

80 IDELR 89

121 LRP 40669

**Portland School District
Oregon State Educational Agency
21-054-018**

September 23, 2021

Related Index Numbers

195.010 Eligibility

195.025 Relationship to FAPE

200.037 Progress Monitoring

265.025 Participants in/Procedures for IEP Meeting

Judge / Administrative Officer

Tenneal Wetherell, Assistant Superintendent

Ruling

The Oregon Department of Education found that a district denied an 8-year-old with autism FAPE under state law and the IDEA by failing to timely report the child's progress, impeding the parents' opportunity to participate in the IEP process, and failing to consider data in making an ESY determination. It ordered corrective action and required the district to convene an IEP meeting to reconsider ESY services and train staff on IEP progress reporting, revisions, implementation, and prior written notice.

Meaning

The determination of whether a student requires ESY services must be individualized and based on documented evidence. Untimely and poor data collection and progress reporting cost this district. In the absence of data, it used its "professional judgement" to decide that the child didn't require ESY services. Had the district adhered to the timeline within the child's IEP and regularly reported progress, including progress during distance learning, the IEP team would have had documented evidence upon which to base its ESY determination, and the parents would have had the information they needed to make informed decisions.

Case Summary

Because an Oregon district didn't base its ESY determination on data, it will have to reconvene the IEP team and reconsider its decision. The district determined that the third-grader with autism plateaued and didn't qualify for ESY services. The parents filed a state complaint. The state ED explained that districts must ensure that ESY services are available under the IDEA if the IEP team determines, on an individual basis, that they're necessary for the provision of FAPE. And, districts in Oregon must develop criteria for determining the need for ESY services, including regression and recoupment time, based on documented evidence. The state ED noted that the child's IEP identified dates when progress reports were to be issued; however, the district didn't issue reports for the first three quarters until June and asserted that some goals couldn't be measured due to distance learning. The state ED observed that the district didn't share any data when it made the ESY determination, the PWN didn't reflect any ESY decision being made, and the team didn't complete an ESY recommendation form pursuant to district procedure. The team explained that it used professional judgment to make the determination. The state ED identified six data points that could've been considered prior to, and after, instructional breaks, including a PLAAFPs and progress reports relating to the post-summer break, the pre-Thanksgiving break, the return in January, and the spring reporting period. "This omission of critical information did not allow the IEP team, including the parents, to make an informed decision," the state ED remarked. It acknowledged that a further review of data may have led to the same conclusion; however, "the decision should have been based on the data that had been collected and available in the student's file." The state ED concluded that the district denied the child FAPE.

Full Text

Findings of fact conclusions and final order

I. Background

On July 27, 2021, the Oregon Department of

Education (Department) received a written request for a special education complaint investigation from the parents (Parents) of a student (Student) residing in the Portland School District (District). The Parents requested that the Department conduct a special education investigation under OAR 581-015-2030. The Department confirmed receipt of this Complaint and forwarded the request to the District.

Under state and federal law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue an order within sixty days of receipt of the complaint.¹ 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.²

On August 3, 2021, the Department's Complaint Investigator sent a Request for Response to the District identifying the specific allegations in the Complaint to be investigated and establishing a Response due date of August 17, 2021.

The District submitted a Response on August 17, 2021, denying three of the allegations and not disputing one of the allegations, providing an explanation, and submitting supporting documents in support of the District's position. The Parents submitted supporting documents on or before August 24, 2021. In total, the District submitted the following items:

1. District Response 21-054-018
2. Exhibit List, ODE case no 21-054-018
3. Individualized Education Program (IEP), 6/1/21
4. Prior Written Notice, re: annual IEP 6/1/21
5. Placement Determination, 6/1/21
6. Meeting Minutes, 6/1/21
7. Notice of Team Meeting, 5/26/21
8. IEP, 5/28/20
9. IEP amendment, 10/26/20
10. Notice of Team Meeting, 1/7/20
11. Placement Determination, 5/28/20
12. Meeting Minutes, 5/28/20
13. Meeting Minutes, 10/26/20
14. Notice of Team Meeting, 5/14/20
15. Notice of Team Meeting, 10/19/20
16. Prior Written Notice, re: amended IEP, 10/26/20
17. Prior Written Notice, re: annual IEP, 5/28/20
18. Extended School Year Data Determination, 5/28/20
19. Function Based Behavior Support Plan, 5/28/20
20. Observation notes, 2/24/20
21. Prior Written Notice, re: IEP review, 10/26/20
22. IEP Progress Reports, 11/6/20
23. IEP Progress Reports, 4/9/21
24. Unnamed document (agreement statements from zoom chat box), 5/26/21
25. Notice of Team Meeting, 5/18/21
26. Notice of Team Meeting, 3/13/21
27. Meeting Minutes 5/26/21
28. Meeting Minutes, 4/5/21
29. Disability Statement, Autism Spectrum Disorder, 5/26/21
30. Prior Written Notice, re: eligibility 5/26/21
31. Parent/Guardian Consent for Individual Evaluation, 4/5/21
32. Eligibility Summary Statement, 5/26/21
33. Reevaluation Assessment Report, 5/25/21
34. Prior Written Notice, re: notice of triennial, 4/5/21
35. Disability Statement, Emotional Disturbance, 5/26/21
36. Email, re: Student PDA profile and flyer, 6/2/21
37. Exhibit 5, cover page
38. Email, re: parent request for work packets,

8/31/20

- 39. Email, re: paper copies, 9/12/20
- 40. Email, re: building closed tomorrow, 9/17/20
- 41. Email, re: draft, 9/24/20
- 42. Email, re: learning center support times, 9/24/20
- 43. Email, re: updated draft, 9/24/20
- 44. Email, re: student IEP related concerns/game, 9/29/20
- 45. Email, re: confidential parent concerns, 10/12/20
- 46. Email, re: communication with mom, 10/16/20
- 47. Email, re: online learning, 11/5/20
- 48. Email, re: meeting?, 11/19/20
- 49. Email, re: IEP, 2/12/21
- 50. Email, re: meeting, 3/9/21
- 51. Email, re: forms for student 3 year re-evaluation, 4/5/21
- 52. Email, re: distance learning supports
- 53. Email, re: parent's email, 4/20/21
- 54. Email, re: student IEP, 4/26/21
- 55. Email, re: student, 5/20/21
- 56. Email, re: draft IEP and agenda for tomorrow, 5/25/21
- 57. Email, re: progress reports, 6/8/21
- 58. Email, re: student, 6/9/21
- 59. Email, re: assistive technology building equipment list, 6/9/21
- 60. Exhibit D6, list of staff
- 61. Screenshot 2021-06-03, re: visuals, 6/3/21
- 62. Email, re: presentation power point for Thursday's meeting, 10/9/20
- 63. Distance learning supports, 10/9/20
- 64. Email, re: reading assessments schedule, 3/17/21
- 65. Social story slide Ms. Cunningham, no date

- 66. Daily Agenda Visual, no date
- 67. Email, re: student handwriting video, 6/1/21
- 68. Email, re: student writing assignments, 6/10/21
- 69. Fox slide show, no date
- 70. Fox paragraph/graphic organizer, 6/11/21
- 71. Email, re: student writing assignment 2, 5/28/21
- 72. Social story, re: writing lessons with (teacher), 5/28/21
- 73. May 28 sequence writing graphic organizer, 5/28/21
- 74. Email, re: student writing assignment 3, 6/3/21
- 75. Whales, re: graphic organizer, 6/3/21
- 76. Whales, re: expectations, 6/3/21
- 77. Examples of visuals, no date
- 78. Example of visual schedule, 4/12/21
- 79. Example of visual for schedule change for April 2021, no date
- 80. District IEP procedures, 6/18
- 81. District ESY procedures, 6/18
- 82. Learning at Home visual, no date
- 83. Emails cover page
- 84. Email, re: speech this year, 9/11/20
- 85. Email, re: supporting parents of children with ASD during distance learning, 9/14/20
- 86. Email, re: speech therapy session, 9/18/20
- 87. Email, re: speech, 9/21/21
- 88. Email, re: consent for telehealth occupational therapy services, 9/25/21
- 89. Email, re: scheduling a time to meet with you, 9/28/20
- 90. Email, re: speech today, 10/5/21
- 91. Email, re: sorry, 10/5/21
- 92. Email, re: minecraft zones, 10/5/20
- 93. Email, re: student reading the book dragon rider, 10/5/21

