

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of  
Bend-La Pine School District 1

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FINDINGS OF FACT,  
CONCLUSIONS,  
AND FINAL ORDER  
Case No. 23-054-046

**I. BACKGROUND**

On December 1, 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 Bend-La Pine School District 1 (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 must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue an order within sixty days of receipt of the complaint.<sup>1</sup> This timeline may be extended if the Parent and the District agree to the extension in order to engage in mediation or local resolution or for exceptional circumstances related to the complaint.<sup>2</sup>

On December 11, 2023, the Department’s Complaint Investigator sent a *Request for Response (RFR)* to the District identifying the specific allegations in the Complaint to be investigated and establishing a *Response* due date of December 22, 2023.

The District submitted a *Response* on December 21, 2023, denying the allegations, providing an explanation, and submitting documents in support of the District’s position. The District submitted the following relevant items:

1. District’s Written *Response* to Complaint, 12/21/23
2. List of Staff, 12/21/23
3. Evaluation Planning Summary, 11/30/23
4. Prior Written Notice (PWN), 11/30/23
5. Parent/Guardian Consent for Individual Evaluation, 11/30/23
6. Prior Notice and Consent for Initial Provision of Special Education Services, 5/19/21
7. PWN, 3/17/23
8. Evaluation Planning Summary, 3/17/23
9. Parent/Guardian Consent for Individual Evaluation, 3/17/23
10. PWN, 4/10/23
11. ESY Parent Info and Consent Form, 3/17/23
12. Email from Parent, 4/10/23
13. Individualized Education Program (IEP), 3/3/23
14. IEP Progress Report, 6/20/23
15. Special Education Placement Determination, 3/3/23
16. Meeting Request, 2/2/23
17. Individualized COVID-19 Recovery Services Review, 3/3/23

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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. PWN, 3/3/23
19. Meeting Request, 1/23/23
20. Authorization to Use and-or Disclose Information, 3/3/23
21. IEP Meeting Summary, 3/3/23
22. Education Service District (ESD) Occupational Therapy (OT) Services Summary, 5/17/22
23. IEP, 3/7/22
24. IEP Progress Report, 6/16/22
25. IEP Amendment, 10/19/22
26. IEP Progress Report, 2/3/23
27. Special Education Placement Determination, 3/7/22
28. Parent/Guardian Consent for Individual Evaluation (*not signed*), 11/10/21
29. Meeting Request, 2/22/22
30. Individualized COVID-19 Recovery Services Review, 3/7/22
31. PWN, 10/19/22
32. PWN, 3/7/22
33. Private Ophthalmology Summary, 11/1/21
34. Private Neurodevelopmental Pediatrics Summary, 11/5/21
35. ESD Vision Referral Evaluation Report, 12/16/21
36. IEP Meeting Summary, 1/6/22
37. IEP Meeting Summary, 3/7/22
38. Abbreviated Day Form, 2/7/22
39. ESD OT Services Summary, 3/1/22
40. Written Agreement Between Parent and District, 10/28/22
41. IEP, 5/19/21
42. IEP Progress Report, 2/4/22
43. Eligibility Summary Statement, 5/19/21
44. Speech Language Report, 5/19/21
45. ESD OT Evaluation Report, 5/10/21
46. Special Education Placement Determination, 5/19/21
47. Disability Statement – Communication Disorder (CD), 5/19/21
48. PWN, 3/11/21
49. Meeting Request, 5/7/21
50. Meeting Request, 3/2/21
51. Referral for Evaluation, 3/11/21
52. IEP Meeting Summary, 3/11/21
53. Parent/Guardian Consent for Individual Evaluation, 3/11/21
54. Parent/Guardian Consent for Individual Evaluation, 4/5/21
55. IEP Meeting Summary, 5/19/21
56. Private Neuropsychological Evaluation Report, 6/2/21

The District submitted additional documents on January 4, 2024.

1. Emails Between District Staff and with Parent, 1/20/23 – 11/2/23
2. Private Neuropsychological Evaluation Report, 10/23/23
3. Parent/Guardian Consent for Individual Evaluation, 3/15/23
4. Private Articulation and Language Evaluation Report, 2/9/23

The Parent submitted a *Reply* on January 3, 2024, providing an explanation and rebuttal. The Parent submitted the following relevant documents in support of the Parent's position:

1. *Reply*, 1/3/24
2. OT report, 12/4/23
3. Letter from Private OT, 1/12/24

The Complaint Investigator interviewed the Parent on January 5, 2024. From January 8 to 11, 2024, the Complaint Investigator interviewed District and ESD personnel. On January 12, 2024, the Complaint Investigator interviewed the Private OT. Virtual interviews were conducted instead of on-site interviews. The Complaint Investigator reviewed and considered all of these documents, interviews, and exhibits in reaching the findings of fact and conclusions of law contained in this order. This order is timely.

## II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this Complaint under 34 CFR §§ 300.151-153 and OAR 581-015-2030. The Complainant’s allegations and the Department’s conclusions are set out in the chart below. The conclusions are based on the Findings of Fact in Section III and the Discussion in Section IV. This Complaint covers the one-year period from December 2, 2022, to the filing of this Complaint on December 1, 2023.

<b>Allegations</b>	<b>Conclusions</b>
<p><b>IEP Content</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 to fully address the Student’s needs that result from the Student’s disabilities.</p> <p>(OAR 581-015-2200; 34 CFR §300.320)</p>	<p><b>Substantiated</b></p> <p>The October 2022 Amended IEP and the March 2023 IEP did not accurately reflect the services and supports the Student was receiving. However, District staff reported the level of services and supports the Student received was necessary. It is difficult to determine whether the Student needed direct OT services, as there is no evidence that the IEP team discussed this issue.</p> <p>As written, the October 2022 Amended IEP and the March 2023 IEP were not reasonably calculated to enable the Student to make progress appropriate in light of their circumstances.</p>
<p><b>Placement of the Child</b></p> <p>The Parent alleges that the District violated the IDEA by failing to ensure that the Student’s placement was based on the Least Restrictive Environment provisions. Specifically, the nature or severity of the Student’s disability is such that education in regular classes with existing supplementary aids and services cannot be achieved satisfactorily.</p> <p>(OAR 581-015-2240 to 581-015-2250; 34 CFR §300.114 to §300.116)</p>	<p><b>Substantiated</b></p> <p>The placement implemented during the 2022-23 school year and first half of the 2023-24 school year was more restrictive than listed in the Student’s March 2022 and March 2023 Placement Determinations. However, District IEP team members reported the implemented placement was proper and reflected the appropriate Least Restrictive Environment for the Student.</p>

