

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of	)	FINDINGS OF FACT,
Portland School District 1J	)	CONCLUSIONS,
	)	AND FINAL ORDER
	)	Case No. 23-054-011

**I. BACKGROUND**

On April 7, 2023, the Oregon Department of Education (the Department) received a written request for a special education complaint investigation from the parent (Parent) of a student (Student) residing in the Portland School District 1J (District). The Parent 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 is obligated to investigate written complaints alleging violations of the Individuals with Disabilities Education Act (IDEA) and issue an order within sixty days of receiving the complaint.<sup>1</sup> This timeline may be extended if the Parent and the District mutually agree to the extension in order to engage in mediation or local resolution or due to exceptional circumstances related to the complaint.<sup>2</sup>

On April 11, 2023, the Department's Complaint Investigator issued a *Request for Response (RFR)* to the District, outlining the specific allegations in the Complaint to be investigated and establishing a *Response* due date of April 25, 2023.

The District submitted a *Response* on April 25, 2023, denying all but one allegation, 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, 4/25/23
2. Exhibit List, 4/25/23
3. List of Staff Knowledgeable about the Complaint, 4/25/23
4. District Meeting Minutes, 3/02/23
5. District Meeting Minutes, 5/31/22
6. District Meeting Minutes, 1/24/22
7. District Meeting Minutes, 4/29/22
8. Email exchanges amongst District Staff and with the Parent, 4/7/22-4/7/23
9. Individualized Education Program (IEP), 3/2/23
10. Safe Eating Protocol, 1/25/23
11. Worksheet for Function-Based Behavior Support Planning, 12/1/22
12. IEP Amendment, 5/1/22
13. IEP, 1/24/22
14. Notice of Team Meeting on 5/31/22, 5/26/22
15. Special Education Placement Determination, 3/13/23 (*likely misdated*)
16. District Meeting Minutes, 5/31/22
17. Written Agreement Between the Parent and the District, 3/2/23

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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)

18. Notice of Team Meeting on 3/2/23, 2/16/23
19. Notice of Team Meeting on 11/14/22, 9/27/22
20. Prior Written Notice (PWN), 3/2/23
21. IEP Progress Report, 1/24/22
22. IEP Progress Report, 1/29/23
23. Eligibility Summary Statement, 1/24/22
24. Notice of Team Meeting on 4/29/22, 4/4/22
25. Special Education Placement Determination, 1/24/22
26. PWN, 4/4/22
27. PWN, 9/1/21
28. Extended School Year Application, 5/1/22
29. Comprehensive Function Based Behavior Support Plan (BSP), undated (but says 2<sup>nd</sup> grade, so probably from 2021-22 school year)
30. Individual Toileting Protocol, 1/24/22
31. PWN – Notice of Evaluation Decision, 1/24/22
32. PWN – Notice of Eligibility, 1/24/22
33. Disability Statement, 1/24/22
34. Notice of Team Meeting on 1/24/22, 1/3/22
35. Parent/Guardian Consent for Individual Evaluation, 9/29/21
36. Prior Notice and Consent for Initial Provision of Special Education Services, 1/24/22
37. Triennial Multidisciplinary Assessment Report (from out of state school district), 3/4/19
38. IEP (from out-of-state school district), 1/16/20
39. IEP team meeting notes, 1/16/20
40. Behavior intervention plan, 3/5/19
41. Adapted physical education assessment, 12/9/21
42. Physical therapy assessment, 1/24/22
43. Occupational therapy evaluation, 1/24/22
44. Speech assessment Report, 1/11/22
45. Parent/ Guardian consent for Individual evaluation, 9/29/21
46. Multidisciplinary assessment Report, 1/24/22
47. Eligibility summary statement, 1/24/22
48. Medical statement, 2/8/22
49. Prior notice and consent for initial provision of special education services, 1/24/22

The District submitted additional documents on May 12, 2023:

1. District Meeting Notes, 12/5/22

The Parent did not submit a *Reply*. On May 10 and 20, 2023, the Parent submitted the following relevant items:

1. IEP, 1/11/21
2. Evaluation Consent Form, 11/14/22
3. IEP Amendment, 4/12/23
4. District Meeting Minutes, 4/12/23
5. PWN, 4/12/23
6. Email exchange between the Parent and District Personnel, 9/27/22 – 5/2/23

The Complaint Investigator interviewed the Parent who filed the Complaint and the Other Parent on May 3, 2023. From May 4 to May 12, 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 delineated 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 April 8, 2022, to the filing of this Complaint on April 7, 2023.

<b>Allegations</b>	<b>Conclusions</b>
<p><b>Evaluation and Reevaluation Requirements</b></p> <p>The Parent alleges that the District violated the IDEA by not initiating a functional behavior assessment although the Parent requested it and the IEP team determined that the Student's educational or related service needs warranted the reevaluation.</p> <p>(OAR 581-015-2105(5); 34 CFR §300.303)</p>	<p><b>Substantiated</b></p> <p>The IEP team determined that the Student needed an FBA at the May 31 and November 14, 2022 IEP meetings. The Parent signed consent for the FBA on November 21, 2022. The District did not complete an FBA within 60 school days. The District did not conduct an FBA at all during the complaint period.</p>
<p><b>Review and Revision of IEPs</b></p> <p>The Parent alleges that the District violated the IDEA by (1) failing to conduct an annual review of the Student's IEP within 365 days after the previous annual review of the Student's IEP; and (2) failing to revise the Student's IEP to address the Student's needs.</p> <p>(OAR 581-015-2225; 34 CFR §300.324)</p>	<p><b>Substantiated</b></p> <p>(1) The District did not contest this issue and acknowledged that it failed to convene the Student's annual IEP review within 365 after the previous annual IEP review on January 24, 2022.</p> <p>(2) The District did not revise the January 2022 and March 2023 IEPs to reflect the Student's needs, including the failure to add services and supports that the IEP team agreed that the Student needed.</p> <p>The District did not allow the IEP team to determine the Student's needs or the services and supports to be provided to meet those needs.</p>
<p><b>IEP Content</b></p>	<p><b>Substantiated</b></p>

<p>The Parent alleges that the District violated the IDEA when it failed to include specific special education and related services and supplementary aids and services in the Student’s IEP necessary for the Student to advance appropriately towards attaining the annual goals, to be involved and progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate with other children with disabilities and children without disabilities.</p> <p>(OAR 581-015-2200; 34 CFR §300.320)</p>	<p>The January 2022 and March 2023 IEPs did not include sufficient special education services and supports to address the Student’s behavior, safety and adult support needs.</p> <p>The Student’s IEPs did not address how the Student would access the general education environment and participate with other children without disabilities.</p> <p>Most of the Student’s IEP goals were carried over from the January 2022 IEP to the March 2023 IEP, yet nothing was included in the March 2023 IEP to address the Student’s lack of expected progress on the IEP goals.</p>
<p><b>Parent Participation</b></p> <p>The Parent alleges that the District violated the IDEA by interfering with the Parent’s ability to participate in decisions 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.</p> <p>(OAR 581-015-2190; 34 CFR §300.501)</p>	<p><b>Substantiated</b></p> <p>The Parent requested that 1:1 adult support be added to the Student’s IEP. The District did not allow the IEP team to decide on the Student’s adult support needs, infringing on the Parent’s right to participate in educational decisions concerning the Student.</p>
<p><b>Free Appropriate Public Education (FAPE)</b></p> <p>The Parent alleges that the District violated the IDEA by (1) failing to conduct an annual review of the Student’s IEP within 365 days after the previous annual review of the Student’s IEP; and (2) failing to revise the Student’s IEP to address the Student’s needs.</p>	<p><b>Substantiated</b></p> <p>The annual review of the Student’s IEP was not conducted within 365 days of the previous annual review, but the January 2022 IEP continued to be implemented until the March 2023 IEP was developed.</p> <p>However, the District’s additional procedural and substantive violations (including the failure to follow IDEA procedures for developing and revising the Student’s IEPs; preventing the</p>