94. Email, re: IEP meeting for student, 10/15/20
 95. Email, re: speech therapy starts tomorrow, 11/16/21
 96. Email, re: OT class this Friday, 12/4/20
 97. Email, re: speech therapy starts tomorrow, 12/13/21
 98. Email, re: speech therapy in January, 12/18/21
 99. Email, re: ASD support groups, 1/19/21
 100. Email, re: speech therapy today, 1/25/21
 101. Email, re: social story for student, 2/5/21
 102. Email, re: student visual for schedule change, 2/5/21
 103. Email, re: reading assessments schedule, 2/11/21
 104. Email, re: speech, 2/22/21
 105. Email, re: writing for student, 3/5/21
 106. Email, re: I am on for speech, 3/8/21
 107. Email, re: speech, 3/15/21
 108. Email, re: reading assessment schedule, 3/16/21
 109. Email, re: speech this week, 3/29/21
 110. Email, re: meeting today, 4/5/21
 111. Email, re: assessment, 4/6/21
 112. Email, re: distance learning supports, 4/7/21
 113. Email, re: assessment plan, 4/8/21
 114. Email, re: draft email, 4/9/21
 115. Email, re: distance learning supports, 4/9/21
 116. Email, re: can student join the meeting?, 4/12/21
 117. Email, re: Monday April 12, 4/12/21
 118. Email, re: sending video, 4/12/21
 119. Email, re: please complete this SPM home form, 4/12/21
 120. Email, re: sending video, 4/12/21
 121. Email, re: please complete this SPM home form, 4/19/21
 122. Email, re: OT class this Friday, 4/20/21
 123. Email, re: sending video, 4/26/21
 124. Email, re: new teacher change, 4/26/21
 125. Email, re: speech is now, 4/26/21
 126. Email, re: video of student, 4/26/21
 127. Email, re: meeting today at 2:45, 4/26/21
 128. Email, re: student handwriting video, 4/26/21
 129. Email, re: student observation trampoline, 4/27/21
 130. Email, re: student, 4/28/21
 131. Email, re: today's writing project, 4/29/21
 132. Email, re: student, 4/30/21
 133. Email, re: student, 5/3/21
 134. Email, re: jumping jacks, 5/6/21
 135. Email, re: private OT reports, 5/12/21
 136. Email, re: having trouble with zoom, 5/24/21
 137. Email, re: report for tomorrow's meeting, 5/25/21
 138. Email, re: nice job!, 5/26/21
 139. Email, re: pathological demand avoidance, 6/1/21
 140. Email, re: student's writing assignment, 6/4/21
 141. Email, re: I showed this to student today, 6/7/21
 142. Email, re: IEP parental notes, 6/9/21
- In total, the Parents submitted the following items:
1. Request for a Complaint Investigation, 7/27/21
 2. List of Exhibits, no date
 3. Email, re: accommodations (building closed tomorrow), 9/17/20
 4. Email, re: accommodations (building closed tomorrow), 9/24/20
 5. Email, re: student IEP related concerns,