<p><b>Free Appropriate Public Education (FAPE)</b></p> <p>The Parent alleges that the District failed to provide the Student with a free appropriate public education.</p> <p>(OAR 581-015-2040; 34 CFR §300.101)</p>	<p><b>Substantiated</b></p> <p>Although implementation errors occurred, the services and supports provided by the District were reported to be necessary. It is unclear whether the failure to consider direct OT services resulted in loss of educational opportunity or benefit. However, both the District's predetermination of the type of OT services available to the Student and the failure to inform the Parent that the Student's educational program did not conform with the Student's IEPs or placement, infringed on the Parent's opportunity to participate in the IEP process, resulting in a denial of FAPE.</p>
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<p><b>REQUESTED CORRECTIVE ACTION</b></p> <p>The Parent requested the following corrective action:</p> <ol style="list-style-type: none"> <li>1. The Student should have a 1:1 TA at all times. For proper inclusion the TA must be trained in the instruction of individuals with disabilities and act discreetly so that none of the students know who they are there to support.</li> <li>2. The Student should receive OT services at school.</li> <li>3. Weekly collaboration between the Student's special education teacher and all the time should be added to the IEP.</li> <li>4. A facilitated IEP meeting should be scheduled.</li> </ol>
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### 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 December 2, 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 eight years old and in the third grade.
2. The Student is currently eligible for special education services under the category of Communication Disorder.
3. The Student's medical history includes diagnoses of mixed receptive-expressive language disorder; articulation disorder; mild intellectual disability; vision abnormalities; CLPB deficiency (3-MGA Type 7 genetic condition); and ADHD, among others.
4. District records indicate, "[The Student] has a medical condition of CLPB deficiency, an extremely rare genetic condition marked in part by congenital cataracts, intellectual and

developmental delays. [The Student's] presentation appears to be a mild version of this genetic condition and parents are working with specialists."

5. On September 9, 2020, the Student started virtual kindergarten at a District elementary school (the Elementary School) through comprehensive distance learning (CDL).
6. Starting in October 2020, the Student received weekly response to intervention (RTI) speech therapy (15 to 20 minutes per week), initially online during CDL, and then in person when in-person schooling resumed.
7. On March 11, 2021, the District convened a meeting and recommended the Student be evaluated for special education services. The Referral form completed by the District stated, "SPEECH ONLY: Reason for referral is for articulation, voice, or fluency concerns ONLY."

When asked why the team decided to only evaluate for speech needs, the SLP stated it is common, especially in kindergarten, to start with communication needs. The SLP also noted that the team decided not to complete cognitive testing right away, because the Parent was hesitant to have the Student evaluated for special education services. The team had other concerns but worried if they pushed too hard the Parent would not agree to the evaluation.

The Parent denied ever being resistant to having the Student evaluated.

8. The Parent initially signed an evaluation consent form on March 12, 2021 which included speech and language assessments. "During the evaluation, fine motor concerns arose." On April 5, 2021, the Parent signed another evaluation consent form, for fine motor assessments.
9. The District's May 10, 2021 Occupational Therapy (OT) Evaluation Report included the following, in relevant part:
  - a. "A file review, informal interviews with [their] teachers, a visual motor/perceptual assessment, as well as an in-person observation within the classroom setting was completed in order to determine eligibility for OT consultative services."
  - b. Observations were "consistent with teacher concerns in fine motor. Observations and scores from the VMI suggest that [the Student] has significant difficulty with visual motor integration. It is also important to note that clinical observations suggest that [the Student] may have functional vision needs that are impacting [their] ability to participate in academic tasks at school."
10. The District's May 19, 2021 Speech Language Report included the following, in relevant part:
  - a. The Student "will likely not meet kindergarten standards for the end of the year. Numbers and letters continue to be difficult for [them] to rotely name... or identify... In addition to whole class reading instruction, [the Student] receives reading intervention 30 minutes daily... the school team wanted to ensure [the Student] got sufficient instructional time before beginning evaluations into areas besides communication or fine motor."
  - b. The Student will receive outside evaluations "which may provide additional neuropsychological information to help inform the school team's decision making."
  - c. "There are no behavioral, adaptive, attention or social concerns at this time in the school environment."

11. On May 19, 2021, the District convened a meeting to discuss the Student's evaluations and eligibility. The Student was found eligible under the disability category of communication disorder, and the IEP team developed the Student's initial IEP.

12. The May 19, 2021 IEP included the following, among other things:

a. Present Levels:

- i. Academics: able to identify three letters of the alphabet; can write some capital letters, can trace name; can count to three; and can identify two numbers.
- ii. Communication: "[The Student's] expressive and receptive language skills are lower than expected for [their] age... uses narrow range of pronouns... and does not use articles... It is not clear [the Student] understands spoken non-routine instructions without supports or cues... [The Student] demonstrated below and significantly below average scores in all language areas."
- iii. OT: "[The Student] is not yet writing [their] name...has been informally receiving small group instruction through a multi-sensory handwriting program, with some success... has significant difficulty with visual motor integration, impacting [their] ability to successfully engage in all parts of [their] academic classwork."

Evaluation results "indicate that [the Student] would benefit from individualized instruction in subjects of difficulty as well as individualized instruction in handwriting. It is anticipated that [the Student] will benefit from occupational therapy consultation and coaching to address handwriting and fine motor concerns."

"[The Student] may benefit from... Access to quiet learning environment with limited distractions" and "Activities to promote visual-motor integration," among other things.

- b. How the Student's disability affects involvement and progress in the general education curriculum: "[The Student's] language skills impact [their] ability to understand classroom language and express [their] thoughts, ideas and knowledge clearly. [Their] fine motor needs impact [their] ability to participate in academic tasks that require writing."
- c. Special Factors: has communication and assistive technology (AT) needs.
- d. Annual Goals: three speech/language goals: (follow 2-3 step directions; use correct 'to be' verb; use articles in sentences); one goal each in writing (independently write all upper and lower case letters), reading (identify and provide correct letters sounds and names for all 26 letters), and math (independently write and identify numbers from 0-30).
- e. SDI: Speech/Language Therapy (160 minutes per month); Writing (160 minutes per month); Reading (300 minutes per month); and Math (120 minutes per month).
- f. Related Services and Need for Aids/Services; Modifications: The team considered these but determined they were not needed.

- g. Supports for School Personnel: SPED Consult; OT Consult; and SLP Consult.
- h. Non-Participation Justification: “will be removed from the general education classroom up to 700 minutes per month in order to receive specially designed instruction... requires a quiet, distraction-free environment in which to practice skills and make progress towards [their] IEP goals.”

13. The May 19, 2021 IEP Meeting Summary included the following:

- a. OT: When the class was cleaning up [the Student] initiated the task after everyone else, [the Student] didn't appear to process it [they] just saw [their] peers do something and then copy [sic] them... [The Student] needs someone to come over and help [them] get started... can't write name even with model... wasn't able to begin [their] writing work.”
- b. “[The Student's] visual perception was below average... fatigued very quickly... [Their] behavior and patterns indicative of something visual going on. [The ESD OT] would recommend a behavior optometrist do an assessment. It can have something to do with the way [their] eyes are tracking. Will qualify for OT.”
- c. “Qualifies in the area of articulation, would like to target language skills right now and worry about articulation as [the Student] develops more language.”
- d. Academic goals were included in the meeting notes, but no further detail or explanation was provided.

14. The May 2021 IEP included SDI in reading, writing, and math, although the Student was only evaluated in the areas of speech-language and fine motor skills. When asked why, the District Speech Language Pathologist (SLP) reported that by the time the IEP team met in May 2021 to develop the IEP, it was clear that the Student needed academic support in addition to communication needs and, therefore, academic goals were added to the IEP.

15. The May 19, 2021 Special Education Placement Determination selected, “More than 80% General Education with Special Education outside classroom,” from the two placement options listed.

