that the present level information was from May 2021 and not current. All measurable data included in the present levels of functional performance was copied from the May 2021 IEP (until February 22, 2023 when progress data was added for the Student's adaptive, speech language therapy, and motor skills goals).

The present levels for social/emotional/behavioral, health (including audiology), and adaptive/daily living skills were never updated by the District. The December 2021 and October 2022 IEPs exclusively contained information copied from the May 2021 in these areas. The present levels for gross motor/accessibility were likewise entirely comprised of information from the May 2021 IEP, until the District added a one sentence update on February 22, 2023. The Student's IEPs did not appropriately identify the Student's language and communication needs.

Although much of the information from the May 2021 IEP was carried over to the December

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<sup>3</sup> *Andrew F.*, 137 S.Ct. at 999

<sup>4</sup> *Id.*

<sup>5</sup> OAR 581-015-2200(1); 34 CFR §300.320(a)

<sup>6</sup> OAR 581-015-2200(1)(d); 34 CFR §300.320(a)(4)

<sup>7</sup> *Andrew F.*, 137 S.Ct. at 1001

<sup>8</sup> *Andrew F.*, 137 S.Ct. at 1002

2021 and October 2022 IEPs, the IEPs did not include: (1) the Student's need for a teacher with experience working with hearing impaired students, and (2) classroom acoustical factors to be considered.

The December 2021 IEP reduced the Student's related services for speech language therapy from 30 minutes per week to 60 minutes per month. The October 2022 IEP reduced the teaching/hearing impaired consultation from 360 minutes per year to 60 minutes per year, despite the team not collecting data on the student's communication progress. There is nothing in the record to reflect why these communication services were reduced. The Student's IEPs also did not fully describe the audiology/hearing related services, resulting in ambiguity as to the specific amount of services required. Except for the related services for speech language therapy and DHH services, the Student's IEPs did not contain any other direct communication services. The IEPs did not include SDI for communication, despite: (1) the Student's severe deficits in receptive and expressive communication, and (2) the nonparticipation justification statement that the Student would benefit from SDI in communication. The Student's IEPs did not contain sufficient supports and services to address the Student's language and communication needs.

Additionally, the Student did not receive speech language therapy services for much of the complaint period, and data on the Student's only communication goal was not collected. This impeded the IEP team's ability to develop an IEP that was reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances.

The Department substantiates this allegation.

### **IEP Team Considerations and Special Factors**

The Complainant alleges that the District violated the IDEA by failing to consider, as a child who is deaf or hard of hearing, the Student's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode.

In developing, reviewing, and revising a student's IEP, the IEP team must consider: (a) the strengths of the student; (b) the concerns of the parents for enhancing the education of the student; (c) the results of the initial or most recent evaluation of the student; and (d) the academic, developmental, and functional needs of the student.<sup>9</sup> The IEP team must also consider special factors, including the communication needs of the student and whether the student needs assistive technology devices and services.<sup>10</sup>

For a student who is deaf or hard of hearing, the IEP team must additionally consider the student's language and communication needs, opportunities for direct communication with peers and professional personnel in the student's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the student's language and communication mode.<sup>11</sup> If, in considering these special factors, the IEP team determines that a student needs a particular device or service (including an intervention,

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<sup>9</sup> OAR 581-015-2205(1); 34 CFR §300.324(a)

<sup>10</sup> OAR 581-015-2205(2); 34 CFR §300.324(a)

<sup>11</sup> OAR 581-015-2205(3)(d); 34 CFR §300.324(a)

accommodation, or other program modification) for the student to receive free appropriate public education (FAPE), the IEP team must include a statement to that effect in the student's IEP.<sup>12</sup>

Other than the October 2021 audiology evaluation and January 2022 AAC evaluation, there is no evidence that the IEP team considered any additional evaluations or assessments when determining the Student's language and communication needs. As updated audiology/hearing information was not added to the Student's IEP, it is unclear to what extent audiology evaluation results were considered by the team. The IEPs did not appropriately identify the Student's language and communication needs.