9/29/20

6. Email, re: top three IEP concerns, 10/26/20
7. IEP Progress Report, 4/9/21
8. Meeting Minutes, 6/1/21
9. Email, re: recovery services and progress reports, 6/1/21
10. Email, re: recovery services (summer accelerated learning), 6/9/21
11. Email, re: request for IEP meeting, 6/19/21
12. Email, re: summer accelerated learning, 6/29/21
13. Email, re: summer accelerated learning (District response), 6/29/21
14. Email, re: summer accelerated learning, 7/8/21
15. Email, re: student accommodations, 10/21/20
16. IEP Meeting Notes, re: 10/26/20 IEP meeting, 10/26/20
17. Email, re: question about 10/26/20 Amended IEP Meeting, 8/31/21
18. Email, re: question about 10/26/20 Amended IEP Meeting, reply 1 8/31/21
19. Email, re: question about 10/26/20 Amended IEP Meeting, reply 2 9/1/21
20. Email, re: student documents, 6/9/20
21. Distance learning concerns 2020, 10/20/20
22. Email, re: student follow up, 11/16/21
23. Parents' Reply, 9/18/21

The Complaint Investigator interviewed the Parent on August 30, 2021. On August 31, 2021, the Complaint Investigator interviewed the District's Special Education Program Administrator, the Student's Special Education Case Manager, one of the Student's 2nd grade long-term substitute teachers, and the District's Legal Counsel. Virtual meetings were held instead of on-site interviews due to the COVID-19 pandemic. The Complaint Investigator reviewed and considered all of these documents, interviews, and exhibits in reaching the findings of

fact and conclusions of law contained in this order. This order is timely.

II. Allegations and conclusions

The Department has jurisdiction to resolve this Complaint under 34 CFR §§ 300.151-153 and OAR 581-015-2030. The Parent'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 July 28, 2020, to the filing of this Complaint on July 27, 2021.

The written Complaint alleges that the District violated the IDEA in the following ways:

Allegations	Conclusions	Content
The Parents allege that the District violated the IDEA when the District failed to provide IEP progress reports in a timely manner and at the required times.	The District acknowledges and the investigation corroborates the IEP progress reports were not provided to the Parents in a timely manner or at the required times. (OAR 581-015-2200(1)(c); 34 CFR § 300.320(3))	Extended School Year (ESY) Services
The Parents allege that the District violated the IDEA when the District failed to offer Extended School Year (ESY) services to the Student and also did not provide a Prior Written Notice (PWN) to the Parents regarding the decision.	The District did not consider available data when making the determination for ESY services. (OAR 581-015-2065; 34 CFR § 300.106)	Individualized COVID-19 Recovery Services
The Parents allege that the District violated the IDEA when the District failed to individually consider whether the Student needed Individualized COVID-19 Recovery Services and have not acted on the Parent's request for an IEP meeting to consider the Student's need for Individualized COVID-19 Recovery Services.	Temporary rule OAR 581-015-2228 was not adopted or in effect until June 24, 2021, which is after the Parents requested the IEP team consider the need	

for Individualized COVID-19 Recovery Services. (OAR 581-015-2228, temporary rule filed 6/24/21 effective 6/24/21 through 12/20/21)Free Appropriate Public Education (FAPE)SubstantiatedThe Parents allege that the District violated the IDEA when the District failed to implement accommodations during Comprehensive Distance Learning (CDL). In addition, the Parents allege that the District's failure to not provide the IEP progress reports, ESY services, and Individualized COVID-19 Recovery Services amounted to a denial of FAPE.The District failed to provide the Student a FAPE when it failed to provide the Parents IEP progress reports and failed to implement all of the Student's IEP accommodations. (OAR 581-015-2040; 34 CFR § 300.101)This resulted in a lack of educational opportunity for the Student.

REQUESTED CORRECTIVE ACTION- The Oregon Department of Education (ODE) should issue an order finding the District in violation of the IDEA for failure to provide a FAPE to the Student.- The ODE should require training for District staff regarding IEP implementation and discussion of recovery services.- The ODE should order compensatory education for the Student for unilaterally refusing to implement the Student's IEP, failure to address the Student's lack of progress, failing to find the Student eligible for ESY services, and failing to discuss recovery services, despite the Parent's request.- The ODE should order a facilitated IEP meeting to develop an IEP for the Student that is reasonably calculated to provide educational benefit for the Student.

III. Findings of fact

Background

1. The Student is 8 years old and will be in the third grade. The Student attends a local elementary school.

2. The Student is eligible for special education and related services due to Autism Spectrum Disorder. The most recent eligibility determination was made on May 26, 2021.