16. A private Neuropsychological Evaluation report, dated June 2, 2021 included the following information, among other things:

- a. “Primary diagnosis: Disorder of intellectual development.”
- b. Scores in the areas of cognitive skills, academic abilities, expressive and receptive language, and attention skills, were in the first percentile.
- c. “[The Student's] overall cognitive functioning is far below other children [their] age... is likely to have more difficulty understanding verbal information than many of [their] peers and will require more explanation to understand concepts and apply previously learned information to novel concepts... [The Student's] challenges... make the application of nonverbal reasoning skills particularly challenging for [them] to demonstrate in many areas of [their] life. One example of this is [their] difficulty identifying most numbers, letters, colors, and shapes. Further, [their] overall challenges with attention and concentration are significantly affecting [their] ability to

function independently... will need ongoing support in special education with para-educator/1:1 support as well as direct instruction in school.”

17. On September 8, 2021, the Student started the 2021-22 school year as a first grader.

18. A November 5, 2021 private Developmental Pediatrics Assessment report included the following, in relevant part:

- a. Diagnosed with mild intellectual disability and attention deficit hyperactivity disorder (ADHD) predominantly inattentive type, in addition to their existing diagnoses.
- b. “[The Student] had previous unrecognized problem with [their] vision. Now that this has been corrected, [the Student] is doing better with visual tasks... is starting to recognize some of [their] letters.” “[The Student] was recently diagnosed with congenital cataracts and vision abnormalities. This is currently corrected with glasses.”
- c. “General knowledge questions were answered at the 3-4 age level... [The Student] is having academic difficulty in all of [their] subjects... has trouble with organizational skills and assignment completion.”

19. A December 16, 2021 ESD Vision Referral Evaluation Report:

- a. The referral was made by the Student’s Special Education Teacher/Case Manager (the Case Manager), “who was wondering whether [the Student’s] vision could be affecting [their] ability to access [their] educational materials.”
- b. A review of a private Optometric Assessment indicated bilateral sutural cataracts, bilateral amblyopia, hypertonic astigmatism, and subnormal vision.
- c. “[The Student] maneuvered around desks, people, and objects without difficulty... [The Student is] an independent traveler within the school setting” and “very familiar with the school layout and remembered routes to various locations.”
- d. Conclusion: “[The Student] is able to visually identify figures at near distance (16”) at an acuity level of 20/60. It’s recommended that all instruction print material be between 12 and 14 point font... does have a mild vision condition that requires [them] to always wear prescription glasses... No additional visual accommodations appear to be required for educational success at this time.”

20. On January 1, 2022 the District convened an IEP meeting to review the vision evaluation results. The IEP meeting notes/summary stated:

- a. The Vision Specialist reported, the Student “[d]iverts [their] attention to distractions right away... [the Student’s] tracking is accompanied by head movements. Vision field appears to be full... Does not see any lower field loss. Visual tracking exercise with stylus [the Student] did well with moderate speed. High speed was too much.”
- b. “[The Vision Specialist] is seeing more concerns with visual perception that a visual impairment. What the eye sees is one thing, what the brain reacts to another thing. [The Vision Specialist] does not see any visual impairment that would impact [their] education... feels it is more of a visual perception issue or a sensory integration issue that is impacting [their] learning. Does not require vision services or accommodations



in the school setting at this time... does better in a 1:1 or quiet, non-distractible environment. This will help with the vision perception piece.”

21. A March 1, 2022 ESD OT “Services/Support Summary” report included the following:

- a. “[S]truggles with writing, reading, math, and organization.”
- b. Under “Intervention/Instruction/Coaching/Collaboration,” the items selected included Equipment; Sensory; Handwriting; Fine Motor; and Health/Comfort/Well-being.

22. On March 7, 2022, the District convened the Student’s annual IEP meeting.

23. The March 7, 2022 IEP (March 2022 IEP) included the following changes, among other things:

- a. “Beginning February, 7 [sic] [the Student] began attending school for an abbreviated week. Per parent choice [the Student] doesn’t attend school 2 days per week and attends outside tutoring. [The Student’s] specially designed instruction minutes listed on in [sic] [their] IEP reflect [their] current time [the Student] is at [the Elementary School] for 3 out of 5 days a week.”
- b. Parent Concerns: the Student was recently “diagnosed with a CLPB deficiency.”
- c. Present Levels of Academic Achievement:
  - i. Reading: receives “Core reading instruction in the general education setting” as well as SDI “in a small group setting, which meets four times per week, thirty minutes per day.” “[The Student] started the year reading 0 correct letter sounds and [the Student] is now reading 8 correct letter sounds” and can identify most of the letters in their name when given a visual.
  - ii. Writing: “made tremendous progress... can independently write [their] name with 70% accuracy... will continue to benefit from small group instruction” in handwriting. “In addition, to receiving specially designed instruction in handwriting, [the Student] also receives specially designed instruction in the classroom during writing time. During this time, [the Student] is participating in grade level writing tasks while getting support...”
  - iii. Math: “making great progress... started year unable to count to 3, [the Student] is now able to count objects to 10... can currently name the number 1... will continue to benefit from small group instruction in math to build [their] skills in counting and identifying numbers to 30.”
  - iv. Communication: “does well in a group... Focus going forward will be on word retrieval, which seems very hard for [them] when put on the spot.”
  - v. OT: recommended “continued support with handwriting at school with pull out sessions,” “complimentary fine motor exercises for strengthening,” “classroom regulation support and equipment,” and “support around organization.”
- d. How the Student’s disability affects involvement and progress in the general education curriculum: “[The Student’s] delays in language and cognitive functioning impact [their] progress in the general education curriculum.”

- e. Goals: one goal each in the areas of Speech/Language Skills (name targeted items); Writing (write name and trace letters of the alphabet); Reading (provide correct letter sounds for all 26 letters); and Math (count and identify numbers from 0-30).

Progress to be reported to the Parent “semesterly” with school progress reports.

- f. Specially Designed Instruction (SDI): Speech/Language Therapy (reduced to 80 minutes per month); Writing (reduced to 150 minutes per month); Reading (reduced to 175 minutes per month); and Math (increased to 140 minutes per month).
- g. Related Services and Supplementary Aids/Services; Modifications: the team considered these but determined they were not needed.

h. Accommodations:

- i. To be provided by special education teacher: access to equipment and equipment trials; access to quiet learning environment with limited distractions; multi-sensory handwriting program; familiar test assessor; and opportunities for fine-motor work through fun activities.

To be provided by general education teacher: visual supports and mnemonics to assist in learning; provide visual supports paired with instruction; extended time on tests and assignments and/or reduce quantity of assignments to balance need for extra time; provide numerous amounts of repetition of directions, instruction, and expectations; for in class writing tasks, dictate sentences in highlighter and have Student trace their sentences; frequent check-ins for understanding of expectations, directions offered one step at a time with a visual model or demonstration; direct check-ins from teacher after whole group instruction; break directions in to single steps with visuals; and preferential seating near front of class to minimize distractions and next to supportive peer.

- ii. Supports for School Personnel: OT consult reduced from 240 to 200 minutes per year.
- i. Non-Participation Justification: removal for SDI was reduced from 700 to 545 minutes per month, which “reflect [the Student’s] current partial week enrollment.”