(OAR 581-015-2225; 34 CFR §300.324)	Parent from participating in the IEP process; and failure to develop IEPs reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances) resulted in a denial of FAPE.
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<b>REQUESTED CORRECTIVE ACTION</b>
<ul style="list-style-type: none"> <li>• The team should revise the Student's IEP to add adult assistance throughout the Student's day based on the Student's needs and existing data.</li> <li>• The District should provide compensatory education to the Student.</li> </ul>

**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 April 8, 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 nine years old and in the third grade.
2. The Student was initially determined eligible for special education services on September 7, 2017, while in another state.
3. The Student is currently eligible for special education services in Oregon under the disability category of Other Health Impairment (OHI).
4. The Student's medical history includes a diagnosis of Smith Magenis Syndrome, which is "a complex and rare genetic developmental disorder affecting multiple systems of the body with congenital birth abnormalities and behavioral and cognitive impact."
5. The out-of-state school district conducted a functional behavioral assessment and developed a behavior intervention plan dated March 4, 2019 to address the Student's noncompliant, self-injurious, and aggressive behaviors.
6. The Student's previous out-of-state school district developed an IEP for the Student dated January 16, 2020 (January 2020 IEP), when the Student was in kindergarten.
7. The January 2020 IEP included the following, in relevant part:
  - a. "[A]reas that impact [the Student] include behavior/impulse control, communication skills and peer socialization." The Student "engages in attention seeking behavior that distracts [the Student] from [their] learning."
  - b. "[The Student] uses a combination of words and signs to communicate. [The Student's] utterances vary from 2-4 words."

- c. “[The Student] is able to self feed [themselves] but must be closely monitored because [they] have a tendency to overstuff [their] mouth.”
  - d. Goals: in the areas of pre-academic/academic, behavior, communication, visual motor, fine motor, and gross motor.
  - e. Special Factors: The Student’s behavior impeded the learning of self or others. “[The Student] demonstrates non-compliance and task avoidance and a mild-moderate level. The student will also demonstrate self-injurious behaviors (e.g., head banging, hitting [their] face, biting [their] thumbs, and throwing [themselves] on the floor) when presented with non-preferred activities... The intensity of [their] self-injurious behaviors can be mild-severe. [The Student] will also show aggression towards staff and [their] peers, usually during non-preferred activities. The intensity of [the Student’s] aggression can be mild-moderate.”
  - f. Placement: “80% of time student is outside the regular class & extracurricular & non-academic activities.”
8. The Student’s previous out-of-state school district developed an IEP for the Student dated January 11, 2021 (January 2021 IEP), which revised most of the goals and decreased the Student’s removal from the general education setting (from 80% to 70% of the school day).
  9. The Student moved to the District shortly before the start of the 2021-22 school year.
  10. The Parent reported that shortly before the first day of the 2021-22 school year, a District administrator contacted the Parent and asked the family to keep the Student home for a few days so the Student’s Special Education Teacher (Case Manager) would have time to review the Student’s out-of-state IEP and prepare.
  11. The District’s first day of school for the 2021-22 school year was September 1, 2021. The Student’s first day of second grade was a couple of days later.
  12. The District issued a Prior Written Notice (PWN) dated September 1, 2021, which stated, “[The District] is offering [the Student] a Communication Behavior placement to support [the Student’s] current IEP services and placement determination identified on 1/16/2020 from [out of state school district]. The current IEP team including parents agree to this offer of FAPE, and comparable services will be implemented until an Oregon eligibility and IEP can be completed.”
  13. The District reported that it did not have the January 2021 IEP and reportedly implemented the Student’s January 2020 IEP from September 2021 until the District developed a new IEP for the Student on January 24, 2022.
  14. No IEP progress information was provided by the District for the IEP goals contained in the January 2020 IEP. A later IEP progress report (from January 2023) included progress data from November 19, 2021 and January 7, 2022, but this data was for IEP goals contained in the Student’s IEP developed on January 24, 2022.
  15. The Parent signed a Consent for Individual Evaluation on September 30, 2021, which included assessments in the following areas: academic, file review, intelligence, behavior, adaptive behavior, communication, fine and gross motor, observation, medical or health statement, and developmental history.

16. On January 24, 2022, the District convened a meeting to determine the Student's eligibility and develop an IEP.

17. At the January 24, 2022 IEP meeting, the Student was found eligible for OHI.

18. The January 24, 2022 IEP (January 2022 IEP) included the following, among other things:

- a. Strengths of Student: "[The Student] works best when provided with frequent and consistent praise. [The Student] may become impulsive when reprimanded... may run from the classroom, playground or away from staff with the function being adult attention. [The Student] does need to be in line of sight during recess, as [they] may leave with another class or run from the playground."
- b. Parent Input: The Parent was "concerned about [the Student's] social skills moving into upper grades and they would like to consider 1:1 support for a time to help [the Student] transition to middle school."
- c. Present Levels: "[The Student] presents with some definite differences in sensory processing that may impact [their] engagement in school... benefits from regular teacher support to resolve peer conflict... difficulty maintaining personal space... often touches classmates during unexpected times during class and when standing in line."

The Student responds "well to encouragement, redirection and positive reinforcement. [The Student] does well with consistency, visuals, and predictability, and benefits from access to fidgets during learning times."

"[The Student] loves to run, but needs adult supervision constantly or else [they] will run away (from the classroom, during recess, lunch time, etc.)."

"[The Student] does need to be monitored when eating, as [the Student] may over-stuff. [The Student] is able to refrain from over-stuffing when prompted with, 'chew and swallow... will swallow foods whole.'"

Adult assistance "mainly needed for behavioral support and verbal cueing/supervision to remain on task and for task redirection."

- d. Special Factors: included behavior ("can become dysregulated and hit [their] head or bite [themselves]. See Service Summary."), communication, and assistive technology.
- e. Statewide and Districtwide Assessment Accommodations: "[The Student] requires adult support and preferred incentives for focus. [The Student] requires an adult to support with breaking down directions into small understandable chunks, provide processing time. Adult support is needed for [the Student] to dictate answers."
- f. Goals: in the areas of adapted physical education (APE), social and emotional skills, self-regulation, writing skills, math, functional skills, communication, reading/language arts, and classroom skills.
  - i. Behavior related goals included appropriately gaining staff attention, appropriately requesting help from an adult and returning to work once support has been given, and keeping hands and feet to self while in proximity of peers.

- g. Specially Designed Instruction (SDI): SDI was not included for self-regulation, although the IEP included a self-regulation goal.
- h. Accommodations: hands on learning experiences; frequent breaks during instruction; providing directions in small chunks with checking for understanding; visual schedule and incentives with immediate reinforcement of appropriate behaviors; academic instruction in small groups with direct/explicit instruction; adult support, visual supports and task analysis for toileting; and flexible seating to support focus.
- i. Supports for School Personnel: “BCBA support for CB team” (60 minutes per year).
- j. Nonparticipation Justification: removal from the general education setting for 80% of the school week.

19. The January 24, 2022 District Meeting Minutes included the following:

- a. “[The Student] has significant social strengths but continues to need to work on social boundaries. Reading non-verbal social cues... Safety skills are another area of concern.” The Student “is learning to maintain appropriate social engagement especially with body boundaries.”
- b. The Parent’s “concerns are less academic but rather” for the Student to be “safe and cared for.”

20. The January 24, 2022 Special Education Placement Determination listed the Student’s selected placement as, “General Education less than 39% with Communication Behavior focus classroom support.”

21. Although the January 2022 IEP present levels and state/district wide assessments referred to adult support needs, the only reference to adult support in the service summary was in an accommodation for toileting. The January 2022 IEP also did not mention a behavior plan.