3. The Student likes to follow classroom routines

and be with classmates. The Student loves to read, play video games, have read-alouds and conversations, and create stories. The Student enjoys music, sports, and helping around the house.

4. The Student has significant struggles with transitions and can become physically aggressive. The Student does not engage in activities that are of low interest, especially writing.

5. The Student's diagnosis and educational eligibility of Autism Spectrum Disorder may impact the Student's ability to independently navigate the classroom environment.

6. During the Spring 2020 Extended School Closure, the Student received instruction remotely. The Student received instruction through CDL for the entire 2020-21 school year. Hybrid instruction was offered by the District and Parents elected to have the Student remain in CDL.

7. The Student receives Specially Designed Instruction (SDI) in the areas of written language, communication, classroom/school skills, and social emotional skills. Related services for Occupational Therapy are also provided.

8. The Student had supplementary aids and services for the 2020-21 school year that included the following accommodations: sensory supports, timers and countdown for transitions, movement breaks, checks for understanding, jobs in class, extra time for comprehension of verbal instructions, visual and verbal expectations, offer alternate work, adult support, transition cues, positive behavioral supports, assistive technology, preferential seating, early notice of schedule changes/emergency drills, calm space, visual supports, schedules and narratives, and pre-teach new routine and expectations.

9. Supports for school personnel that were provided included consultation to teaching staff from various specialists.

10. The Student's special education placement determinations for both the May 28, 2020, and the June 1, 2021, IEPs are listed as general education greater than 90% with special education support.

Content of the IEP

11. The IEP Progress Reports for the 2020-21 school year indicated the progress reports were to be issued November 6, 2020, January 30, 2021, and April 9, 2021. The Portland Public Schools website indicates the last day of instruction for fourth quarter of the 2020- 21 school year was June 11, 2021.

12. The District provided the Parents with IEP progress reports for the first 3 quarters of the 2020-21 school year on June 8, 2021.

13. For the classroom/school skills (two goals), writing, and social-emotional IEP goals, the IEP Progress Reports for the 2020-21 school year indicated that "progress has been made toward the goal, but the goal may not be met. Instructional strategies may need to be changed." This progress code was reported for these four goals for at least two quarters, with two of the goals having this progress code for all three quarters that were reported. The progress report for the communication goal did not include any information for the first quarter, but did report progress for the second and third quarters.

14. When queried at the June 1, 2021 IEP meeting as to why IEP goals were remaining the same from one IEP to the next, District staff reported that, due to CDL, some of the IEP goals were not able to be measured.

15. In its Response, the District does not dispute the allegation that the progress reports were not provided to the Parents in a timely manner and at the required times.

Extended School Year (ESY) Services

16. The IEP team met on June 1, 2021 to review the Student's data and consider the need for ESY services.

17. The June 1, 2021 IEP meeting notes indicate the Parents requested ESY services and shared the Student had "improved" at home; however, this improvement is not specified.

18. The June 1, 2021 IEP meeting notes indicate District staff stated they were seeing a plateau, but not

regression, of the Student's skills. The notes indicate that there was no solid data of regression and recoupment criteria being met due to CDL.

19. There is no evidence that ESY data, including regression and recoupment data, was shared at the June 1, 2021 meeting and District staff indicated the IEP team did not complete ESY recommendation forms. During interviews, District staff indicated the progress reporting data was not used in the decision as to whether ESY services were required for the Student.

20. In the documents received from the District there are five of eight data points that occur before or after instructional breaks.

21. The District's decision was to not offer ESY services. The Parent's Legal Counsel requested a PWN explaining why no ESY services were being offered.

22. The PWN issued on June 1, 2021 does not reflect any decisions made regarding ESY services, nor is this documented in any other PWN provided to the Complaint Investigator.

Individualized COVID-19 Recovery Services

23. After the IEP meeting on June 1, 2021, the Parent's Legal Counsel emailed the District to request a discussion about recovery services.

24. On June 9, 2021, the District responded to the Parent's request for a discussion on recovery services with an email that indicated the Student was considered but not referred for a summer accelerated learning program. This is a general education program.