24. The March 7, 2022 “IEP Meeting Summary” included the following:

- a. “[The Student’s] strongest skills come out when [they’re] in a small group.”
- b. The Case Manager stated, “[their] minutes are cut in half, since [the Student has] been coming about half time. If that changes we can update [their] IEP.”

25. In the March 7, 2022 Special Education Placement Determination, the two same options were considered. The IEP team again selected “More than 80% General Education with Special Education outside classroom,” stating the Student would receive SDI in the resource room and in the regular classroom, and “Student would benefit from specialized instruction in a small group environment with minimal distractions.”

The other option considered was, "More than 80% General Education with Special Education within classroom." Under possible harmful effects, it stated, "Based on current skill level, student would experience frustration in the General Education curriculum [sic]."

26. On September 7, 2022, the Student started the 2022-23 school year as a second grader.

27. The Student's second grade teacher (Second Grade Teacher) reported the following about the 2022-23 school year:

- a. The Case Manager provided the Student's SDI for approximately 30 minutes per day each in math, reading, and writing. These were primarily pull-out services, depending on what the class was working on. It was easier for the Student to work in a quieter environment.
- b. The Student needed support with most tasks and for all class instructions. Except for when the Student was with the Case Manager, the Student sat next to the Teacher for most of the day to receive more support. The Second Grade Teacher provided a lot of support, but it was not possible to provide the Student's accommodations all the time. Often support was also provided to the Student by peers.
- c. All of the Student's academic work was modified in some way, as the Student was not able to access the second grade curriculum at grade level. The Student had a folder of modified worksheets prepared by the Case Manager for them to work on when the class was doing something they could not access.
- d. The ESD OT would occasionally come and check-in. The Second Grade Teacher was not aware of any specific OT plan and or any OT work they were expected to work on with the Student. They did not receive any specific instructions from the OT.

28. Starting in fall 2022, the Student returned to attending school full time.

29. On October 19, 2022, the Student's IEP was amended by written agreement between the Parent and the District "to reflect [the Student's] specially designed instruction minutes being increased to match [their] full school week."

30. The October 19, 2022 IEP Amendment included the following changes:

- a. SDI: Speech/Language Therapy (increased to 120 minutes per month); Writing (increased to 240 minutes per month); Reading (increased to 350 minutes per month); and Math (increased to 240 minutes per month).
- b. Non-Participation Justification: removal was increased to "up to 950 minutes per month."

31. Most SDI areas in the October 2022 IEP Amendment were increased well past their 2021 levels, except for Speech/Language Therapy which remained below the 160 minutes included in the May 2021 IEP.

32. In a January 20, 2023 email exchange between with the Case Manager, the Parent requested "getting [the Student] a 1:1 aide at school."

The Case Manager's response stated, "Regarding a 1:1 aid [sic] at school. Our district does not assign 1:1 aids [sic] to students, we provide additional adult support when needed. What

would you like [the Student] to get more adult support in? Right now, [the Student] receives specially designed instruction at [their] level 25 min/day for reading, 25min/day for writing, 25 min/day for math and pull-out services for speech with some give-and-take for special classroom activities and library... [the Student] is not a big fan of someone sitting next to [them] in class and helping [them]. [The Student] likes to be able to do things on [their] own or with the support of a peer.”

The Parent’s response stated, “I’m just going growing concerned about [their] progress and I want to make sure we’re doing enough... I’m just worried that [the Student] isn’t learning enough to keep moving forward and [the Student] definitely isn’t maturing as fast as [their] classmates. I’m honestly mostly worried about [their] safety... I know how long anything with the district takes and [the Student] is definitely going to need more and more support each year if we keep passing [them] on up.”

33. When asked about one-on-one aides, the District reported it does not automatically assign one adult to one student. The team looks at the specific student’s services and needs, then identifies which parts of the day the student needs adult support and for which specific activities or tasks. If the student cannot do the task independently and needs adult support to access their education, it will be included in the IEP as an accommodation. The District has students who have adult support all day long, but it would not be labeled as a “1:1 aide.”
34. The February 3, 2023 IEP Progress Report indicated the Student made progress in Writing. On the other goals (Speech/Language, Reading, and Math), data showed the Student was at approximately the same level as they were in their June 2022 IEP Progress Report. The progress code for some goals was listed as “the goal may not be met by annual review date.”
35. A March 3, 2023 ESD “OT/PT Services / Support” document from ESD indicated the Student was receiving the support in the same areas (Fine Motor, Health/Comfort/Well-being, Equipment, Sensory, and Handwriting) as listed in the March 2022 OT Summary. The OT added that the Second Grade Teacher was frequently observed sitting with the Student and providing one-on-one support in writing.
36. On March 3, 2023, the District convened the Student’s annual IEP meeting.
37. The March 3, 2023 IEP (March 2023 IEP) included the following changes, among others:
  - a. Parent Concerns: “expressed concern with [the Student’s] rate of progress and [their] academic level as [the Student] continues to get older and progress into high grade levels. [The Parent] is concerned about [the Student] continuing to progress grade levels and not being academically at that level.”
  - b. Present Levels of Academic Achievement:
    - i. Reading: “has made tremendous reading growth” and knows all their letter sounds except one.
    - ii. Writing: “...is writing [their] name independently... is participating in all of the writing activities in class with accommodations and modifications... is participating in grade level writing tasks with supporting in writing [their] ideas down onto [their] paper and using assistive technology.”
    - iii. Math: “continuing to work on counting and identifying numbers to 10...not consistent in [their] math skills and has difficulty retaining math skills and will

occasionally not be able to do something [the Student] was able to do the previous day.”

- iv. Communication: “[The Student’s] goal last year was focused on word retrieval... made some limited progress on commonly used items... but struggles with other categories... this area may be better served by providing picture/word banks.”
- v. OT: the recommendation changed to “continued support with handwriting at school with push in sessions,” instead of pull-out sessions.
- c. Present Levels of Functional Performance: added medical diagnoses (CLPB deficiency and ADHD).
- d. Goals: Two goals in the area of Speech/Language Skills (produce grammatically accurate sentences; produce // in all word positions); one goal in Writing (dictate three sentences to an adult and copy down the sentences on paper); one goal in Reading (blend 8 CVC words and read 10 sight words); and two goals in Math (count objects and pair the number of objects; identify numbers and count from 0-20).
- e. Specially Designed Instruction (SDI): Math (increased to 300 minutes per month).
- f. Accommodations: added provide shorter assignments with less production or alternative work and activities at the Student’s level during general education reading and math times; access to assistive technology, seating, organization supports, etc.; for writing tasks, write sentences on white board for Student to copy onto their paper; and movement to assist in learning.
- g. Supplementary Aids/Services; Modifications: added “Modified math activities and assessments in class to reflect current level of ability.”
- h. Supports for School Personnel: added AT consult.
- i. Non-Participation Justification: “[The Student] will be removed from the general education classroom up to 1,010 minutes per month in order to receive specially designed instruction in reading, writing, math, speech and language in the resource and/or speech room.”

38. The March 3, 2023 IEP Meeting Summary included the following information, among other things:

- a. “Discussion of options – [The Parent] would like [the Student] to get more specific schooling at [their] level. Worries [the Student] is not getting the foundational skills [the Student] needs in [their] classroom.
- b. “[The Student] is supported during all academic blocks during those time periods. If [the Student] can access, it is in the classroom. If it is too hard, [the Student] is pulled out and works on [their] own goals.”
- c. SDI: “Minutes stay the same, (30 minutes for each academic subject- math, reading, writing) 30 minutes/week for speech. OT and Assistive Tech on consult.”