The Student's IEPs included accommodations to support the Student's language and communication needs, such as language scaffolds, visual and verbal cues, and adult support, among other things. However, the IEPs did not contain sufficient information on how to implement the total communication/multimodality approach ("signs, gestures, words, or an augmentative communication system"). It is unclear whether the school had staff who were qualified to implement this total communication approach. The DHH Specialist reported that the instructional aides were not sufficiently proficient in ASL to serve as language models for the Student. Except for consultation services from the DHH Specialist, there is no evidence that any school staff had specialized training in sign language or in working with students who are deaf or hard of hearing. The IEP team did not identify how the Student's language and communication needs would be met.

The IEP team never established whether the Student needed support from an ASL interpreter or an educational assistant proficient in ASL. The District's job posting for an ASL/Interpreter/Intervener suggests that the ASL support was needed. However, the need was never affirmed at an IEP meeting or added to the Student's IEP.

The IEP accommodations stated that important information would be repeated to the Student when peers spoke in class, and visual supports would be provided for peer interactions. The IEPs did not otherwise address opportunities for direct communication with peers. The Case Manager reported that efforts were made to include the Student in small group activities in the general education classroom. When asked whether the Student and peers could communicate with each other in general education, the Case Manager did not know.

The IEPs did not indicate the Student's level of residual hearing, or whether this factor was considered in determining IEP services and supports. At the December 8, 2021 and October 26, 2022 IEP meetings, the Parent asked about the use of a sound system that would connect directly to the Student's hearing aids, which could improve sound quality and reduce background noise. It is unclear if the IEP team ever considered whether the use of this type of device could improve the Student's access to instruction and the general education curriculum. The Parent likewise requested that (1) the District teach the Student sign language, (2) District staff use sign language with the Student, and (3) the District provide the Student with an educational assistant proficient in ASL or an ASL interpreter. It is unclear to what extent the IEP team considered the concerns of the Parent for enhancing the education of the Student. While District personnel reported they made efforts to use more sign language because of the Parent's requests, it was never specifically identified as a need or incorporated into the IEP. As the IEP team did not ascertain whether these services and supports were appropriate, there is nothing to reflect the Parent's requests were fully considered.

The Department substantiates this allegation.

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<sup>12</sup> OAR 581-015-2205(4)

## **Additional Findings**

### **When IEPs Must Be in Effect**

School districts must provide special education and related services to a child with a disability in accordance with the child's IEP.<sup>13</sup> 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>14</sup> As soon as possible after the development of the IEP, the services included therein must be made available to the student in accordance with the student's IEP.<sup>15</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>16</sup> "IEP Teams and other school personnel should be able to demonstrate that, consistent with the provisions in the child's IEP, they are providing special education and related services and supplementary aids and services."<sup>17</sup>

"IEP Teams must implement policies, procedures, and practices relating to... how a child's progress towards meeting annual goals will be measured and reported," to ensure that the district offers "an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."<sup>18</sup> A district violates the IDEA when it materially fails to implement an IEP.<sup>19</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>20</sup>

Two IEPs were in effect during the complaint period (December 2021 IEP and October 2022 IEP). Both IEPs included one speech-language therapy goal and related services for speech language therapy at 60 minutes per month. The record indicates that the District provided one speech language therapy session on April 5, 2022 and no additional SLP services occurred until January 31, 2023, when regular SLP services were reinstated. The District did not provide evidence that any additional SLP services were provided during the complaint period. In addition, the IEP team determined in January 2022 that the Student needed an AAC device, but the Student did not have access to the device until February 2023.

The District did not provide special education and related services in accordance with the Student's IEPs. The deficiency in the language and communication services and supports provided to the Student constitutes a material failure to implement the IEPs in effect during the complaint period.