22. The District provided a copy of an undated IEP Progress Report which only included baseline data dated January 24, 2022 for the Student’s IEP goals. It did not include any progress information.

23. The District issued a PWN dated April 4, 2022, proposing to provide the Student with ESY services because of “teacher data indicating severe regression and unusually long periods of recoupment.” The District amended the January 2022 IEP to reflect the ESY determination.

24. The Parent reported being told by the Case Manager that the Student would benefit from pushing into the general education classroom, but the Case Manager did not have the necessary staffing to do this.

25. The Parent stated they were unaware of any general education opportunities provided to the Student during the 2021-22 school year outside of general education lunch and recess.

26. In a May 2, 2022 email to the Case Manager, the Parent requested an IEP meeting “to explore ways [the Student] can be supported.”

27. In a May 25, 2022 email from the Parent to the IEP team, the Parent sent a list of items they wanted like to discuss at an upcoming May 31, 2022 IEP meeting, including the following:



- a. "We've received a progress report dated 5/8/22, but it does not indicate [the Student's] growth from January to May. Related to this, we are looking for [the Student's] progress from September 2021 to January, 2022 when [the Student's] [District] IEP was written. This will help us all understand whether [the Student] has made expected progress this school year."
  - b. "We would like to discuss [the Student's] Behavior Support Plan as well, including the FBA and progress data."
  - c. "Finally, we'd like to request additional adult assistance (1:1 assistance) be added to [the Student's] IEP, to address [the Student's] safety and supervision needs."
28. Prior to the meeting, a District program assistant (the PA) asked the Case Manager for information about the Student. In a May 30, 2022 email to the PA, the Case Manager reported, "[The Student] has a hard time working in small groups without being disruptive; running from the table to go out of the room (or threatening to); ripping [their] materials; saying 'X is stupid' in order to incite a peer; leaving instructional groups etc. [The Student] is doing this for attention and we are working on supporting [them] to access attention in a positive way... [The Student] has not regressed academically, but [the Student] hasn't progressed in math. [The Student] does imitate all maladaptive behaviors in the classroom to gain attention, as part of [their] Smith Magenis Syndrome."
29. On May 31, 2022, the District convened an IEP meeting. The purpose of the meeting was "Planning Meeting for IEP review/BSP review and One on One support".
30. The May 31, 2022 District IEP meeting notes including the following:
- a. The Parent reported that the Student "had 1:1 support that was provided from existing staff" in kindergarten. The Student was "less triggered by non-attached adults" and it would be "useful to switch adults rather than have a designated full time 1:1." The Student "needs to be watched while at the park or in public as [they] will run our touch children without asking." The Parent would like the Student to "have 1:1 support for pushing into general education."
  - b. The Parent asked for 1:1 support to be added to the Student's IEP.
  - c. "[The PA] stated data collection needs to come first, monitor support and if behaviors are increasing or decreasing... The plan is to perform the FBA/BSP in the fall and collect data."
  - d. The Parent requested data collected for the BSP and progress notes from September 2021 to January 2022.
31. The Parent reported the following about the May 31, 2022 IEP meeting:
- a. The PA explained the process for evaluating whether a student needs additional adult support. The District had to collect data for two months to determine adult support needs, and review resource allocation.
  - b. Because there were only a few weeks left in the school year, the team would wait until the fall to start the process. The team agreed to meet in November, when the team would have sufficient data to make a decision on the request for 1:1 support.

32. The District did not provide the Parent with a PWN related to the Parent's request for 1:1 adult support at the May 31, 2022 IEP meeting.
33. The PA reported that the process for when a parent asks for additional adult support, the team is required to (1) conduct an FBA and develop a behavior support plan (BSP) to look at behaviors that may require additional supports from the teacher, para educators in the classroom, or other school building staff; (2) take data for six to eight weeks on interventions that are being implemented for replacement behaviors in the BSP; and (3) then the team can have a discussion about adult support needs.
34. In notes dated June 7, 2022, a District speech language pathologist (the SLP) providing "whole group literacy activity" to the CB classroom wrote, "[The Student] has participated in 70% of these groups. 30% of the time, [the Student] has either eloped from the classroom or is standing on desks/furniture while the SLP is on the carpet with the rest of the class."
35. The Parent sent an email to the IEP team on June 9, 2022, to follow up on items discussed at the May 31, 2022 IEP meeting:
  - a. "We requested that additional adult assistance (1:1 para educator) be added to [the Student's] IEP. School staff described the level of support that [the Student] has required, which is intense, and that it is being provided through creative collaboration from [the Caser Manager] and program paras. The district declined our request, and agreed to conduct a data-based process to fully determine whether a dedicated 1:1 is needed."
  - b. "The team noted that [the District] has not conducted a Functional Behavioral Assessment for [the Student], but developed a Behavior Support Plan based on classroom observations/data. The team agreed to conduct a comprehensive FBA in the fall, concurrently with collecting data to support decision-making around 1:1 support."
36. The District provided an undated Comprehensive Function Based Behavior Support Plan (BSP) which included the following information.
  - a. Behavior of concern: "Head banging, biting self, climbing, running from the classroom.
  - b. Replacement behavior: "[The Student] can work for 1:1 time with staff such as in sensory room..."
  - c. The section on the BSP for data collection was left blank, including the area for identifying which staff is responsible for collecting data and when.  
It is unclear when this BSP was developed, but it was likely sometime during the 2021-22 school year as the Student was listed as a second grader.
37. On August 30, 2022, the Student started the 2022-23 school year as a third grader in the CB classroom with a new, first year teacher (the Teacher).
38. The Teacher reported being hired by the District a week before the start of the 2022-23 school year. The Teacher was not provided with IEPs for the students in the CB class until the day before school started.
39. The Teacher reported that following about the beginning of the school year:
  - a. The Student did not have a behavior plan in place.

- b. At the time, the Student was not engaging in any dangerous or inappropriate behavior.
  - c. The Student needed adult support with toileting (1:1 adult support) and transitions (at least line of sight but not necessarily 1:1 adult support).
  - d. The SLP expressed concern to the Teacher that the Student may be aspirating while eating and wanted to get the District's feeding team involved.
40. The Teacher reported that the CB classroom was supposed to have three paraeducators. However, throughout the year the classroom had staffing shortages and did not always have three paraeducators.
41. On September 27, 2022, the District issued a meeting notice for an IEP meeting scheduled on November 14, 2022, with the purpose of the meeting listed as "Amendment to discuss 1:1 accommodations."
42. In October 2022, the Student started exhibiting new behaviors which involved inappropriate touching of staff and peers. The Teacher reported being told to always have the Student within arm's reach of a paraeducator, but that the classroom did not always have sufficient staff available.
43. The Teacher started to collect data on the Student's new behavior, as recommended by a District board certified behavior analyst (BCBA).
44. The Parent reported that the Student was involved in two serious incidents in the fall that involved inappropriate touching. One incident occurred when the Student was in the bathroom without adult support, although the Student was supposed to always have adult support in the bathroom.
45. The Parent reported that at a meeting to discuss the incidents, the Parent expressed that the incidents could have been prevented if the Student had additional adult support. When the Parent asked about their request for 1:1 adult support and data collection, the Principal and the Teacher did not seem to know about the request or the plan to collect data.
46. The Teacher reported the following:
- a. The Teacher was not told that IEP team agreed to initiate an FBA and collect data on the Student's adult support needs in the fall. The Teacher first heard about this when the Parent asked about data collection in October or November 2022.
  - b. The Teacher did not know how to use the District's computer system at the start of the school year. It was not until later that the Teacher learned how to access the May 31, 2022 IEP meeting notes, which included the relevant IEP team agreements.
47. In an October 13, 2022 email to the Parent, the Teacher reported that the Student was "defiant and instigating fights with other kids by calling them 'stupid'. I'm going to work on a more personalized behavior chart for [the Student] for next week and see if that helps at all. I'm worried because the students [the Student] tends to target are bigger, stronger kids who tend to get violent, and I don't want them to retaliate."
48. The Teacher reported that a few months into the school year, one of the classroom's three paraeducators was moved to a different assignment within the school. Then another

paraeducator left for a different job. The school shuffled staff around but the classroom had two paraeducators instead of three for several months.