- d. The Case Manager stated they thought the Student would be reading “by the end of the year.”
39. It is unclear why only modified math was added to the Student’s IEP, as the IEP Present Levels stated the Student did writing activities with modifications, and the Student’s Second Grade Teacher stated that the Student’s work was modified in all subjects.
40. When asked, the District reported second grade is early to identify modified schoolwork, and it is usually done around fifth grade. However, at the time of the March 3, 2023, IEP meeting, math was the subject where the team felt like the Student was not making progress and they had enough information to make that decision. For reading, it appeared the Student was making some progress, and the team was not ready to decide on whether the Student needed modified reading.
41. It is unclear why the March 3, 2023 Meeting Summary stated the Student’s SDI minutes would stay the same, at “30 minutes for each academic subject- math, reading, writing,” as this did not match the SDI minutes listed in the IEP.
42. In the March 3, 2023 Special Education Placement Determination, the same two options were considered. The IEP team again selected “More than 80% General Education with Special Education outside classroom,” and rejected “More than 80% General Education with Special Education within classroom.”
43. The Parent stated the Student’s placement was inappropriate as it did not provide enough adult support and did not give the Student sufficient opportunities to learn in small groups with peers that were at the Student’s level. The Parent did not feel that inclusion in the regular classroom during general education curriculum instruction, which the Student could not access, was appropriate or beneficial for the Student.
44. The District reported that it has a typical continuum of alternative placement options, including self-contained programs in different facilities for students with regulation issues. The District does not have “life skills” classrooms. The District has placements that “include removal to self-contained classrooms all day or with push-in opportunities in the general education environment. These are very restrictive placements for students who are significantly impacted by their disabilities and who are working on functional skills. These were not appropriate for the Student.”
45. At the March 3, 2023 IEP meeting, the team determined the Student qualified for extended school year services (ESY) in math. However, the Parent officially declined ESY on March 17, 2023.
46. A March 17, 2023, Evaluation Planning Summary included the following:
- a. “Current eligibility of Communication Disorder, suspected eligibility of Other Health Impairment and/or Intellectual Disability.”
  - b. “[T]he IEP team determined additional information was needed to determine [the Student’s] eligibility, present levels, or [the Student’s] special education and related service needs.
47. The Parent signed an Evaluation Consent form on March 17, 2023, which included psychoeducational assessments, social/emotional assessments, adaptive behavior

assessments, observation of learning environment, and educational evaluation of learning and achievement.

48. In an April 10, 2023 email to the Case Manager, the Parent, wrote, "I would not like [the Student] to be evaluated at this time, thank you."

When asked, the Parent reported the Student was scheduled to undergo extensive private evaluations over the summer and they did not want the Student to be evaluated twice.

49. The District issued a PWN dated April 10, 2023, which stated, "The parent has revoked consent for the District to conduct a special education evaluation to update [the Student's] eligibility categories... After [the Student] is evaluated at [a private] Clinic this summer the team will revisit a school based evaluation to update [their] eligibility categories."

50. The SLP reported that, after the Student received the ADHD and mild intellectual disability diagnoses, the team wanted to conduct comprehensive evaluations ahead of the Student's three-year evaluation deadline to update the eligibility categories and IEP to make sure all current needs were addressed. However, the SLP believed that, even without updated evaluations, the Student's IEP accurately reflected the Student's needs and did not feel the IEP would have changed much with new evaluation information.

51. The Parent reported providing copies of all the Student's outside evaluations and progress information. It is unclear to what extent this information was reviewed and considered by the District and IEP team. The private evaluation information was never mentioned in the IEP present levels. Except for the October 2022 IEP Amendment to adjust the Student's SDI minutes, which was done by written agreement, the District did not convene an IEP meeting to review and revise the Student's IEP outside of the annual IEP reviews.

52. The June 20, 2023 IEP Progress Report indicated that the Student made some progress in most areas, but noted all the goals may not be met by the annual review date.

53. In an August 28, 2023 email to the Case Manager, the Parent expressed concerns about the Student's move to third grade, writing:

"I just have lots of questions about how [the Student's] daily schedule is going to look... how a 3rd grade classroom is developmentally appropriate and beneficial... how [the Student] will be kept safe around children who are not actually [the Student's] peers re:maturity [sic], understanding, grade level, toileting, similar interests... I'm really concerned about how we've moved past core fundamentals and just keep passing [the Student] on... I just want to have an open discussion about all the options the school & District have... a suitable learning environment for [the Student] includes flexibility and thinking outside the box that these hastily introduced inclusion policies didn't leave as much room or funding to accomplish well... I want to make sure [the Student is] actually working 1:1 when [they are] pulled out, I think we've already discussed that push in isn't particularly helpful because [the Student is] just SO distractible."

54. On September 6, 2023 the Student started the first day of the 2023-24 school year as a third grader.

55. The Parent reported that the Student advancing to the next grade was more difficult each year because the complexity of academic content continued to increase, while the Student was still working on identifying letters and numbers.

56. The Third Grade Teacher reported third grade was a big jump academically from second grade and the amount of material the Student was able to access was getting significantly smaller.

57. On September 14, 2023, the District convened a meeting at the Parent's request, which included the Case Manager, a Director of Student Services, the Assistant Principal, the SLP, and the Third Grade Teacher.

The SLP reported that at the meeting, the Parent stated they wanted the Student in a separate program for students with higher needs but was told the District did not have this option as the District tried to serve all students at their neighborhood school and in the general education classroom as much as possible.

58. On September 21, 2023, in an email exchange with the Case Manager, the Parent asked if the Student could receive OT services at school.

The Case Manager responded, "School based OT is delivered through a consult model where they consult with [the teacher] and myself on supporting [the Student] through-out [their] School day. They do not work with students directly in the school setting and are contracted by the ESD."

In response, the Parent stated that because of this, the Student would not attend school on Mondays starting the following week in order to attend outside OT and speech services. "I've seen so much growth since [the Student has] started OT – I find it to be such a good use of [their] time and it helps [them] access everything else [they are] working on."

59. The District generally reported across staff members that it has a consult-only model for OT, with OTs contracted from the local ESD. The District always puts OT in IEPs as support for school personnel. Typically, the OT will do the assessment, write up a plan, train school staff on how to implement the plan, and come in regularly to update the plan as needed. School staff can also reach out to the OT if they need help or have questions. The OT work is individualized for each student. One district staff member noted that, depending on the specific student's need, the OT can do direct services. The OT also noted that direct services are "always an IEP team decision."

60. According to statements from the Third Grade Teacher, along with a copy of the Student's daily schedule emailed to the Parent by the Case Manager on September 25, 2023:

- a. Each day the Student received approximately 180 minutes of pull-out and 25 minutes of push-in services, provided by the Case Manager (Reading: 65 minutes outside the class, 25 minutes push-in; Math: 55 minutes outside the class; Writing: 30 minutes outside the class; and 30 minutes of pull-out for "project time").
- b. Each day the Student spent approximately 95 minutes in the general education environment outside the third grade classroom for lunch, recess, and specials.
- c. Each day the Student spent approximately 85 minutes in the third grade classroom (70 minutes for morning role and check-in, snack time, read aloud/quiet time, brain break, and end of day check-in and classroom clean-up; and approximately 15 minutes of full class phonics instruction, in which the Student worked on self-directed worksheets from a folder of modified reading and math work until the Case Manager arrived to push-in and work with the Student on phonics at their level).



