

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of  
Portland School  
District 1J

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FINDINGS OF FACT,  
CONCLUSIONS,  
AND FINAL ORDER  
Case No. 23-054-031

**I. BACKGROUND**

On August 7, 2023, the Oregon Department of Education (the Department) received a written request for a special education complaint (Complaint) from an attorney for the parents (Parents) of a student (Student) attending school in the Portland Public School District (District). On August 15, 2023, the Parents' Attorney submitted an amendment to the Complaint. The Complaint requested that the Department conduct a special education investigation under OAR 581-015-2030. The Department confirmed receipt of the original Complaint and confirmed receipt of the Amended Complaint and forwarded both requests to the District by email on August 18, 2023.

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 August 24, 2023, the Department's Complaint Investigator sent an *Amended Request for Response (RFR)* to the District identifying the specific allegations in the Complaint and Amended Complaint to be investigated and establishing a *Response* due date of September 7, 2023.

The District submitted a *Response* on September 5, 2023, admitting in part and denying in part the allegations, providing an explanation, and submitting documents in support of the District's position. The District submitted the following relevant items:

1. District's Written *Response* to Complaint, dated 9/5/23
2. IEP, 2/23/22
3. Eligibility Statement, 2/23/22
4. Placement determination, 2/23/22
5. Meeting Minutes, 12/14/21
6. Meeting Minutes, 2/23/22
7. Prior Written Notice (PWN), 12/14/21
8. Meeting record, 5/14/21
9. PWN, 2/23/22
10. Eligibility Statement, 2/23/22
11. Notice of Team Meeting, 1/21/22
12. Parent Consent for evaluation, 12/6/21
13. PWN, 1/21/22
14. IEP, 2/22/23

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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)

15. Meeting Minutes, 2/22/23
16. Meeting record, 3/1/23
17. Meeting record, 3/16/23
18. Notice of Team Meeting, 12/14/22
19. Notice of Team Meeting, 1/18/23
20. PWN, 2/22/23
21. PWN, 4/5/23
22. PWN, 8/4/23
23. PWN, 12/13/22
24. Email communication, 11/17/22 through 8/7/23
25. Report Card, 2022-23 school year
26. Progress Reports, 1/27/23
27. Progress Reports, 6/12/23
28. Eligibility Summary Statement, 2/23/22
29. Adapted Physical Education Assessment Reevaluation, 2/18/22
30. Psychoeducational Report, 2/23/22
31. Social Communication Assessment Report, 2/14/22
32. Occupational Therapy Evaluation, 2/23/22
33. Eligibility Determination, 2/23/22
34. Multidisciplinary Supplemental Assessment Report, 2/27/23
35. Occupational Therapy Contact note, 9/10/21 through 6/8/21
36. List of Knowledgeable Staff

The Parents submitted a *Reply* on September 13, 2023, via email. The Parents did not submit additional documents with the *Reply*.

On September 28, 2023 and September 29, 2023, the Complaint Investigator communicated with the Parents' attorney, concerning the District's proposed corrective action and the corrective action being sought by the Parents. On October 3, 2023, the Complaint Investigator interviewed two of the District's attorneys by telephone. On October 4, 2023, the Complaint Investigator interviewed the Parents and their attorney by video conference and telephone. The Complaint Investigator reviewed and considered all of these documents, interviews, and exhibits in reaching the findings of fact and conclusions of law contained in this order. This order is timely.

## II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this Complaint under 34 CFR §§ 300.151-153 and OAR 581-015-2030. The Parents' allegations and the Department's conclusions are set out in the chart below. The conclusions are based on the Findings of Fact in Section III and the Discussion in Section IV. This Complaint covers the one-year period from August 16, 2022 to the filing of the Amended Complaint on August 15, 2023.