25. On June 10, 2021, the Parents, through Legal Counsel, requested an IEP meeting to discuss recovery services. The Parent's Legal Counsel contacted the District for information on recovery services and an IEP meeting on June 14 and 29, 2021.

26. The District responded to the Parent's Legal Counsel on June 29, 2021 indicating there was no new information and an IEP meeting could be

scheduled in September of 2021.

Free Appropriate Public Education (FAPE) - Accommodations

27. The District provided several examples of District staff providing the Student and the Parent with materials for accommodations such as social stories, graphic organizers, visual cues, and lesson topics in advance. Some of these materials were provided sporadically throughout the year and others were provided to the Parents starting in April, 2021.

28. The Parents notified the District of their concerns about IEP accommodations not being implemented during CDL starting on September 17, 2021, and made an additional seven requests for accommodations to be implemented during the 2020-21 school year.

29. The Parent's Legal Counsel documented, through IEP meeting notes and email, that the following accommodations were to be added to the IEP when the IEP team met to review the IEP on October 26, 2020; structured binder, iPad, color-coded paper, visual cue cards, and learning materials provided in advance of instruction.

30. The amended October 26, 2020 IEP does not include any of the accommodations noted in the previous finding.

31. The PWN issued on October 26, 2020 does not address the Parent's request for accommodations to be added to the IEP.

32. Based on interviews and a cross-referencing of the noted IEP accommodations for the May 28, 2020 IEP, the October 26, 2020 amended IEP, and the June 1, 2021 IEP, the following accommodations were included in the IEP, but were either not implemented at all or not consistently, or the Student did not have access to the accommodations or materials for the following accommodations: sensory supports, visual timers, jobs in class, transition cues, and assistive technology.

33. During interviews, District staff reported there were several accommodations that were not

appropriate for CDL including such accommodations as timers, jobs in class, and transition cues. These accommodations were not removed from the Student's IEP at the amended IEP meeting held on October 26, 2020 or at any other time during the 2020-21 school year.

IV. Discussion

Content of the IEP

The Parents alleged that the District violated the IDEA when the District failed to provide IEP progress reports in a timely manner and at the required times.

The IEP must include a description of how the child'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 (such as through quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.³

Based on the District's 2020-21 school year calendar and information provided on the Student's IEP progress reports, these reports should have been provided to the Parents on or around November 6, 2020; January 30, 2021; April 9, 2021; and June 11, 2021. The District provided the Parents with progress reports for the first three quarters of the 2020-21 school year on June 8, 2021. At the time of the complaint interviews, the District had not provided the Parents with a progress report for the fourth quarter. In the District's Response, the District acknowledged the IEP progress reports were provided to the Parents in an untimely manner and have taken corrective actions including providing the Parents with IEP progress reports on June 8, 2021 and clarifying requirements with the Student's Case Manager.

The Department substantiates this allegation.

Extended School Year (ESY) Services

The Parents allege that the District violated the IDEA when the District failed to offer ESY services to the Student.

School districts must ensure that ESY services

are available as necessary to provide a free appropriate public education to a child with a disability. Extended school year services must be provided only if the child's IEP team determines, on an individual basis, that the services are necessary for the provision of free appropriate public education to the child. A school district may not limit extended school year services to particular categories of disability or unilaterally limit the type, amount, or duration of those services. The purpose of extended school year services is the maintenance of the child's learning skills or behavior, not the teaching of new skills or behaviors.⁴

School districts must develop criteria for determining the need for extended school year services. Criteria must include regression and recoupment time based on documented evidence or, if no documented evidence, on predictions according to the professional judgement of the team. Regression means significant loss of skills or behaviors in any area specified on the IEP as a result of an interruption in education services. Recoupment means the recovery of skills or behaviors specified on the IEP to a level demonstrated before the interruption of education services.⁵

At the June 1, 2021 IEP meeting, the District claimed there was not solid data that shows regression or recoupment due to Comprehensive Distance Learning. No data was shared at this meeting and the IEP team did not complete an ESY recommendation form that was part of the District's procedure. The District determined the Student had plateaued and did not qualify for ESY services. When queried during interviews, the District stated that in absence of documented evidence, the IEP team used professional judgement to make the determination. The Parents disagreed with this decision.