61. The Third Grade Teacher reported that the pull-out and push-in times varied a little because there were times when the Student preferred to stay in the class with the Case Manager rather than be pulled-out. Additionally, the start and end times of each part of the schedule might not be exact depending on the day.
62. District witnesses reported that the Student's pull-out and push-in time was provided almost exclusively by the Case Manager. It was also reported that the Student received more service time from the Case Manager than any other student in the school. The Student was reported to receive more special education services than the IEP team documented in the IEP.
63. Starting on September 25, 2023, the Student stopped attending school on Mondays to attend private OT and speech services.
64. In an October 17, 2023 email to the Case Manager and the Third Grade Teacher, the Parent wrote, "My main concerns boil down to unsafe staffing in the gen Ed [*sic*] classroom. It's not inclusion done well with a 29:1 ratio even under the best circumstances..." The Parent stated they did not want the Student in the general education classroom without adult support and would prefer to pick the Student up from school early if the school was unable to provide it.
65. The Parent reported they have never been clear on the level of support the Student received at school. The schedule provided by the Third Grade Teacher was ambiguous regarding specific special education service times.
66. An October 23, 2023 private Neuropsychological Evaluation report included the following information, in relevant part:
  - a. The Parent thinks the Student "gets about one hour of pull out support each day" and "is in the general education classroom for around 80%" of the day.
  - b. Evaluation results indicated the Student has a full Scale IQ of 45; verbal learning and memory was in the first percentile; "results indicated overall challenges in adaptive functioning"; "fine motor speed and coordination were in the far below average range for [the Student's] preferred right hand and in the average range for [their] non-preferred left hand"; "Visual-motor integration (eye-hand coordination in using a pencil with the preferred hand) was below the average range (Beery VMI = <1st percentile)."
  - c. The Student's intellectual disability "is likely related to [their] genetic condition, 3-MGA Type 7, for which there is a dearth of information regarding the neurocognitive impacts of [their] condition to the developing central nervous system... [The Student] showed significant impairment in right-handed fine motor coordination and speed... While [the Student's] overall neurocognitive functioning suggests generalized [central nervous system] impairment, there are elements of this profile that may indicate focal impairment in the left cerebral hemisphere."
67. A November 30, 2023 PWN stated the team decided to evaluate the Student and the Parent "requested that the District use previous assessment data when possible."
68. The Parent reported, and District staff confirmed, the District agreed to use the October 23, 2023 private Neuropsychological Evaluation report instead of the District conducting its own evaluations.
69. On December 1, 2023, the Parent signed an evaluation consent form, which stated the evaluation would be "[b]ased on a review of existing information, no additional data is needed

to determine if your child is, or continues to be, eligible for special education services or to determine your child's educational needs."

70. Witnesses reported the following about the Student's adult support needs:

- a. The SLP stated the Student did not need adult support for social or group activities where everyone was doing the same thing and there was no "cognitive load." When there was a cognitive element, the Student needed more direct instruction. The SLP reported the classroom teacher should be able to implement all the Student's accommodations in the classroom.
- b. The Second Grade Teacher reported the Student clearly needed more adult support. They noted that the Student could not get started on a task by themselves and all instructions had to be provided to the Student in a different way. The Teacher noted that the Student liked peer support, but that the District cannot put the responsibility of teaching the Student on a peer. Extra adult support would have helped facilitate the Student's learning in the classroom.
- c. The Third Grade Teacher reported the Student needed adult support for all academic tasks, as well as many other classroom tasks. Additional adult support would be helpful with any classroom activities that required the Student to respond to a question. However, since all the Student's academic instruction occurred outside the classroom or with push-in support in the classroom, the Student was doing well with the services and supports provided. The Student would also benefit from additional adult support in specials, particularly to access music instruction.
- d. The Student's Private OT reported adult support is needed in the classroom to keep an eye on the Student, identify when to intervene, help the Student stay focused, get the Student back on track if they lose focus, and help them move forward and complete their work.
- e. All school staff interviewed stated the Student was able to get around the school independently, including walking to the office, to the Case Manager's classroom, and to the restroom on their own.
- f. When asked if the Student would know what to do in the hallway if there was an emergency, the Third Grade Teacher stated that, if other students or staff were present, the Student would be able to follow them. However, if the Student was alone in the hallway during an emergency, the Student would not know what to do or where to go.
- g. Except for being alone in an emergency, no one except for the Parent had any safety concerns about the Student being outside the classroom without adult support.

71. District staff agreed the Student loved being in the general education classroom and received non-academic benefit from being with peers. The Third Grade Teacher reported the Student's level of services and supports (with all academic instruction outside the classroom) was necessary and well balanced with the non-academic benefits the Student received from time spent in the classroom with peers.

72. On December 1, 2023, the Parent filed this Complaint.

73. A December 4, 2023 Private OT report included the following information, among other things:

- a. The Student has received weekly OT services from this Private OT since April 2022. The Student “has significantly delayed fine motor and body coordination skills.” “Ongoing skilled OT is required to address these concerns...”
- b. The Private OT worked with the Student on their “quality of movement especially around balance, body awareness and motor coordination.” “[The Student] continues to require support for body coordination including hand/eye coordination, visual motor skills and fine motor skills...”
- c. The Student “struggles with the sequencing and motor planning. [The Student] is known to backslide with previously attained skills when they are not practiced often. [The Student] does best with multisensory learning that relies on touch, movement and vision instead of auditory information which [the Student] struggles to follow and sequence in isolation.”

74. The Private OT reported:

- a. The Private OT provided direct services for motor coordination activities and foundational interventions that target neurocognitive development, to help with fine motor and visual motor skills.
- b. The Student has severe vision challenges and worked with the Private OT for the last 1.5 years on maintaining static visual fixation. The Student has made a lot of progress and is now “able to maintain visual fixation for 10 seconds.” However, visual fixation is only the precursor to visual tracking, which is a skill needed for reading, writing, and other tasks in the classroom. The Student’s difficulty holding a visual fixed gaze has significantly impacted them in the academic environment.
- c. “[The Student] is now working on smooth, horizontal visual tracking which is very difficult for [them]. [The Student] does better when [they] compare movement in touch with visual tracking... [Their] challenges with visual tracking impacts [their] ability to visually scan the environment especially a busy environment like a classroom, smoothly moving eyes from left to right (Reading), looking from far to near such as in a classroom looking between front of class to desk and copying. Additionally, [the Student] has been working on motor planning which is a challenge and also impacts visual motor performance with skills like handwriting.”
- d. “It is likely that a combination of factors impact [the Student’s] overall performance in the academic environment including the above mentioned visual skills, motor planning, attention and cognitive abilities...”. When the Student is doing academic work, they need to be in a quiet environment without distractions. Based on their vision issues, the Student needs a lot of visual accommodations (e.g., color blocking to eliminate visual distractions).
- e. The Private OT stated the Student needs a combination of direct and consult services. The Student needs more interventions at school than they have been receiving, including more OT support in areas other than handwriting.