Allegations	Conclusions
<p><b>When IEPs Must Be in Effect (Implementation)</b></p> <p>The Complaint alleges that the District violated the IDEA by failing to provide 180 minutes of Occupational Therapy (OT) services during the 2022-23 school year, as required by the Student's IEP.</p>	<p><b>Not Substantiated</b></p> <p>The District provided 300 minutes of OT services from March 2, 2022 through June 8, 2022, following adoption of the Student's February 23, 2022</p>

<p>(OAR 581-015-2220; 34 CFR §§ 300.323 &amp; 300.324).</p>	<p>IEP. The IEP only included information regarding annual minutes of services rather than also including duration and frequency. Therefore, the District did implement the IEP as written.</p>
<p><b>Review and Revision of IEPs; Prior Written Notice(PWN); Parent Participation – General</b></p> <p>The Complaint alleges that the District violated the IDEA in the following respects:</p> <ol style="list-style-type: none"> <li>1. On June 2, 2023, the District issued an inappropriately backdated PWN dated April 5, 2023, which addressed an issue not yet proposed at the time of the IEP meeting on April 5, 2023.</li> <li>2. On June 2, 2023, the District issued an inappropriately backdated PWN dated April 5, 2023, which added an additional 180 minutes of Occupational Therapy services for the upcoming 2023-24 school year without the participation of the Parents and without an IEP team meeting.</li> <li>3. On August 4, 2023, the District unilaterally rescinded the April 5, 2023 PWN noted above, without the participation of the Parents and without an IEP meeting.</li> </ol> <p>(OAR 581-015-2225; 34 CFR §§ 300.324(a)(4), (a)(5), (a)(6) &amp; (b)(1); OAR 581-015-2310; 34 CFR §300.503; OAR 581-015-2190; 34 CFR §§ 300.500, 300.327 &amp; 300.501(b))</p>	<p><b>Substantiated</b></p> <p>The District, in its <i>Response</i>, “acknowledges that communicating about compensatory education proposal through the forum of PWN is not the purpose of those notices as contemplated by the IDEA.” Additionally, the District failed to involve the IEP team, including the Parents, in its decisions concerning OT services.</p>

<p><b>REQUESTED CORRECTIVE ACTION</b></p>
<p>The Parent requested the following corrective action:</p> <ol style="list-style-type: none"> <li>1. “Compensation in the form of partial or complete monetary reimbursement for 3 weeks of tuition for...a summer camp for kids with developmental disabilities which focuses on social emotions needs and communication.”</li> <li>2. “Occupational Therapy Push-In Support for mainstreaming in the 5th grade class, during Music, PE, or Library – areas of [the Student’s] day where [the Student] struggles the most.”</li> <li>3. “Facilitated IEP Meeting.”</li> <li>4. “Training for Portland Public Schools staff regarding when written IEP meetings are required.”</li> <li>5. “Training for Portland Public Schools staff regarding appropriate issuance of Prior Written Notice.”</li> </ol>

### 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 August 16, 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 10 years old and presently in fifth grade in the District.
2. The Student is primarily eligible for special education under the disability category of Autism Spectrum Disorder (ASD); with an additional disability of Other Health Impairment (OHI), according to eligibility documents dated February 23, 2022.
3. The Student's IEP in effect on August 8, 2022, one year before the filing of the original *Complaint*, is dated February 23, 2022. This IEP provided, as a Related Service, "Occupational Therapy" to be provided by the "LEA" by an "Occupational Therapist" in "GenEd/SpEd" for "180 min" "per year" with a start date of February 23, 2022 and an end date of February 22, 2023.
4. The Student's IEP team, including the Parents, adopted an IEP dated February 22, 2023. This IEP, like the Student's February 23, 2022 IEP, provided, as a Related Service, "Occupational Therapy" to be provided by the "LEA" and by an "Occupational Therapist" in "GenEd/SpEd" for "180 min" "per year" with a start date of February 22, 2023 and an end date of February 21, 2024.
5. Following adoption of the Student's February 22, 2022 IEP, the District, from March 2, 2022 through June 8, 2022, provided OT services to the Student ten times for 30 minutes each time, totaling 300 minutes. These OT contacts occurred nearly weekly for 30 minutes each time, during this time period.
6. Due to parental leave taken by the Occupational Therapist providing OT services at the Student's school, and despite efforts by the District to hire a replacement Occupational Therapist, the District did not provide any OT services to the Student during the 2022-23 school year.
7. Notes from an IEP meeting on March 16, 2023, noted an upcoming meeting to discuss OT services on April 5, 2023, to include a District Academic Program Administrator, the Parent's Advocate (Advocate), the District's Attorney, the Case Manager, the Parents, and the Principal. An email from the Advocate dated May 15, 2023 noted that the District had not contacted the Parents regarding "recovery services for OT services this school year." This email stated that now that the 2022-23 school year is nearing an end "the parents are requesting compensatory education in the form of the school district contributing funds toward camp this summer that addresses OT skills and services."
8. In an email dated May 25, 2023, the Advocate requested that the District respond by May 31, 2023 to the Parents' request that, as compensation for the OT services not delivered during the 2022-23 school year, the District pay for all or part of a camp the Student planned to attend during the summer of 2023. The District's Attorney responded, also on May 25, 2023, stating they might not have a response by May 31<sup>st</sup>, "but hopefully within the first week of June". On

May 30, 2023, the Advocate reported, in an email to the District's Attorney, that the cost of the "camp for three weeks is \$1,905.00."