49. On November 10, 2022, the Parent signed a "Parent Permission for Individual Screening and/or Assessment" which stated the Student had been referred for the assessment because of concerns with feeding and swallowing.
50. On November 14, 2022, the District convened an IEP meeting to discuss the Parent's request for 1:1 adult support.
51. The Teacher reported taking meeting notes at all the Student's IEP meetings, but the District was unable to locate the Teacher's meeting notes from the November 14, 2022 IEP meeting.
52. The Parent reported the following about the November 14, 2022 IEP meeting:
  - a. When the Parent asked about the FBA and data collection that should have been initiated at the beginning of the school year, the District reported that they had not been started.
  - b. The Teacher presented data on the behavior of inappropriate touching, which the PA was unaware of. The PA said that the data collected by the Teacher was irrelevant to the adult support data collection process. The PA stated that the team needed to first do an FBA and BSP, to identify the behavior of concern to collect data on. The PA told the Parent that the team needed to wait and see if a BSP could eliminate the Student's need for 1:1 adult support.
  - c. The discussion at the meeting was all about the need to collect data, and not a team discussion about the Student's needs.
  - d. The Parent stated that additional adult support could have prevented the October incidents involving inappropriate touching. The PA stated that the Student would have an adult within arm's reach and told the Teacher to make sure this occurred. The Teacher stated that the classroom did not have the staffing to do this. The Parent expressed concern for how the Teacher would be able to collect the required data for adult support needs without sufficient staffing.
53. The Teacher reported that at the November 14, 2022 IEP meeting, the PA told the Parent that because the classroom had a new teacher, the FBA and data collection "got lost in the shuffle." The PA stated that the Student would get an FBA, but it would not be right away as there were a lot of students who needed an FBA and were ahead of the Student.
54. The PA reported the following:
  - a. The IEP team met in November to discuss the adult support request. However, the Parent changed the request for adult support to a request for "designated adult support." This required that the team to start a new, different process (a new FBA/BSP, data collection, routine analysis, rating scales, and review of staff schedules).
  - b. When asked, the PA stated that "designated adult support" meant support that is provided by an extra adult coming into the classroom, not support provided by one of the classroom paraeducators. The PA added that the designated adult is not limited to supporting the Student, the designated adult can also help other students in the classroom.

- c. When it became clear that the Parent thought the process for determining adult support allocation had already been started, the team immediately got the BCBA to come help with the Student's behavior plan.
55. When asked, the Teacher did not think that the Parent's request for additional adult support had changed. The Teacher reported that the Parent made the 1:1 adult support request at every meeting.
  56. At the November 14, 2022 IEP meeting, the Parent stated that they did not receive IEP progress reports for the previous school year. After the meeting, the Teacher found IEP progress reports from the 2021-22 school year in the District's computer system and sent them to the Parent.
  57. The Student's January 2022 IEP was not amended at the November 14, 2022 IEP meeting, although the Student was exhibiting new behaviors and the team determined that the Student needed to be within arm's reach of an adult.
  58. The District did not issue a PWN related to the Parent's request for 1:1 adult support at the November 14, 2022 IEP meeting.
  59. In a November 14, 2022 email to the BCBA, the PA wrote, "We need your support in conducting an FBA/BSP for [the Student] ... We have a BSP review scheduled for Dec. 5<sup>th</sup>. Can you please push this student to the top of your list?"
  60. On November 17, 2022, the Parent wrote an email to the team to follow-up on what occurred at the November 14, 2022 IEP meeting:
    - a. "We are concerned about the lack of response and that tasks were dropped... It remains the district's responsibility to ensure that FAPE is provided even during staffing shifts."
    - b. The Student's "incidents of inappropriate peer contact" and "average number of times the teacher needed to be removed to work with [the Student] in the hallway regarding behaviors" have both increased since October.
    - c. "This fall there have been two significant incidents with peers of a sexual nature... A team convened with district consultation, which indicated that arms-length adult proximity was needed to prevent additional incidents."
    - d. "[The Teacher] shared that with the current program staffing, it is not possible to provide the level of adult proximity that [the Student] needs."
    - e. "We continue to urge the district to provide the level of supervision and proximity that [the Student] requires per [their] disability, and are very concerned that additional incidents are likely to happen while the district takes additional weeks to complete the tasks we agreed on last May."
    - f. The team agreed to meet again on December 5, 2022 to review the results of the FBA.
  61. On November 21, 2022, the Parent signed a Consent for Evaluation which stated that the District was proposing to evaluate the Student by using an FBA because "more information is needed to develop a behavior support plan."

62. The Teacher reported that, because of staffing shortages, it was difficult for the Teacher to take the data needed for an FBA. Therefore, instead of conducting an FBA and collecting four to six weeks of behavior data, the BCBA helped the Teacher fill out a comprehensive worksheet based on the Teacher's observations.
63. The BCBA reported being asked by the PA to help the Teacher with completing the BSP process, as the Teacher had never done this before. The Teacher took data on the behavior of concern. The BCBA helped the Teacher develop the BSP worksheet, but the BCBA was not involved in data collection and did not conduct an FBA.
64. A "Worksheet for Function-Based Behavior Support Planning" dated December 1, 2022 included the following:
- Behavior of concern: "Inappropriate touch with peers/adults- touching, pinching, goruping [sic], grabbing others on their body or clothing..."
  - Setting factors: "unstructured play, periods of waiting during instruction, diverted adult supervision, and unsupervised time in restroom."
  - Triggers: "instruction given to class, groups of peers talking/playing together, adult sitting with and providing attention to another peer."
  - Baseline data: "inappropriate touching occurred an average of 3.3 times per day in October 2022, and an average of 4.5 times in November 2022."
  - The section in the BSP for data collection was left blank, including which staff is responsible for collecting data and when.
65. On December 5, 2022, the District convened a meeting to review the new BSP and discuss data collection.
66. The Teacher's December 5, 2022 meeting notes included the following:
- "[The BCBA] explains that the behaviors are complex and a full FBA will take time, so we have a worksheet created in the meantime. We may find that the strategies are enough to support positive behaviors... there was an old BSP in [the Student's] files, but the targeted behaviors are not applicable anymore, so we updated it."
  - "[The BCBA] confirms consistent data will be taken and we will need to come together in no more than four weeks from the start of the BSP implementation to review the new data."
  - "[The Parent] asks [the PA] about resource allocation for [the Student], aside from this one particular behavior of inappropriate touch... [The PA] explains we're going to first try to build [their] skill rather than relying on an adult for constant support ... we now need time to teach the designated replacement behaviors, then we will see if additional supports are needed."
  - The PA stated, "[Our data will reveal if such an accommodation will really help [the Student] in the way [the Student] needs... we will talk about the possibility of resource allocation at the next meeting... [the PA] acknowledges that the process is long, but explains that we need to identify what kind of support [the Student] will need. If it is adult support, we need to determine exactly what the adult would do for [the Student] that would help [the Student] be more successful in school."