#### **IV. DISCUSSION**

#### **Content of IEP**

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 to fully address the Student's needs that result from the Student's disabilities.

"[The] essential function of an IEP is to set out a plan for pursuing academic and functional achievement."<sup>3</sup> "An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth."<sup>4</sup>

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

The specific special education and related services and supports to be provided must enable the student to: (1) advance appropriately toward attaining annual goals, (2) be involved and progress in the general education curriculum, and (3) be educated and participate with other children with and without disabilities.<sup>6</sup>

An "IEP need not aim for grade-level advancement," "[i]f that is not a reasonable prospect for a child."<sup>7</sup> However, a child's educational program must still be "appropriately ambitious in light of his circumstances... The goals may differ, but every child should have the chance to meet challenging objectives."<sup>8</sup> "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created."<sup>9</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>10</sup>

There were two IEPs in place during the Complaint period, the October 2022 Amended IEP and the March 2023 IEP. In both IEPs, present level information was included for math, reading, writing, communication, and OT. A 2021 evaluation for these areas, as well as vision, was also included in the present levels. No other evaluation information or present level information was included. The Parent provided the District with copies of the Student's outside evaluations and service updates. It is unclear to what extent this information was considered, as it was not reflected in the IEPs or meeting notes. Both IEPs stated the Student's language and cognitive functioning impacted their progress in the general education curriculum.

The October 2022 Amended IEP included 350 minutes of SDI per month in reading, 240 in writing, 240 in math, and 120 in speech (up to 950 minutes per month). The March 2023 IEP called for 350 minutes of SDI per month in reading, 240 in writing, 300 in math, and 120 in speech (up to 1,010 minutes per month). During the 2022-23 school year, the record reflects the Student was getting at least 1,740 minutes per month total in reading, writing, math, and speech. This aligns with the March 3, 2023, IEP meeting notes, in which the Case Manager

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<sup>3</sup> *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988, 999 (2017)

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

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

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

<sup>7</sup> *Andrew F.*, 137 S.Ct. at 999

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

<sup>9</sup> *Andrew F.*, 137 S.Ct. at 1001

<sup>10</sup> *Andrew F.*, 137 S.Ct. at 1002

stated the Student's minutes would stay at thirty minutes each day in reading, writing, and math. It is unclear why the service minutes delivered did not conform with what was listed in the Student's IEP.

During the first half of the 2023-24 school year, according to school staff and a copy of the Student's schedule, the Student was receiving approximately 205 service minutes each day, plus 30 minutes each week in speech (totaling approximately 2,990 minutes per month, after factoring in the Student's Monday absences). When asked, District staff asserted the amount of service minutes provided to the Student was an appropriate balance between the need for SDI and the non-academic benefits of being with peers in the classroom. The Third Grade Teacher stated the Student needed this level of academic service time outside the class, as the Student was not able to access any grade level instruction provided by the Teacher in the class.

The October 2022 Amended IEP did not include any modifications. The 2023 March IEP added modified math only, although the Second and Third Grade Teachers reported the Student received modified work in all academic subjects during the complaint period.

The Student's IEPs did not include adult support. Both the Second and Third Grade Teacher reported the Student needed support for most tasks in the general education classroom. The Parent believed the Student required adult support and requested such support. The SLP stated the classroom teacher should be able to implement the Student's accommodations without additional support, although the Second Grade Teacher stated that was not always possible. Although both teachers provided a lot of support to the Student, they said the Student may have needed from additional adult support in the classroom to help the Student access classroom instruction and activities. The Third Grade Teacher suggested adult support might also be necessary for the Student to access the general education music class.

The 2022 and 2023 IEPs did not accurately reflect the amount of services and supports the Student received, and needed, to access their education.

It is difficult to determine whether the Student needed direct OT services, as it appears that the IEP team never discussed the issue. A District administrator stated a student could get direct OT services if necessary, however, other school staff consistently reported the District's OT service model only offered consultation services. The 2021 ESD OT Report stated that the Student was being evaluated to determine whether the Student was "eligible for OT consultative services," implying that the only method of service available to the Student was OT consultation, essentially a predetermination of services.

The Parent reported being told multiple times the Student could not get direct services for OT because they were not offered by the District. The Parent stated the IEP team never discussed the Student's need for direct OT services because it was not an option. When asked, District IEP team members could not recall the issue being discussed at an IEP meeting. No IEP meeting notes for the Student's meetings include any relevant information indicating that there was ever consideration of direct services. However, the Student's Private OT reported that the Student had significant difficulty with body coordination, visual motor, and fine motor skills, which impacted the Student's ability to access their education.

As written, the Student's 2022 and 2023 IEPs were not reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances. Notwithstanding, District IEP team members asserted that the services and supports that were actually implemented were both necessary and appropriate for the Student to access their education.

The Department substantiates this allegation.

### **Placement of the Child**

The Parent alleges that the District violated the IDEA by failing to ensure that the Student's placement was based on the Least Restrictive Environment provisions. Specifically, the Parent alleged that the nature or severity of the Student's disability is such that education in regular classes with existing supplementary aids and services cannot be achieved satisfactorily.

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

Placement decisions should not be based solely on factors such as category of disability, severity of disability, configuration of delivery system, availability of educational or related services, availability of appropriate staff, or administrative convenience.<sup>13</sup> "Each student's placement must be individually-determined based on the individual student's abilities and needs... it is the program of specialized instruction and related services contained in the student's IEP that forms that basis of the placement decision."<sup>14</sup> The IDEA "requires that the placement be based on the IEP, and not vice versa."<sup>15</sup>

In this case, the Parent did not believe it was appropriate for the Student to be in the general education classroom during instructional times as the Student could not access grade level curriculum. The Parent wanted the Student to receive more instruction one-on-one or in small groups, in a quiet setting free from the distractions present in the general education classroom. District staff interviewed generally agreed with these assertions. School staff reported the Student loved being in the general education classroom with peers and received social benefits from this time. They also reported the Student was not able to access the grade level general education curriculum and the Student's time in the classroom was primarily during non-academic periods, especially during the 2023-24 school year. The placement actually implemented by the District was closer to what the Parent requested than the District made the Parent aware of. The Student was receiving more individualized instruction at the Student's level outside the classroom than was reflected in the Student's IEPs and placement determination.

The Student's selected placement in both March 2022 and March 2023 was more than 80% general education with special education outside the classroom. For each placement determination, only two options were considered by the team. Based on the service times discussed above, during the 2022-23 School year the Student received special education services approximately 23% percent of the time. During the first half of the 2023-24 school year, the Student received special education services approximately 40% percent of the time.

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

<sup>12</sup> OAR 581-015-2240 and OAR 581-015-2250(1); 34 CFR §300.114(a)(2)

<sup>13</sup> OSEP Memorandum 95-9 (11/23/1994); Letter to Veazey (OSEP 11/26/2001)

<sup>14</sup> OSEP Memorandum 95-9

<sup>15</sup> *K.D. ex rel. C.L. v. Dep't of Educ., Hawaii*, 665 F.3d 1110, 1123 (9<sup>th</sup> Cir. 2011)

The Student's March 2022 and March 2023 Placement Determinations did not accurately reflect the educational placements that were implemented by the District during the 2022-23 and 2023-24 school years.