9. On June 1, 2023, the District sent an email to the Parents and the Advocate stating "our records clerk missed sending out the PWN concerning OT services earlier this week. I've attached it for your reference." The PWN emailed to the Parents on June 1, 2023, is dated April 5, 2023. This PWN stated that: "The District proposes an additional 180 minutes of OT related services that were not provided the 22-23 SY during the 23-24 SY through district programming." This PWN also stated: "The district agrees to provide the additional 180 minutes of OT related services as part of the student's IEP services." Under the description of evaluation procedure, assessment, record or report listed as a basis for the proposed or refused action the PWN stated: "Special Education service records (e.g. IEP)" and "Team member communications". The PWN also stated that "The district rejects not providing these services because of the student's need as documented on the IEP", and that "The district will provide OT related services in the next school year. The district rejects proposal [sic] to provide OT through family's private service over the summer."
10. In an email dated June 4, 2023, the Advocate renewed the Parents' request that the: "district assist with the cost of the camps this summer (2023) that address OT minutes that were not served during the 2022-2023 school year. The cost of the camp is \$1,905.00. Please respond to our request by June 12<sup>th</sup>, 2023." On June 6, 2023, the District's Attorney, in response to the Advocate questioning why a PWN sent out in June of 2023 was dated April 5, 2023, stated they assumed: "that was a decision-date and the paperwork may have been delayed, but I will check."
11. On August 3, 2023, the District's Attorney sent an email to the Advocate, stating that an OT served the Student: "in the Spring, 2022 under [the Student's] 2/23/22 IEP and [the Student] received full service hours. 300 minutes between 3/2/22 and 6/8/22. [The Student's] service minutes were 180 minutes per year (2/23/22 to 2/22/23). So, there isn't a need for compensatory OT services at this time. [The Student's] new IEP similarly calls for 180 minutes of OT and this will be served during the current annual cycle. I've asked if the OT can see [the Student] early in this next school year."
12. A PWN dated August 4, 2023 states that: "The district is declining parent request for OT compensatory services under the 2022-23 IEP." This PWN also states: "The district is declining this request as services were provided consistent with the IEP. [The Student] received 300 minutes of Occupational Therapy services, which met the 180 OT service minutes for the 2022-23 annual IEP." The basis for the decision is described in the PWN as only: "Review of 2022-23 IEP and OT service logs." This PWN also states: "Other options considered were providing compensatory services, but were declined due to OT services minutes being delivered." Finally, the August 4, 2023 PWN states: "This PWN is also a correction to the 4/5/2023 PWN that stated that 180 OT services minutes would be compensated. Upon review of the service logs, it was determined that 300 OT service minutes were delivered for the 2022-23 annual IEP. The 4/5/23 PWN has been rescinded due to the district's error."
13. During interviews of two District attorneys, the District conceded that no IEP meetings occurred before issuance of the April 5, 2023 PWN, distributed on June 1, 2023 and the August 4, 2023 PWN. Rather, the District's attorneys confirmed that discussions occurred among District staff, including the Special Education Director, the Case Manager and an attorney for the District, and that discussions were had with the Parent Advocate, prior to issuance of the PWNs and the decisions reflected therein. The Parents were not involved in any of these discussions.