- e. "...the classroom is currently understaffed but the interventions for [the Student] will require adult support. [The Student's Other Parent] asks if the team will document times that interventions can't be put into place because of lack of support in the classroom. [The PA] says that this aspect will be documented and will be part of the decision-making for allocating additional resources."
67. On January 3, 2023, an occupational therapist for the feeding team (the OT) contacted the SLP about the referral, stating that the feeding team would come assess the Student on January 11, 2023.
68. The Parent reported that they assumed the Student had 1:1 adult support while eating as it was a known safety issue. The Parent could not recall whether the feeding issue specifically came up during the previous school year.
69. The Student's annual IEP was due on January 23, 2023. The annual IEP meeting was not held until March 2, 2023. The District stated its April 25, 2023 Response, "The district admits Student's annual review was delayed in the spring, 2023. Student's IEP was due on/before January 23, 2023 and review was not held until March 02, 2023. Student was not denied a free and appropriate education during the period of January 23, 2023 to March 02, 2023 as the IEP team continued to serve Student under the January 24, 2022 IEP."
70. In a January 25, 2023 email to District IEP team members, the SLP reported meeting with the feeding team and stated, "[The Student] needs a one-on-one during lunch time. I understand our staffing situation here is limited. I am wanting to work with our team to figure out a plan because this is something that needs to take place. [The Student] needs someone to sit with [them] during lunch time/anytime [they] are eating, to make sure [they] are safe and to eliminate the risk of choking... I wanted to share this with you, since it was discussed today and is of deep concern."
71. In a January 25, 2023 email to the PA and other IEP team members, the OT wrote, "This student has a genetic disorder and the common symptoms related to feeding safety include hypotonia and oropharyngeal dysplasia ... Today's observation reveals even more concerns likely due to the highly stimulating environment of the cafeteria. [The Student] is highly distractible, may not follow directions, eats at fast pace, over stuffing [their] mouth. [The Student] appears to have structural and motorical challenges in [their] oral feeding skills, coupled with [their] cognitive and intellectual disabilities, affect largely on [their] safe eating. The staff members have managed to keep [the Student] safe thus far although current staffing does not allow one dedicated adult to sit by [the Student]. We strongly recommend that 1:1 adult supervision should be placed in order to prepare [their] food and drink and monitor safe eating throughout the mealtimes."
72. The District's January 25, 2023 Safe Eating Protocol included the following:
- a. **"Do not feed this student if a trained feeder is unavailable."**
  - b. "CAUTION: High risk of choking! Watch for fast eating pace, overstuffing, pocketing of food, and incomplete chewing. Highly distractible."
  - c. "FEEDING PROCEDURE: 1. Direct 1:1 adult support for food preparation, monitoring of eating pace, and cueing to chew and swallow..."

- d. "It is important that school personnel and parents/caregivers recognize the critical nature of the eating process and follow this protocol during all school activities... **\*This safe eating protocol may only be modified by the [District] Feeding Team.\***"

73. It is unclear when the feeding protocol was first implemented. The Parent does not recall the feeding protocol being shared with the team or discussed until the March 2, 2023 IEP meeting.

74. The Student's January 2022 IEP stated that the Student would remain in the general education setting for 20% of the school week. The Teacher reported that this requirement was met during the 2022-23 school year with general education recess and lunch. However, once the feeding team determined that eating in the cafeteria was a safety problem, the Student was removed from the general education lunch.

75. The District provided an IEP Progress Report for the Student dated January 29, 2023 which included progress information dated November 19, 2021; January 7, April 4, June 7, and November 3, 2022; and January 29, 2023. It is unclear how the IEP Progress Report included progress information dated November 19, 2021 and January 7, 2022 for these goals, as they were not added to the Student's IEP until the January 24, 2022 IEP meeting.

A January 29, 2023 progress note stated that the Student met their reading goal.

76. On February 6, 2023, the District convened an IEP meeting to discuss the Parent's request for 1:1 adult support.

77. Witnesses reported the following about the February 6, 2023 meeting:

- a. The Parent reported being told that the District had only collected one week of data and the team would have to reconvene after the data collection was complete. When the Parent asked why the IEP team could not speak to the Student's needs and make a decision, the PA stated that they could not do anything without the data.
- b. The PA confirmed that the Teacher had limited data and the Parent was told that the District needed to collect more. The PA stated that the Teacher should have collected more data, and more consistently. After the meeting, the PA and the BCBA helped the Teacher and collected data for a week.
- c. The Teacher reported that the PA did not feel that the data collected by the Teacher was consistent or comprehensive enough. The PA told the Parent that staffing issues impacted the team's ability to take enough comprehensive data. The Parent expressed frustration and felt this was the same thing they were told at previous meetings, that the District needed more data and could not make a decision yet.

78. The District did not provide a PWN related to the Parent's request for 1:1 adult support at the February 6, 2023 IEP meeting.

79. The PA sent data taken by the PA and BCBA to the District special education administration before the March 2, 2023 IEP meeting, along with the Student's IEP documents. The PA did not ask for or include the Teacher's data in what was submitted.

80. In a March 2, 2023 email to the Parent, the Teacher wrote, "As you know, [the Student] has not yet pushed into general education, so we are excusing [the Student's] 3rd Grade teacher from this meeting... if this decision is okay with you, please sign the form and send it back to me."



81. On March 2, 2023, the District convened an IEP meeting to develop the Student's annual IEP.

82. The March 2, 2023 IEP (March 2023 IEP) included the following changes, in relevant part:

- a. Strengths of Student: "[The Student] is most successful when [the Student] is receiving 1:1 adult attention... eats breakfast and lunch in a separate setting with para support, according to [their] feeding protocol."
- b. Parent Input: "Parents are generally concerned for the safety of [the Student] and others, particularly because [the Student] does not have 1:1 support."
- c. Present Levels: "[The Student] benefits from a fidget and an adult within arms reach [*sic*] to support focus. [The Student] is able to line up when prompted, but needs multiple prompts to stay in line and keep [their] hands to [themselves]." "[The Student] often hugs, squeezes, or otherwise touches peers and adults without permission."

"[The Student] requires adult support to engage in academic tasks. [The Student] is easily distracted by sights and sounds in [their] environment and is often watching peers or staff than [*sic*] visually attending to [their] task... often seeks connection with adult and peers throughout the day and is working on how to seek this connection in a safe way."

- d. Goals: most goals were carried over from the previous IEP, many word-for-word. Some goals included small changes. The title of the self-regulation goal was changed to social skills, and the title of the functional skills goal was changed to independent living skills. The goal criteria on the math goal and a communication goal was increased, but criteria on the APE goal was decreased.

The social skills goal (keep hands and feet to self when in proximity to peers) included present level information which stated, "[The Student] currently requires an adult within arm's reach during unstructured times to reduce the amount of non-consensual touching. Based on teacher recorded data, [the Student] currently averages 9.5 non-consensual touches per hour."

- e. SDI: SDI for functional skills (150 min per week) was removed. Although the title of the functional skills goal in the previous IEP changed to independent living skills, and an independent living skills goal was included in this IEP, SDI for independent living skills was not included.

SDI for social skills was not included, although a social skills goal (formerly titled self-regulation) was included in the IEP.

- f. Accommodations: existing accommodations primarily stayed the same except that some form of additional adult support was added to most (e.g., "1:1 adult support" was added to accommodations for toileting protocol and transitions on and off the bus; "adult supervision" was added to frequent breaks during instruction; "adult support" was added to providing directions in small chunks with checking for understanding).

A new accommodation was added for "1:1 adult support for Safe Eating Protocol, with step up plan in place toward social eating skills."

- g. Supports for School Personnel: added consultation for feeding team (60 minutes per year).