The Department substantiates this allegation.

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

The Parent alleges that the District failed to provide the Student with a free appropriate public education.

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>16</sup> In order to determine whether a student has been denied a FAPE, the courts review a district's compliance with the procedural and substantive components of the student's educational program. 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>17</sup>

Not every procedural error is sufficient to rise to a denial of FAPE.<sup>18</sup> The procedural test consists of three pivotal procedural errors: (1) whether the student suffers a loss of educational opportunity;<sup>19</sup> (2) whether the parent's right to participate in the IEP process was infringed;<sup>20</sup> or (3) whether the procedural error caused a "deprivation of educational benefit."<sup>21</sup> Procedural errors rise to the level of a denial of FAPE where, absent the errors, there is a "strong likelihood" that alternative educational possibilities for the student "would have been better considered."<sup>22</sup>

"In order to fulfill the goal of parental participation in the IEP process," a school district is required to conduct meaningful meetings.<sup>23</sup> Predetermination occurs when a District makes a determination about the type or form of services it is willing to provide prior to a meeting, regardless of the individual needs of the student, and is unwilling to consider alternatives.<sup>24</sup>

Although the services and supports provided, and the Student's level of removal from the general education setting, were not accurately reflected in the Student's IEPs and placement determination, District staff reported the level of services and supports provided to the Student was necessary. While implementation errors occurred, they were in the form of increased levels of services and supports at an appropriate level, and there is no evidence of lost educational opportunity or benefit from these errors.

It is unclear whether the District's failure to consider the Student's need for direct OT services resulted in the loss of educational opportunity or benefit. At a minimum, both (1) the District's predetermination that only OT consult services were available to the Student and, (2) the failure to inform the Parent that the Student's IEPs and placement did not accurately reflect

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<sup>16</sup> OAR 581-015-2040(1); 34 CFR §300.101(a)

<sup>17</sup> *Andrew F.*, 137 S.Ct. at 999

<sup>18</sup> *Amanda J. v. Clark Co. Sch. Dist.*, 267 F.3d 877, 892 (9<sup>th</sup> Cir. 2001) (citing *Roland M. v. Concord 13684 Sch. Comm.*, 910 F.2d 983, 994 (1<sup>st</sup> Cir. 1990))

<sup>19</sup> *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 969 F.2d 1479, 1484 (9<sup>th</sup> Cir. 1992)

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

<sup>21</sup> *Amanda J.*, 267 F.3d at 892 (citing *Roland M.*, F.2d at 994)

<sup>22</sup> *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 657 (9<sup>th</sup> Cir. 2005)

<sup>23</sup> *Target Range*, 960 F.2d at 1485

<sup>24</sup> *Id.*

the educational program implemented by the District, infringed on the Parent's right to participate in the IEP process and resulted in a denial of FAPE.

The Department substantiates this allegation.

### **Additional Findings**

#### **Parent Participation/When IEPs Must Be In Effect**

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.<sup>25</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>26</sup> "In order to fulfill the goal of parental participation in the IEP process," a school district is required to conduct meaningful meetings.<sup>27</sup> Predetermination occurs when a District makes a determination about the type or form of services it is willing to provide prior to a meeting, regardless of the individual needs of the student, and is unwilling to consider alternatives.<sup>28</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>29</sup> "Parents must be able to use the IEP to monitor and enforce the services their child is to receive."<sup>30</sup>

The District evaluated the Student to determine eligibility for OT consultative services. The District inappropriately limited the type of OT services available to the Student. OT services were predetermined by the District, outside of the IEP process and without the participation of the Parent.

The Student's IEP and placement were developed by the IEP team at an IEP meeting, with parent participation. However, the Parent was not informed that the District was implementing a different educational program. Regardless of whether the services and supports provided were appropriate, the Parent was not afforded the opportunity to participate in decisions with respect to the Student's IEP, educational placement, and provision of FAPE. Further, the District failed to provide special education and related services in accordance with the Student's IEP.

### **V. CORRECTIVE ACTION<sup>31</sup>** *In the Matter of Bend-La Pine School District* *Case No. 23-054-046*

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

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<sup>25</sup> OAR 581-015-2190(1); 34 CFR §300.322(a)

<sup>26</sup> Letter to Northrop (OSEP 5/21/2013), citing 71 Fed. Reg. 46,678 (2006)

<sup>27</sup> Target Range, 960 F.2d at 1485

<sup>28</sup> Id.

<sup>29</sup> Pasatiempo v. Aizawa, 103 F.3d 796, 804 (9th Cir. 1996)

<sup>30</sup> M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1198 (9th Cir. 2017)

<sup>31</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)).

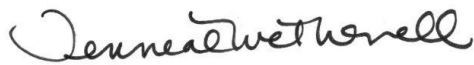


<b>Action Required</b>	<b>Submissions</b>	<b>Due As Soon As Possible But Not Later Than</b>
<p>1. The District must ensure that all District staff responsible for evaluating, developing and implementing IEPs, and determining placement for this Student receive training in each of the following areas:</p> <ul style="list-style-type: none"> <li>• Evaluation Procedures;</li> <li>• IEP Content;</li> <li>• IEP Implementation;</li> <li>• Placement Determination;</li> <li>• Predetermination of Services;</li> <li>• Parent Participation;</li> <li>• When IEPs Must Be In Effect; and</li> <li>• FAPE.</li> </ul>	<p>Training agenda/materials to ODE for review/approval.</p> <p>Sign-in sheet for training.</p>	<p><b>June 1, 2024</b></p> <p><b>October 1, 2024</b></p>
<p>2. The District must reconvene the IEP team<sup>32</sup> to ensure the Student has an appropriate IEP that enables the provision of FAPE and reflects the services the Student is receiving. This IEP must be developed following discussion and consideration of all relevant issues, including but not limited to</p> <ul style="list-style-type: none"> <li>• Any and all adult support required by the Student throughout the school day, and the specifics of that support, if required;</li> <li>• Any and all special education and related services required by the Student, especially whether the Student needs direct OT services, and details about those services, if required; and</li> <li>• Any and all supplementary aids and services, especially modifications, that are necessary to enable the Student to access the general education curriculum;</li> </ul>	<p>Meeting Notice</p> <p>Completed IEP</p>	<p><b>March 1, 2024</b></p> <p><b>April 1, 2024</b></p>
<p>3. If the IEP team determines that the Student requires direct OT services, the District and Parent must collaboratively determine the amount of Compensatory Education required due to the District's predetermination of consultative OT services. Should the District and Parent</p>	<p>Meeting Notice</p> <p>Completed IEP</p>	<p><b>March 1, 2024</b></p> <p><b>April 1, 2024</b></p>

<sup>32</sup> The Department offers IEP Facilitation at Parent and District Request. Please inform ODE if this is desired.

not be able to agree on the Compensatory Education required, either Party can request ODE to determine the amount following the completion of the IEP.		
4. Based on the completed IEP, the District must ensure that an appropriate team, including the parents, determines the educational placement of the Student in conformity with LRE provisions.	Meeting Notice  Completed IEP	<b>March 1, 2024</b>  <b>April 1, 2024</b>

Dated: this 30th Day of January 2024




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Tenneal Wetherell  
Chief of Staff  
Oregon Department of Education

E-mailing Date: January 30th, 2024

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).)