The Complaint Investigator was able to identify six data points that could have been considered by the IEP team when making the ESY determination at the June 1, 2021 IEP meeting. These data points were collected at the following times and were prior to and after instructional breaks during the 2020-21 school

year: 1) May 28, 2020 IEP meeting (present levels statement), 2 and 3) the progress reports for the November 6, 2020 reporting period could serve to provide information for the post-summer break recoupment and pre-Thanksgiving break period, 4) the progress reports for the January 30, 2021 reporting period, and 5) the progress reports for the April 9, 2021 reporting period, and 6) the October 26, 2020 amended IEP in which the IEP team updated the present levels for the Student.

This data should have been presented at the June 1, 2021 IEP meeting. This omission of critical information did not allow the IEP team, including the Parents, to make an informed decision. While a further review and consideration of the data may have led the IEP team or the District to make a final determination that the Student continues to not qualify for ESY services, the decision should have been based on the data that had been collected and available in the Student's file.

The Department substantiates this allegation.

Individualized COVID-19 Recovery Services

The Parents allege that the District violated the IDEA when the District failed to individually consider whether the Student needed Individualized COVID-19 Recovery Services and have not acted on the Parent's request for an IEP meeting to consider the Student's need for Individualized COVID-19 Recovery Services.

Oregon Administrative Rule 581-015-2228 is a temporary rule that was adopted on June 24, 2021 and is effective from June 24, 2021 through December 20, 2021. As defined in this rule, Individualized COVID-19 Recovery Services are those services determined necessary for children with disabilities due to the impact of the COVID-19 Pandemic, which may include but are not limited to: special education and related services; supplementary aids and services; additional or intensified instruction; social emotional learning support; and peer or adult support. The IEP team for each eligible child with a disability shall

individually consider the need for Individualized COVID-19 Recovery Services at least at each initial IEP meeting and each regularly scheduled annual review meeting through the 2022-23 school year.⁶

The Parents' Legal Counsel made four (4) requests to discuss Individualized COVID-19 Recovery Services between June 1, 2021 and June 29, 2021. OAR 581-015-2228 was adopted and went into effect on June 24, 2021. The District responded to the Parent's request for Individualized COVID-19 Recovery Services on June 29, 2021 with an offer to schedule an IEP meeting in September of 2021. Under the temporary rule and starting with the 2021-22 school year, the District is required to consider Individualized COVID-19 Recovery Services at each initial IEP meeting, at each regularly scheduled annual review meeting through the 2022-2023 school year, or earlier if requested by the parent.

The Department does not substantiate this allegation.

Free Appropriate Public Education (FAPE)

The Parents alleged that the District failed to provide IEP progress reports in a timely manner and at the required time. The Parents also alleged the District failed to: provide ESY services to the Student, implement accommodations during CDL, individually consider whether the Student needed Individualized COVID-19 Recovery Services, and act on the Parent's request for an IEP meeting to consider the Student's need for Individualized COVID-19 Recovery Services. As a result of these alleged failures, the Parents alleged that the District violated the IDEA by denying the Student a FAPE.

The IDEA was passed 'to ensure that all children have available to them a free appropriate public education...designed to meet their unique needs.'⁷ A FAPE is defined as an education that is provided at public expense, meets the standards of the state educational agency, and is in conformity with the student's IEP.⁸ In determining whether a district has

denied a student a FAPE, there is a two-part test. First the district must comply with the procedures set forth in the IDEA, and second the student's IEP must be reasonably calculated to enable the student to receive educational benefit.⁹ While harmless procedural errors do not constitute a denial of FAPE,¹⁰ "procedural inadequacies that result in the loss of educational opportunity clearly result in the denial of a FAPE."¹¹

In this matter, the District did not provide IEP progress reports for the 2020-21 school year to the Parents until June 8, 2021. This delay created a situation in which the Parent was not able to meaningfully participate in the IEP process due to a lack of information about the Student's progress towards IEP goals. Additionally, several of the Student's accommodations were not implemented as required by the IEP during CDL. This combination of procedural and substantive violations resulted in a denial of FAPE.