83. The March 2, 2023 District Meeting Minutes included the following information:
- a. “[The PA] confirms the amount of data that has been collected and sent to executive leadership is sufficient for an allocation decision. [The PA] asks [the Teacher] to send [the PA] data to add to the case.”
  - b. “[The PA] shares that executive leadership is reviewing data to decide on para allocation. [The PA] recommends that the IEP accommodations explicitly state when adult support is needed throughout the day.”
  - c. “With [the Student] having lunch in a separate setting, we will need to find other times for [the Student] to join [their] general education peers.”
  - d. References in the Meeting Minutes to an IEP team discussion on IEP goals were limited to:
    - i. Discussion: “[The Teacher] read through the IEP draft.”
    - ii. Team Action: “make necessary edits including: editing first writing goal, removing second writing goal...”
84. The District’s April 25, 2023 Response stated the following about the Student’s IEP goals carried over at the March 2, 2023 IEP meeting: “Meeting minutes reflect discussion and IEP agreement regarding Student’s goals. Certain goal areas were continued where appropriate, with Student’s progress noted and present levels updated. Student’s social emotional goals; self-regulation, APE and communication goals were carried/continued where Student had made progress during the previous annual IEP cycle, but had not yet met the goals. This continuation was made after team discussion and agreement. Student’s complex medical diagnosis has characteristics that impact the pace with which goal areas may be met due to intellectual and behavioral features of [their] diagnosis.”
85. Although the January 29, 2023 IEP Progress Report reported that the Student met their reading goal, the reading goal was carried over, word for word.
86. The March 2023 IEP did not mention an FBA or BSP. It did not include information on general education opportunities for the Student.
87. The Parent reported that, at the March 2, 2023 IEP meeting, the PA stated that the District had enough data, but “executive leadership” would review the data and make the decision. The Parent asked the PA (1) why the IEP team was not making the decision, and (2) when “executive leadership” would make the decision. Despite asking multiple times, the PA did not provide the Parent with any answers. The Parent expressed concern that the determination of what the Student needed was not being made by the IEP team, and the decision was being made outside of the IEP meeting.
- a. The BCBA confirmed that the Parent was told that executive leadership and not the IEP team would review the data and make a decision on the Student’s need for additional adult support.
  - b. The PA confirmed that the decision of whether the Student needed additional adult support would be made by the District special education administration, and the decision would be based on a review of the Student’s information (data collected and IEP documents) and

District resources. The PA reported not being given any timeframe by administrators for when the decision would be made.

88. The Teacher reported the following about the March 2, 2023 IEP meeting:

- a. The PA had the Teacher edit the accommodations to identify when the Student needed additional adult support. The Teacher reported that the IEP accommodations were changed to reflect what was already occurring, including the times of day the team all knew that the Student needed additional adult support. After the meeting, the Student's level of adult support did not change.
- b. When asked why the Student's goals were carried over and what was discussed by the team at the meeting, the Teacher did not recall anything specific about the goal discussion except that the team was in agreement as they went through the IEP goals. The Teacher reported that the team discussed that they had been focusing on the Student's behavior needs this year, particularly since the new behavior of inappropriate touching emerged. The team, including the Parent, agreed that the Student's behavior needs were the highest priority, not academics.

89. The PA reported the following:

- a. When asked, the PA did not know why the Student's IEP goals were carried over. The PA checked their personal notes and stated there was nothing in their notes about a goal discussion.
- b. When asked if IEP team member input is considered when administrators make a decision on a student's adult support needs, the PA stated they thought so because the administrators would review all IEP components, including meeting minutes.

90. The District issued a March 2, 2023 PWN which stated, "The IEP team has determined that [the Student] requires the services listed on the attached IEP" and "All service options were considered by the IEP Team and those detailed on the IEP were agreed to by the Team."

91. The District did not issue a PWN related to the Parent's 1:1 adult support request at the March 2, 2023 IEP meeting.

92. The Teacher reported they never sent a PWN to the Parent regarding the 1:1 adult support request.

93. The BCBA reported that in mid-March, 2023, the Student started exhibiting self-injurious behavior (head banging) that had not been seen at school before, although the Parent had previously reported this occurred at home often. Prior to this behavior, the BCBA did not think the Student required 1:1 support. However, once this behavior emerged, the BCBA recommended that an adult be with the Student to implement safety protocols.

94. The Teacher reported that the Student's self-injurious behavior continued to escalate, sometimes taking multiple adults to keep the Student safe. The Teacher reported that the Student's need for adult support increased throughout the school year.

95. On April 2, 2023, the Parent sent a follow-up email about what occurred at the March 2, 2023 IEP meeting which included:

“The school district has still not yet made a decision on our request for 1:1 additional adult assistance for [the Student] ... A decision has still not been made, nearly an entire school year later. Our request has not been addressed in a timely manner with excuses and delays given at each of our follow-up meetings since the initial request, **preventing [the Student] from getting the support [the Student] needs.**

At the most recent team meeting, [the PA] noted that sufficient data has been collected to answer this question, and has been sent to ‘executive leadership’ for a decision. This is documented in meeting notes and is **a violation of IDEA.** All decisions are to be made by the IEP team including parents.

Several of the Student’s new IEP goals have been carried over from the last IEP, with the same or similar baselines. This is a red flag indicating [the Student] is not making expected progress, another potential violation of IDEA.”

96. In an April 7, 2023 email to the BCBA, the Teacher wrote, “We are having our most escalated day with [the Student] thus far...”

97. On April 7, 2023, the Parent filed this Complaint.

98. The District’s April 25, 2023 *Response* stated the following, among other things:

- a. “Parents and district staff continue to refine Student’s adult supports under the IEP to minimize potentially self-injurious behavior and maximize Student’s engagement... Close adult supervision is necessary as demonstrated when Student recently injured [themselves], necessitating medical attention.”
- b. “Student’s parents have fully participated in Student’s evaluation/eligibility and annual IEP reviews in 2022 and 2023 as documented in meeting minutes and correspondence with district staff and administration. Student’s IEP team has documented parent concerns; and with Parents’ request for one-to-one adult support, has continued to review behavioral data, regarding how to best accommodate Student.”
- c. The Student’s “placement offers adult paraprofessional staff to support Student’s access to and participation in, mainstreaming opportunities with general education peers.”

#### IV. DISCUSSION

##### Evaluation and Reevaluation Requirements

The Parent alleges that the District violated the IDEA by not initiating a functional behavior assessment even though the Parent requested it and the IEP team determined that the Student’s educational or related service needs warranted the reevaluation.

A reevaluation must occur if the educational or related service needs of a student warrant a reevaluation, or if the child’s parents or teacher requests a reevaluation.<sup>3</sup> If a district refuses an evaluation requested by the parent, the district must provide the parent with prior written notice.<sup>4</sup> An evaluation must be completed within 60 school days from written parent consent to the date of the meeting to consider eligibility, continuing eligibility, or the student’s educational

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<sup>3</sup> OAR 581-015-2105(4); 34 CFR § 300.303(a)

<sup>4</sup> OAR 581-015-2110(2); 34 CFR § 300.503(a)(2)

needs.<sup>5</sup>

The Student moved into the District from out of state with a 2019 behavior intervention plan. It is unclear whether this behavior plan was implemented by the District or what behavior supports were provided to the Student during the 2021-22 school year. The District did not conduct an FBA when it evaluated the Student to determine eligibility for special education in Oregon. The District provided an undated “comprehensive function based behavior support plan” from the 2021-22 school year, but it is unclear when it was developed. The Teacher reported that the no behavior plan was in place for the student at the start of the 2022-23 school year. The behavior plan dated December 1, 2022, served as the only such plan during the 2022-23 school year.

Starting on May 31, 2022, the Parent requested 1:1 adult support at every IEP meeting (May 31, November 14, and December 5, 2022; February 6 and March 2, 2023). The PA reported that when a parent requests 1:1 adult support, the IEP team is required to conduct an FBA and develop a BSP before data can be collected on a student’s adult support need. This must be completed before any decision on whether a student needs 1:1 adult support can be made. At the May 31, 2022 IEP meeting, the IEP team agreed that the Student needed an FBA, which would be initiated in fall 2022. When the Teacher started working for the District, one week before the start of the 2022-23 school year, the Teacher was not informed of this agreement. The Teacher received a copy of the Student’s IEP the day before school started but did not know how to access any of the Student’s other IEP documents in the District’s computer system, which would have reflected the team agreement.