14. Regarding the allegation that the District failed to implement the Student's IEP with respect to OT services, in its *Response*, the District: "admits [the Student] did not receive OT services during the 2022-2023 school year. However, [the Student's] February 202[2] IEP nevertheless has been implemented – [the Student] received 300 minutes of OT services between March – June 2022. [The Student] is currently receiving regular OT services during the 2023-2024 school year. While the February 2023 IEP has been implemented as described above, the District acknowledges the lack of OT services for the previous school year is not ideal and understands the family's frustrations in this regard."
15. Regarding the allegations concerning Review and Revision of IEPs, PWN and Parent Participation, in its *Response* the District stated: "The District disputes the allegation that the PWN issued on June 1 was fraudulent or duplicitous. While the District acknowledges the date of April 5 on a PWN issued in June responding to the family's proposal made in May is understandably confusing, the suggestion of negative intentions on the District's behalf is inflammatory and unwarranted. The District further acknowledges that communicating about compensatory education proposals through the forum of PWNs is not the purpose of those notices as contemplated by the IDEA. Through this investigation, the undersigned has advised relevant District staff regarding these issues; the District proposes corrective action described below to further clarify requirements regarding PWNs to ensure clarity on this topic moving forward."
16. In its *Response*, the District proposed the following Corrective Action: "Student-Specific: The District proposes to provide [the Student] with an additional 180 minutes of OT services to compensate for the lack of OT services during the 2022-23 school year. District-Specific: The District proposes to provide training to all Special Education Program Administrators as to the requirements of and best practices regarding the issuance of PWNs."

## IV. DISCUSSION

### **When IEPs Must Be In Effect (IEP Implementation)**

The Complaint alleged that the District violated the IDEA by failing to provide 180 minutes of Occupational Therapy services during the 2022-23 school year, as required by the Student's IEP.

School districts must ensure that an IEP is in effect for each child with a disability within the district's jurisdiction at the beginning of each school year.<sup>3</sup> Districts must provide special education and related services to a child with a disability in accordance with a child's IEP.<sup>4</sup> The district must ensure that each staff member, including service providers, has access to a student's IEP and is informed of their specific responsibilities for implementing the IEP and the specific accommodations, modifications, and supports in accordance with the IEP.<sup>5</sup> The IEP must also include the anticipated frequency, amount, duration, and location of services required by the Student.<sup>6</sup>

A district violates the IDEA when it materially fails to implement an IEP.<sup>7</sup> "A material failure occurs when there is more than a minor discrepancy between the services a school provides to

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

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

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

<sup>6</sup> OAR 581-015-2200(1)(e)

<sup>7</sup> *Van Duyn v. Baker Sch. Dist. 5J*, 502 F3d 811, 822 (9<sup>th</sup> Cir. 2007)

a disabled child and the services required by the child's IEP."<sup>8</sup>

In this case, the District provided 300 minutes of OT services from March 2, 2022 through June 8, 2022, following adoption of the Student's February 23, 2022 IEP. The IEP only included the amount of OT service minutes to be provided annually. While there seems to be confusion within the District and between the parties about what was actually required or intended, the IEP was implemented as it was written.

The Department does not substantiate this allegation.

### **Review and Revision of IEPs; Prior Written Notice; Parent Participation – General**

The Parents alleged that that the District violated the IDEA's provisions regarding Review and Revision of IEPs, PWN and Parent Participation, when the District issued a PWN on or about June 1, 2023 backdated to April 5, 2023 and purporting to address an issue regarding the payment of tuition for an upcoming camp when the Parents did not request payment for the camp until May of 2023. The Parents also alleged that the District failed to ensure parent participation in the decision to add 180 minutes of OT services for the upcoming 2023-24 school year. The Parents also alleged that the District unilaterally rescinded the PWN dated April 5, 2023 on August 4, 2023, and determined the District would not provide the Student with compensatory OT, all without ensuring the participation of the Parents in the decision.

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

A student's IEP must be reviewed and revised periodically, but at least yearly, to determine whether the annual goals for the child are being achieved.<sup>9</sup> A school district must ensure that the IEP Team reviews and revises the child's IEP, as appropriate, to address: (1) any lack of expected progress towards the annual goals and the general education curriculum; (2) the results of a reevaluation conducted; (3) information about the child provided to, or by, the parents; (4) the child's anticipated needs; or (5) other matters.<sup>10</sup> Changes to the IEP may be made either by the entire IEP team at an IEP team meeting, or without a meeting if an agreement is made between the school district and the parent of a child with a disability.<sup>11</sup>

#### **PWN**

OAR 581-015-2310 provides that prior written notice must be given to the parent of a child before a District proposes to initiate or change special education services.