The Department substantiates this allegation.

V. Additional Findings

Prior Written Notice (PWN)

PWN must be given to the parent of a child within a reasonable period of time before a school district proposes or refuses to initiate or change, the identification, evaluation, educational placement of the child, or the provision of a free appropriate public education to the child. The content of the PWN must include: a description of the action proposed or refused by the school district; an explanation of why the district proposes or refuses to take the action; a description of each evaluation procedure, assessment, test, record, or report the school district used as a basis for the proposed or refused action; a statement that the parents of a child with a disability have protection under the procedural safeguards and, if this notice is not an initial referral for evaluation, the means by which a copy of the Notice of Procedural Safeguards may be obtained.¹²

The PWN issued October 26, 2020 does not include the District's decision to add some and refuse

other accommodations requested by the Parent. The PWN issued to the Parents on June 1, 2021 does not include a description of the action proposed or refused by the school district, or a description of each evaluation procedure, assessment, test, record, or report the District used as a basis for the proposed or refused action. The PWN dated June 1, 2021, does not address the District's refusal to provide ESY services.

VI. Corrective action¹³

In the Matter of Portland School District Case No. 21-054-018

Action Required Submissions Due Date 1. The District is to convene an IEP team meeting to re-consider the ESY recommendation for the 2020-21 school year. The District shall submit the following after the IEP meeting: October 29, 2021- Meeting Notice- Data reviewed- ESY Recommendation Form - Meeting minutes- Updated IEP Service Summary, if needed- PWN detailing the decision- ESY plan and schedule, if needed The District shall submit the following after ESY services have been provided, if ESY services are determined to be necessary: September 1, 2022- Log of all ESY services provided to the Student 2. The District is to conduct staff training for school- and district-based members of the Student's IEP team in the areas of IEP progress reporting, IEP revisions, IEP implementation, and PWN. The District shall submit the following: January 10, 2022- Training materials- Training agenda- Sign-in sheets

Dated: this 23rd Day of September 2021

//signed

Tenneal Wetherell

Assistant Superintendent

Office of Enhancing Student Opportunities

E-mailing Date: September 24, 2021

Appeal Rights: Parties may seek judicial review of this Order. Judicial review may be obtained by filing a petition for review within sixty days from the service of this Order with the Marion County Circuit Court or with the Circuit Court for the County in which the party seeking judicial review resides.

Judicial review is pursuant to the provisions of ORS § 183.484. (OAR 581-015-2030 (14).)

¹OAR 581-015-2030(12) and 34 CFR § 300.152(a)

²OAR 581-015-2030(12) and 34 CFR § 300.152(b)

³OAR 581-015-2200(c) and 34 CFR § 300.320

⁴OAR 581-015-2065(1)(2)(3)(4) and 34 CFR § 300.106

⁵OAR 581-015-2065 (5)(6) and 34 CFR § 300.106

⁶(OAR 581-015-2228(1)(2), temporary rule filed 6/24/21 effective 6/24/21 through 12/20/21)

⁷20 U.S.C. § 1400(d)(1)(A)

⁸*Id.* § 1401(9)

⁹*Bd. Of Educ. v. Rowley*, 458 U.S. 176, 206-07 (U.S. 1982)

¹⁰*L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008)

¹¹*Shapiro v. Paradise Valley Unified Sch. Dist.* No. 69, 317 F.3d 1072, 1079 (9th Cir. Ariz. 2003)

¹²OAR 581-015-2310(2)(3) and 34 CFR § 300.503

¹³The 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)).

Statutes Cited

20 USC 1400(d)(1)(A)

20 USC 1401(9)

Cases Cited

458 U.S. 176 -- Followed

556 F.3d 900 -- Followed

317 F.3d 1072 -- Followed