At the November 14, 2022 IEP meeting, the IEP team again agreed that the Student needed an FBA. The Parent signed an evaluation consent form for an FBA on November 21, 2022. However, the District did not conduct an FBA in November or December 2022 as the team determined it would take too long. The District instead developed a “worksheet for function based behavior support planning.” The District did not complete an FBA within the 60 school day timeline (which ended on or about March 10, 2023). An FBA was not conducted by the District before or during the complaint period, although (1) the District stated that an FBA was required to determine the Student’s adult support needs and (2) the IEP team considered the Student’s behavior needs to be the number one priority. The District did not provide a PWN to inform the Parent that the District was not conducting an FBA.

The Department substantiates this allegation.

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

The Parent alleges that the District violated the IDEA by (1) failing to conduct an annual review of the Student’s IEP within 365 days after the previous annual review of the Student’s IEP; and (2) failing to revise the Student’s IEP to address the Student’s needs.

A school district must ensure that the IEP team reviews a student’s IEP at least once every 365 days, to determine whether the annual goals for the child are being achieved.<sup>6</sup> The IEP Team must revise a student’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 any reevaluation conducted; (3) information about the student provided to, or by, the parents; (4) the student’s anticipated needs; or (5) other matters.<sup>7</sup>

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<sup>5</sup> OAR 581-015-2110(5)(b); 34 CFR § 300.301(d)

<sup>6</sup> OAR 581-015-2225(1)(a); 34 CFR § 300.324(b)(1)(i)

<sup>7</sup> OAR 581-015-2225(1)(b); 34 CFR § 300.324(b)(1)(ii)

In developing, reviewing, and revising a student's IEP, the IEP team must consider the strengths of the student; the concerns of the parents for enhancing the education of the student; the results of the initial or most recent evaluation of the student; and the academic, developmental, and functional needs of the student.<sup>8</sup> The IEP team must also consider special factors, including the behavioral needs of the student.<sup>9</sup> If a student's behavior impedes the student's learning or that of others, the team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior.<sup>10</sup> If, in considering these special factors, the IEP team determines that a student needs a particular service (including an intervention, 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>11</sup>

"An IEP is not a guarantee of a specific educational or functional result for a child with a disability. However, the IDEA does provide for revisiting the IEP if the expected progress is not occurring."<sup>12</sup> "If a child is not making progress at the level the IEP Team expected, despite receiving all the services and supports identified in the IEP, the IEP Team must meet to review and revise the IEP if necessary, to ensure the child is receiving appropriate interventions, special education and related services and supplementary aids and services, and to ensure the IEP's goals are individualized and ambitious."<sup>13</sup>

The District acknowledged that it failed to conduct an annual review of the Student's IEP within 365 days after the previous annual review. The Student's IEP review due date was January 23, 2023 and the Student's annual IEP occurred on March 2, 2023.

The Student had two IEPs in effect during the complaint period, the January 2022 IEP and the March 2023 IEP. The January 2022 IEP present levels indicated that the Student had additional adult support needs, including the need for line of sight at recess, to be monitored while eating, assistance for behavioral support, and supervision to remain on task and for task redirection. However, the January 2022 IEP service summary only mentioned adult support in one accommodation (adult support with toileting). The January 2022 and March 2023 IEPs identified behavior as a special factor and the present levels demonstrated that the Student had various behavior needs. But the IEPs did not mention a behavior support plan or include specific information from the BSPs.

The Parent expressed concern about the Student's disability related needs and requested that 1:1 adult support be added to the Student's IEP on multiple occasions. The Teacher reported that there were times that everyone knew that the Student needed additional adult support, such as the need for 1:1 support for toileting and line of sight for transitions. But this information was not added to the January 2022 IEP. In October 2022, the Student started exhibiting the new behavior of inappropriate touching. The Parent reported that incidents of inappropriate touching occurred during times that the Student should have had 1:1 adult support. At the November 14, 2022 IEP meeting, the team determined that the Student needed to be within arm's reach of an adult. The January 2022 IEP was not revised to reflect this or any other behavior related need.

The January 25, 2023 feeding protocol indicated extreme safety concerns. The IEP was not revised to reflect this safety issue until the March 2, 2023 IEP meeting, even though the IEP

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<sup>8</sup> OAR 581-015-2205(1); 34 CFR § 300.324(a)

<sup>9</sup> OAR 581-015-2205(2); 34 CFR § 300.324(a)

<sup>10</sup> OAR 581-015-2205(3); 34 CFR § 300.324

<sup>11</sup> OAR 581-015-2205(4);

<sup>12</sup> Q&A on *U.S. Supreme Court Case Decision Endrew F. v. Douglas County Sch. Dist.*, Re-1, 71 IDELR 68 (EDU 2017)

<sup>13</sup> *Id.*

team met on February 6, 2023. Despite the identification of new behavior, adult support, and safety needs, no revisions were made to the Student's IEP at the November 14, 2022 IEP meeting, the December 5, 2022 IEP meeting, or the February 6, 2023 IEP meeting. The only revision made to the January 2022 IEP at all was the addition of extended school year services.

Although it is the IEP team's responsibility to review and revise the IEP to address all disability related needs, the District did not allow the Student's IEP team to do this. The IEP team had all the information required by District policy to make a decision on the Student's adult support needs at the March 2, 2023 IEP meeting. Nonetheless, the District did not allow the IEP team to make this decision. District IEP team members reported that the decision would be made unilaterally by the District special education administration, outside of an IEP meeting. The decision was based on (1) data and information gathered by the IEP team, and (2) resource allocation.

The IEP team did not review and revise the Student's IEPs as necessary to address the Student's needs.

The Department substantiates this allegation.

### **IEP Content**

The Parent alleges that the District violated the IDEA when it failed to include specific special education and related services and supplementary aids and services in the Student's IEP necessary for the Student to advance appropriately towards attaining the annual goals, to be involved and progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate with other children with disabilities and children without disabilities.

"[The] essential function of an IEP is to set out a plan for pursuing academic and functional achievement."<sup>14</sup> "It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth."<sup>15</sup>

An IEP must contain many things, including a statement of the student's present levels of achievement and functional performance; measurable annual goals and a description of how the student's progress toward meeting the annual goals will be measured and reported; a statement of the specific special education and related services and supplementary aids and services to be provided; and an explanation of the extent to which the student will not participate with children without disabilities in the regular class and activities.<sup>16</sup>

The specific special education and related services and supports to be provided must enable the student to advance appropriately toward attaining annual goals; be involved and progress in the general education curriculum; and be educated and participate with other children with and without disabilities.<sup>17</sup> "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created."<sup>18</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>19</sup>

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<sup>14</sup> *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988, 999 (2017)

<sup>15</sup> *Id.*

<sup>16</sup> OAR 581-015-2200(1); 34 CFR § 300.320(a)

<sup>17</sup> OAR 581-015-2200(1)(d); 34 CFR § 300.320(a)(4)

<sup>18</sup> *Andrew F.*, 137 S.Ct. at 1001

<sup>19</sup> *Andrew F.*, 137 S.Ct. at 1002

“Where necessary to provide FAPE, IEPs must include consideration of behavioral needs in the development, review, and revision of IEPs. IEP Teams must consider and, if necessary to provide FAPE, include appropriate behavioral goals and objectives and other appropriate services and supports in the IEPs.”<sup>20</sup> “For a child whose behavior impedes his or her learning or that of others, and for whom the IEP team has decided that a [behavior intervention plan (BIP)] is appropriate... the IEP Team must include a BIP in the child’s IEP to address the behavioral needs of the child.”<sup>21</sup>

As discussed previously, the January 2022 and March 2023 IEPs did not include sufficient special education services or supports to reflect the behavioral, feeding safety, and adult support needs of the Student. Additionally, the January 2022 IEP did not include SDI for self-regulation, although the IEP included a self-regulation goal. The March 2023 IEP did not include SDI for independent living skills and social skills, although the IEP included goals in those areas.