### **Free Appropriate Public Education (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>21</sup> In order to determine

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<sup>13</sup> OAR 581-015-2220(1)(a); 34 CFR §300.323(c)

<sup>14</sup> OAR 581-015-2220(1)(a); 34 CFR §300.323(a)

<sup>15</sup> OAR 581-015-2220(2)(b); 34 CFR 300.323(c)(2)

<sup>16</sup> OAR 581-015-2220; 34 CFR §300.323

<sup>17</sup> Questions and Answers on U.S. Supreme Court Case Decision *Endrew F. v. Douglas County Sch. Dist.*, Re-1, 71 IDELR 68 (EDU 2017)

<sup>18</sup> *Id.*

<sup>19</sup> *Van Duyn v. Baker Sch. Dist.* 5J, 502 F3d 811, 822 (9th Cir. 2007)

<sup>20</sup> *Id.*

<sup>21</sup> OAR 581-015-2040(1); 34 CFR §300.101(a)

whether a student has been denied a FAPE, 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>22</sup> Not every procedural error is sufficient to rise to a denial of FAPE.<sup>23</sup> The procedural test consists of three pivotal procedural errors: (1) whether the student suffers a loss of educational opportunity;<sup>24</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>25</sup>

The District did not develop an IEP that was reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances. The District did not provide the services and supports as required by the Student's IEP, resulting in a loss of educational opportunity. These procedural and substantive violations resulted in a denial of FAPE.

### Prior Written Notice

Prior written notice (PWN) must be given to the parent of a child within a reasonable period before a school district proposes or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child. The content of the prior written notice must include a description of the action proposed or refused by the school district; an explanation of why the district proposes or refuses to take the action; a description of each evaluation procedure, assessment, test, record, or report the school district used as a basis for the proposed or refused action; and a statement that the parents of a child with a disability have protection under the procedural safeguards. If this notice is not an initial referral for evaluation, how a copy of the Notice of Procedural Safeguards may be obtained and sources for parents to contact to obtain assistance in understanding their procedural safeguards are required to be provided. Further required is a description of other options that the IEP Team considered and the reasons why those options were rejected, and a description of and other factors that are relevant to the agency's proposal or refusal.<sup>26</sup>

As described in the previous section, the Parent in this case made multiple requests of the school district that the IEP team had an obligation to consider, determine a course of action, and inform the Parent. As these items were not included in the IEP, the District had an obligation to provide PWN to the Parent indicating that it was refusing to provide them and it failed to do so.

## **V. CORRECTIVE ACTION<sup>27</sup>** *In the Matter of Dallas School District 2* *Case No. 23-054-008*

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

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<sup>22</sup> *Andrew F.*, 137 S.Ct. at 999

<sup>23</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>24</sup> *Target Range*, 969 F.2d at 1484

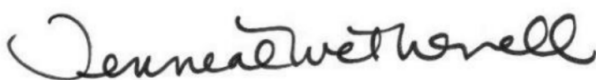
<sup>25</sup> *Amanda J.*, 267 F.3d at 892 (citing *Roland M.*, F.2d at 994)

<sup>26</sup> OAR 581-015-2310(1)(2)(3)

<sup>27</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)).

Action Required	Submissions	Due Date
<p>1. The District must provide the Student with Compensatory Education to make up for SDI/related services not provided pursuant to Student's IEP. The Compensatory Education to be offered to the Parent shall include at least:</p> <ul style="list-style-type: none"> <li>• 7 hours of related services in speech language therapy.</li> </ul> <p>The District must hold an IEP meeting with the Parent to develop a plan to deliver this SDI/related service.<sup>28</sup></p>	<p>The District shall submit the following to the ODE Legal Specialist:</p> <p>Completed plan for delivery of Compensatory Education developed in IEP meeting with Parent;</p> <p>Evidence showing compensatory education was provided.</p>	<p><b>June 15, 2023</b></p> <p><b>April 15, 2023</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 Content;</li> <li>• IEP Special Factors;</li> <li>• IEP Implementation;</li> <li>• Prior Written Notice;</li> <li>• Parent Participation;</li> <li>• Language and Communication, and;</li> <li>• Hearing Impaired Students.</li> </ul>	<p>Training agenda/materials to ODE Legal Specialist for review/approval.</p> <p>Sign-in sheet for training.</p>	<p><b>June 15, 2023</b></p> <p><b>September 15, 2023</b></p>

Dated: this 28<sup>th</sup> Day of April 2023




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Assistant Superintendent  
Office of Enhancing Student Opportunities

E-mailing Date: April 28, 2023

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>28</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).