#### **Parent Participation – General**

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

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<sup>8</sup> *Id.*

<sup>9</sup> OAR 581-015-2225(1)(a); 34 CFR §300.324(b)(1)(i)

<sup>10</sup> OAR 581-015-2225(1)(b); 34 CFR §300.324(b)(1)(ii)

<sup>11</sup> OAR 581-015-2225; 34 CFR §300.324

IEP at no cost to the parent. “Parents must be able to use the IEP to monitor and enforce the services their child is to receive.”<sup>12</sup>

A school district must consider the concerns of the parents for enhancing the education of their child, among other indicators of the student’s academic, developmental, and functional needs. “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>13</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.” “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>14</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.

The District failed to comply with its obligations concerning review and revision of IEPs, the issuance of PWNs, and parent participation. The District concedes that it did not follow the proper procedures for making decisions concerning the provision of compensatory OT services, choosing to issue PWNs, dated April 5, 2023 and August 4, 2023, instead. The District, in its own words, “acknowledges that communicating about compensatory education proposal through the forum of PWN is not the purpose of those notices as contemplated by the IDEA.” Additionally, the District failed to ensure involvement of the IEP team, including the Parents, in its decisions concerning OT services.

The Department substantiates these allegations.

### **Additional Finding – IEP Content**

A student’s individualized education program (IEP) should include a statement of measurable annual goals, including academic and functional goals designed to meet the student’s needs resulting from the student’s disability to enable the child to be involved in and make progress in the general education curriculum. The IEP should also include a description of how the student’s progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided. It should also contain a statement of the specific special education, related services, and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the student, and a statement of the program modifications or supports for school personnel.<sup>15</sup>

A student’s services, aids, and program modifications should be designed to enable the student to advance appropriately toward attaining their measurable annual goals. Furthermore, they should assist students to be involved in and make progress in the general education curriculum; participate in extracurricular and other nonacademic activities; and be educated and participate with other children with disabilities and children without disabilities within the general education curriculum, extracurricular activities, and other nonacademic activities. The IEP should also include the projected dates for initiation of services and modifications and the anticipated frequency, amount, location, and duration of the services and modifications.<sup>16</sup>

The service description included in an IEP must enable both the Parents and those responsible for implementing the IEP to have the same clear understanding of the services to be provided

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<sup>12</sup> *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1198 (9<sup>th</sup> Cir. 2017)

<sup>13</sup> Letter to Northrop (OSEP 5/21/2013)

<sup>14</sup> *W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1985 (9<sup>th</sup> Cir. 1992)

<sup>15</sup> OAR 581-015-2200(1)(a)—(1)(d)

<sup>16</sup> OAR 581-015-2200(1)(c)—(1)(e)



for the student. Including multiple locations where a single service is anticipated to be provided (e.g., “GenEd/SpEd”) decreases that clarity of understanding. Planning for service minutes to be provided annually leaves room for further ambiguity. The Student’s February 23, 2022 IEP simply indicated that the Student would receive 180 minutes of OT services per year, and included no other information about frequency, duration, and location of services. The specified location was unclear as to where the service would be received, nor was sufficient information provided to the Parents about the frequency and duration of OT services as required by OAR 581-015-2200(1)(e).

This resulted in the Student receiving no OT services during the 2022-23 school year.

**V. CORRECTIVE ACTION<sup>17</sup>**  
*In the Matter of Portland Public School District 1J*  
*Case No. 023-054-031*

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

<b>Action Required</b>	<b>Submissions</b>	<b>Due Date</b>
1. The District must hold an IEP meeting with the Parents to develop a plan to provide compensatory OT services of 180 minutes.	The District shall submit the following:  Completed plan for delivery of Compensatory Education developed in IEP meeting with the Parents.  Evidence showing compensatory OT services were provided.	<b>December 1, 2023</b>   <b>September 15, 2024</b>
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: <ul style="list-style-type: none"> <li>• IEP Review/Revision;</li> <li>• Prior Written Notices; and</li> <li>• Parent Participation</li> <li>• IEP Content</li> </ul>	Training agenda/materials to County Contact for review/approval.  Sign-in sheet for training.	<b>February 15, 2024</b>   <b>April 1, 2024</b>

Dated: this 13th Day of October 2023

<sup>17</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)).

*Tenneal Wetherell*

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Tenneal Wetherell  
Chief of Staff  
Office of Enhancing Student Opportunities

E-mailing Date: October 13, 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).)