At the March 2, 2023 annual IEP meeting, most of the Student’s IEP goals were carried over. Both academic and non-academic goals were carried over, including the reading goal that the Student had already met. Although the District’s Response stated that the continuation of goals was made after team discussion and agreement, there is nothing in the record to reflect this. The only relevant information included in the Meeting Minutes was that the Teacher “read through the IEP draft,” and the Teacher would edit one writing goal and remove another. The Parent, the Teacher, and the PA could not recall anything specific about a discussion of the Student’s IEP goals, and the PA’s personal notes did not include anything about a goal discussion. Notwithstanding the Student’s lack of expected progress on their IEP goals, the Student’s IEP services and supports were not adjusted to address this issue.

The Student’s IEPs did not contain information on how the Student would access the general education environment and participate with peers without disabilities. The Parent reported that the Case Manager recommended that the Student push-in to the general education classroom during the 2021-22 school year, but that the school did not have sufficient staffing. A March 2, 2023 email from the Teacher stated that the Student had not attended the general education classroom during the 2022-23 school year. Before the removal of the Student from general education lunch because of feeding concerns, the Student’s general education time was met by attending general education lunch and recess. Afterward, the Student only attended general education recess, although the Student’s IEP required the Student to be in the general education setting for 20% of the school day. The IEPs did not identify any general education opportunities or add any services or supports to address the Student’s need to access the general education setting.

The Student’s IEPs did not contain special education services and supports needed to enable the Student to advance appropriately toward attaining annual goals or be educated and participate with other children with and without disabilities. The Student’s IEPs were not reasonably calculated to enable the Student to make progress appropriate in light of their circumstances.

The Department substantiates this allegation.

### **Parent Participation**

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<sup>20</sup> Q&A on U.S. Supreme Court Case Decision *Endrew F. v. Douglas County Sch. Dist.*, Re-1, 71 IDELR 68 (EDU 2017)

<sup>21</sup> Questions and Answers on Discipline Procedures, 52 IDELR 231 (OSERS 2009)



The Parent alleges that the District violated the IDEA by interfering with the Parent's ability to participate in decisions 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.

A school district must provide parents the opportunity to participate in meetings with respect to the identification, evaluation, IEP, and educational placement of their child, and the provision of FAPE to their child.<sup>22</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>23</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>24</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>25</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>26</sup>

The Parent requested that 1:1 adult support be added to the Student's IEP at the May 31, 2022 IEP meeting and all subsequent meetings. 1:1 adult support was not added to the Student's IEP at any of these meetings. On March 2, 2023 the District reported it had all the information required to make a decision on the Student's adult support needs. But the District would not allow the IEP team to make the decision. The IEP team, including the Parent, was excluded from the discussion about the Student's needs and the services to be provided to meet those needs. The IEP team, including the Parent, was excluded from participating in educational decisions concerning the Student.

At the time the Complaint was filed, the District had yet to decide on the Student's adult support needs, almost a year after the Parent's first request. As neither the IEP team nor District administrators determined whether the Student needed 1:1 adult support, the Parent's request was never fully considered.

The Department substantiates this allegation.

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

The Parent alleges that the District violated the IDEA by (1) failing to conduct an annual review of the Student's IEP within 365 days after the previous annual review of the Student's IEP; and (2) failing to revise the Student's IEP to address the Student's needs.

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>27</sup> In order to determine 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>28</sup> Not every procedural error is sufficient to rise to a denial of FAPE.<sup>29</sup> The procedural test consists of three pivotal procedural

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<sup>22</sup> OAR 581-015-2190(1); 34 CFR §300.322(a)

<sup>23</sup> Letter to Northrop (OSEP 5/21/2013), citing 71 Fed. Reg. 46,678 (2006)

<sup>24</sup> *Pasatiempo v. Aizawa*, 103 F.3d 796, 804 (9<sup>th</sup> Cir. 1996)

<sup>25</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>26</sup> *Id.* at 1484

<sup>27</sup> OAR 581-015-2040(1); 34 CFR § 300.101(a)

<sup>28</sup> *Andrew F.*, 137 S.Ct. at 999

<sup>29</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))

errors: (1) whether the student suffers a loss of educational opportunity;<sup>30</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>31</sup>

The District failed to conduct an annual review of the Student's IEP by January 23, 2023. As the January 2022 continued to be implemented until the annual IEP review on March 2, 2023, this procedural error on its own may not have resulted in a denial of FAPE.

However, the District did not follow IDEA procedures when it prevented the Student's IEP team from determining the Student's needs and revising the IEP to address the Student's needs. In doing so, the District infringed on the Parent's right to participate in the IEP process. The Student's IEPs were not reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances, which resulted in a loss of educational opportunity. These procedural and substantive violations resulted in a denial of FAPE.

The Department substantiates this allegation.

### **Additional Finding**

#### **Prior Written Notice (PWN)**

Prior written notice must be given to the parent of a child within a reasonable period of time before a school district proposes or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. The prior written notice must include a description of the action proposed or refused; 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; a statement that the parent of the child has protection under the procedural safeguards; a description of other options that the IEP team considered and the reasons why those options were rejected; and a description of other factors that are relevant to the agencies proposal or refusal.<sup>32</sup>

At five IEP meetings during the complaint period, the Parent requested that 1:1 adult support be added to the Student's IEP. The District did not provide any PWN to the Parent for the District's refusal to add 1:1 adult support to the Student's IEP. The District did not provide the Parent with a PWN when the District decided not to conduct an FBA.

### **V. CORRECTIVE ACTION<sup>33</sup>**

*In the Matter of Portland School District 1J  
Case No. 23-054-011*

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

<b>Action Required</b>	<b>Submissions</b>	<b>Due Date</b>
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<sup>30</sup> *Target Range*, 969 F.2d at 1484

<sup>31</sup> *Amanda J.*, 267 F.3d at 892 (citing *Roland M.*, F.2d at 994)

<sup>32</sup> OAR 581-015-2310; 34 CFR § 300.503

<sup>33</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)).

<p>The District must allow the IEP team to convene and determine whether designated adult assistance is required for the Student without undue external influence. If this assistance is required, it must be provided within 10 school days of that determination being made, including days for which the child receives extended school year services, if applicable.<sup>34</sup></p>	<p>The District shall submit the following to the Legal Specialist:</p> <p>Completed IEP and meeting notes showing whether designated adult assistance is needed, developed in IEP meeting with Parent;</p> <p>Prior Written Notice documenting the district's proposal or refusal to provide 1:1/designated adult assistance as requested by the parent.</p> <p>Evidence showing service is being provided if required.</p>	<p><b>June 19, 2023</b></p> <p><b>June 19, 2023</b></p> <p><b>September 29, 2023</b></p>
<p>1. The District must conduct an FBA and convene an IEP meeting to review the FBA and review and revise the Student's BSP if necessary.</p>	<p>Meeting Notice;</p> <p>Completed IEP.</p>	<p><b>August 1, 2023</b></p> <p><b>September 1, 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>• Evaluation Requirements;</li> <li>• Review and Revision of IEPs;</li> <li>• IEP Content;</li> <li>• IEP Development;</li> <li>• Parent Participation;</li> <li>• Prior Written Notice._____</li> </ul>	<p>Training agenda/materials to Legal Specialist for review/approval.</p> <p>Sign-in sheet for training.</p>	<p><b>August 15, 2023</b></p> <p><b>September 15, 2023</b></p>

Dated: this 5<sup>th</sup> Day of June 2023




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Tenneal Wetherell

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<sup>34</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).

Assistant Superintendent  
Office of Enhancing Student Opportunities

E-mailing Date: June 5, 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).)